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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA

MOTION FOR LEAVE TO FILE COMPLAINT

The United States of America asks leave of the Court to file the attached Complaint against the States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida.

JOHN N. MITCHELL,
Attorney General.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1969.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. ——, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA

COMPLAINT

The United States of America, by the Attorney General and the Solicitor General, brings this suit against the States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida, and for its causes of action states:

FIRST CAUSE OF ACTION

(Against the State of Maine)

I

The jurisdiction of this Court is invoked under Article III, Section 2, paragraph 2, of the Constitution of the United States, and Title 28, United States Code, Section 1251(b)(2).

II

At all times herein material, the United States was and, except as set forth in Paragraph III hereof, has ever since been and now is entitled, to the exclusion of the defendant State, to exercise sovereign rights over the seabed and subsoil underlying the Atlantic Ocean, extending seaward from the ordinary low-water mark and from the outer limit of inland waters on the coast to the outer edge of the continental shelf, for the purpose of exploring the area and exploiting its natural resources; and the State, except as set forth in Paragraph III hereof, has never had and does not now have any title thereto or property interest therein.

III

On May 22, 1953, by Public Law 31 of the 83d Congress, known as the Submerged Lands Act, 67 Statutes at Large 29, the United States granted to the State the title to and ownership of the submerged lands and natural resources lying in the Atlantic Ocean within the boundaries of said State, but not extending seaward more than three geographic miles from the ordinary low-water mark or from the outer limit of inland waters; and by said Act the United States released its claim for money or damages arising out of any operations by the State or under its authority in the area so granted.

IV

The State claims some right, title or interest in the seabed and subsoil of the continental shelf underlying the Atlantic Ocean more than three geographic miles seaward from the ordinary low-water mark and from

the outer limit of inland waters, adverse to the United States.

V

In the exercise of the rights claimed by it, the State has purported to grant exclusive oil and gas exploration and exploitation rights in approximately 4.4 million acres of land submerged in the Atlantic Ocean in the area in controversy.

VI

By reason of the foregoing, the United States is now entitled, to the exclusion of the Defendant State, to exercise sovereign rights over the seabed and subsoil underlying the Atlantic Ocean, lying more than three geographical miles seaward from the ordinary low water mark and from the outer limit of inland waters on the coast, extending seaward to the outer edge of the continental shelf, for the purpose of exploring the area and exploiting its natural resources, and is entitled to an accounting for all sums of money derived by the State from the area lying more than three geographical miles seaward from the ordinary low water mark and from the outer limit of inland waters on the coast, which are properly owing to the United States.

VII

On August 7, 1953, by Public Law 212 of the 83d Congress, known as the Outer Continental Shelf Lands Act, 67 Statutes at Large 462, 468, Congress declared the "urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the outer Continental Shelf" and

provided that such need should be met by the issuance of mineral leases in that area by the Secretary of the Interior to private operators. By its conduct and claims described in Paragraphs IV and V hereof the State is interfering with and obstructing, or threatens to obstruct the orderly and effective exploration, leasing, and development of said mineral resources, and will continue to do so and will thereby cause great and irreparable injury to the United States unless the rights of the United States are declared and established by this Court. The United States has no other adequate remedy.

VIII

The original jurisdiction of this Court is invoked because there is urgent need for prompt and final settlement of the controversy, because the fundamental question in issue relates to aspects of the foreign policy of the United States which are most appropriately a subject for original adjudication by this Court, and because only in this Court is it possible to join all the defendant States whose participation is necessary to the orderly adjudication of issues in which they have a common interest.

SECOND CAUSE OF ACTION

(Against the State of New Hampshire)

IX

The United States repeats and realleges the allegations contained in paragraphs I through IV and VI through VIII hereof, with the same force and effect as if herein set forth.

THIRD CAUSE OF ACTION

(Against the Commonwealth of Massachusetts)

X

The United States repeats and realleges the allegations contained in paragraphs I through IV and VI through VIII hereof, with the same force and effect as if herein set forth.

FOURTH CAUSE OF ACTION

(Against the State of Rhode Island and Providence Plantations)

XI

The United States repeats and realleges the allegations contained in paragraphs I through IV and VI through VIII hereof, with the same force and effect as if herein set forth.

FIFTH CAUSE OF ACTION

(Against the State of New York)

XII

The United States repeats and realleges the allegations contained in paragraphs I through IV and VI through VIII hereof, with the same force and effect as if herein set forth.

SIXTH CAUSE OF ACTION

(Against the State of New Jersey)

XIII

The United States repeats and realleges the allegations contained in paragraphs I through IV and VI

through VIII hereof, with the same force and effect as if herein set forth.

SEVENTH CAUSE OF ACTION

(Against the State of Delaware)

XIV

The United States repeats and realleges the allegations contained in paragraphs I through IV and VI through VIII hereof, with the same force and effect as if herein set forth.

EIGHTH CAUSE OF ACTION

(Against the State of Maryland)

XV

The United States repeats and realleges the allegations contained in paragraphs I through IV and VI through VIII hereof, with the same force and effect as if herein set forth.

NINTH CAUSE OF ACTION

(Against the Commonwealth of Virginia)

XVI

The United States repeats and realleges the allegations contained in paragraphs I through IV and VI through VIII hereof, with the same force and effect as if herein set forth.

TENTH CAUSE OF ACTION

(Against the State of North Carolina)

XVII

The United States repeats and realleges the allegations contained in paragraphs I through IV and VI through VIII hereof, with the same force and effect as if herein set forth.

ELEVENTH CAUSE OF ACTION

(Against the State of South Carolina)

XVIII

The United States repeats and realleges the allegations contained in paragraphs I through IV and VI through VIII hereof, with the same force and effect as if here set forth.

TWELFTH CAUSE OF ACTION

(Against the State of Georgia)

XIX

The United States repeats and realleges the allegations contained in paragraphs I through IV and VI through VIII hereof, with the same force and effect as if here set forth.

THIRTEENTH CAUSE OF ACTION

(Against the State of Florida)

XX

The United States repeats and realleges the allegations contained in paragraphs I through IV and VI through VIII hereof, with the same force and effect as if herein set forth. The term "Atlantic Ocean" as used herein is to be understood as including the Straits of Florida.

WHEREFORE, the United States prays that the defendants be required to answer this complaint, and that a decree be entered declaring the rights of the United States as against the defendants in the subsoil, seabed, and natural resources underlying the Atlantic Ocean, including the Straits of Florida, lying more than three geographical miles seaward from the ordinary low-water mark and from the outer limit of inland waters to the edge of the continental shelf, and requiring said defendants to account for all sums of money derived therefrom, and for such other and further relief as may be proper in the premises.

JOHN N. MITCHELL,
Attorney General.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1969.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. ——, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA

BRIEF IN SUPPORT OF MOTION

JURISDICTION

This controversy between the United States and the States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida is within the original jurisdiction of this Court under Article III, Section 2, paragraph 2, of the Constitution of the United States and Title 28, United States Code, Section 1251(b)(2).

STATEMENT

The purpose of this litigation is to establish, as against the defendant States, the rights of the United States in the lands and natural resources of the bed of the Atlantic Ocean, beginning at a line three geo-

graphical miles seaward from the ordinary low-water mark and from the outer limit of inland waters and extending seaward to the edge of the continental shelf.

The thirteen original colonies did not separately acquire ownership of the three-mile belt in the adjacent sea or of the soil under it. Such ownership was acquired by the national government after the formation of the Union and the federal government rather than the States had paramount rights in and power over the three-mile belt in the marginal sea, including full dominion over the underlying mineral resources. *United States* v. *California,* 332 U.S. 19.

Under Presidential Proclamation No. 2667, dated September 28, 1945, 59 Stat. 884, the United States claimed the natural resources of the subsoil and sea bed of the Continental Shelf beneath the high seas but contiguous to the coasts of the United States. In 1953, by enacting the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301–1315, Congress gave the defendant States ownership of the bed of the three-mile territorial sea within their boundaries.[1] Beyond that the situation in the Atlantic Ocean remains as it was. In the same year, Congress passed the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331–1343. This Act asserted jurisdiction of the United States over the Outer Continental Shelf. On March 24, 1961, by ratifying the Convention on the Continental Shelf, 15 U.S.T. (Pt. 1) 471, the United States

[1] Section 4 of the Submerged Lands Act, 43 U.S.C. 1312, confirmed the boundary of each of the original States as a line three geographical miles distant from its coast line, and approved and confirmed past or future claims to that distance by other States.

affirmed the rights of a coastal nation over the Continental Shelf to explore and exploit its natural resources.

Maine claims title to submerged lands extending 100 miles into the Atlantic Ocean on the basis of provisions contained in a number of colonial charters. Relying on this claim, Maine has issued a permit purporting to grant exclusive oil and gas exploration and exploitation rights in approximately 3.3 million acres of these submerged areas in the Atlantic Ocean, more than three miles from the coast. The other defendant States have asserted that the same or similar charter provisions entitle them to submerged lands and resources of the continental shelf more than three miles from the coast in the Atlantic Ocean. To permit complete adjudication of these common claims, we have joined as defendants all the Atlantic coast States.

ARGUMENT

I

THE COMPLAINT STATES FACTS ENTITLING THE UNITED STATES TO RELIEF

In *United States* v. *California,* 332 U.S. 19, this Court held that the original thirteen States did not separately acquire ownership of the three-mile belt in the adjacent sea or of the soil under it.[2] Such owner-

[2] Eleven of the thirteen proposed defendants are original States. Maine and Florida, of course, are not, but the same principle governs their claims, as it did the claims of California, Louisiana and Texas, by virtue of the Equal Footing Clause. See, particularly, *United States* v. *Texas,* 339 U.S. 707, 717–720.

ship was acquired by the national government after the formation of the Union; the federal government, rather than the States, then obtained paramount rights in and power over the three-mile belt in the marginal sea, including full dominion over the underlying mineral resources. By the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301–1315, the United States gave the defendant States ownership of the bed of the three-mile territorial sea within their boundaries in the Atlantic Ocean. But, at the same time, Congress reasserted the right of the federal government to the resources seaward of those granted and, as the Court noted in *United States* v. *Louisiana,* 363 U.S. 1, 7, "the Act concededly did not impair the validity of the *California*, *Louisiana*, and *Texas* cases, which are admittedly applicable to all coastal States * * *."

Nevertheless, the State of Maine claims by virtue of certain Colonial Charters, and as successor to Massachusetts, that when it became a member of the Union its boundary and ownership extended into the Atlantic Ocean 100 miles from its coastline, and that the limits provided in the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. 1301–1315, cannot diminish its rights. By making repeated public assertions of its claims to vast submerged areas lying more than three miles seaward from the ordinary low-water mark and from the outer limit of inland waters and by granting exclusive oil and gas exploration and exploitation rights to large submerged areas in the Atlantic Ocean, Maine has created a dispute which requires adjudication by this Court.

The United States seeks to secure a declaration of its rights in the submerged lands and resources lying more than three miles seaward from the ordinary low-water mark and from the outer limit of inland waters along the coast of the Atlantic States exactly comparable in terms to that entered in the case of *United States* v. *Louisiana et al.*, 382 U.S. 288. That is to say, it will identify the area in suit by its relationship to the ordinary low-water mark and outer limit of inland waters without determining the physical location of the area on the ground in any particular locality. Such a decree can be entered with a minimum of delay. In our view, it will not require the taking of any evidence, but involves only questions of law and matter of which the Court will take judicial notice.

II

THIS IS AN APPROPRIATE CASE FOR EXERCISE OF THE ORIGINAL JURISDICTION OF THIS COURT

This case is one which eminently justifies invoking the original jurisdiction of this Court. It is not a case of merely monetary importance (although the value of the subject matter is enormous); nor is it one of only local or transitory significance. The dispute is between the Nation itself and thirteen coastal States, and, until resolved, the disagreement impedes the "further exploration and development of the oil and gas deposits of the submerged lands of the outer Continental Shelf" for which Congress has declared an "urgent need." 67 Stat. 468, 43 U.S.C. 1337(a).

It was repeatedly recognized during the congres-

[illegible]

[illegible]

[illegible]

having the case come before this Court on findings of fact made by a lower court.

In *United States v. Louisiana*, 354 U.S. 515, involving the adjudication of the rights of the federal government and Louisiana to the resources in the Gulf of Mexico, this Court stated that "the issues in this litigation are so related to the possible interests of Texas, and other States situated on the Gulf of Mexico, in the subject matter of this suit, that the just, orderly, and effective determination of such issues requires that they be adjudicated in a proceeding in which all the interested parties are before the Court," and thereupon ordered the joinder of all the other Gulf Coast States. So, here, the United States seeks to join as parties defendant all the Atlantic Coast States because each of them has asserted claims to submerged lands in excess of three miles from its coast upon grounds similar to those of Maine. Inasmuch as

We have included Florida as a proposed defendant with respect to its claims in the Atlantic Ocean only, which, in our view, encompasses any claim to the submerged lands of the Florida Straits on the southern side of the Florida Keys. That State's claims in the Gulf of Mexico were, of course, determined in 1960 in *United States v. Florida*, 363 U.S. 121, decree and mem. *United States v. Louisiana* et al., 364 U.S. 505. But Florida's claims in the Atlantic Ocean, although placed at issue in this proceeding (see Amended Complaint filed by the United States and Answer filed by Florida in No. 11, Original, U.S. 1962), have never been adjudicated. While these issues can of course be decided in supplementary proceedings to that case (see No. 6, Original), it would seem more appropriate to join Florida as a party to this action, where the general question of State claims to the submerged lands underlying the Atlantic Ocean will be resolved.

the claims of the Atlantic Coast States are based upon either the same charters or upon other charters containing similar language, or which incorporate by reference the terms of such charters, the claims of the Atlantic Coast States present an even greater identity than did those of the Gulf Coast States. They can be joined only in this Court.

The issues presented here grow out of, and are in a sense but a continuation of, those presented in the cases of *United States* v. *California*, 332 U.S. 19; *United States* v. *Louisiana*, 339 U.S. 699; and *United States* v. *Texas*, 339 U.S. 707. They are of equal urgency and importance. The considerations which led this Court to take jurisdiction of those cases as original suits are fully applicable here.

CONCLUSION

For the reasons stated, the motion for leave to file the complaint should be granted.

Respectfully submitted.

JOHN N. MITCHELL,
Attorney General.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

FILED
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IN THE

Supreme Court of the United States

October Term, 1968

No. 35, ORIGINAL

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF MAINE, ET AL.,
Defendants.

BRIEF OF THE COMMONWEALTH OF VIRGINIA IN OPPOSITION TO THE MOTION OF THE UNITED STATES FOR LEAVE TO FILE COMPLAINT

ROBERT Y. BUTTON
Attorney General of Virginia

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Supreme Court Building
Richmond, Virginia 23219

IN THE

Supreme Court of the United States

October Term, 1968

No. 36, ORIGINAL

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE, ET AL.,

Defendants.

BRIEF OF THE COMMONWEALTH OF VIRGINIA IN OPPOSITION TO THE MOTION OF THE UNITED STATES FOR LEAVE TO FILE COMPLAINT

Now comes the Commonwealth of Virginia pursuant to Rule 9(5) of the Rules of the Supreme Court of the United States and opposes the motion of the United States for leave to file complaint in the above-captioned action, and as its brief in opposition to such motion adopts and approves the brief in opposition filed herein by the State of Maine.

WHEREFORE, for the reasons set forth in the brief of the State of Maine, the Commonwealth of Virginia prays that the motion of the United States for leave to file complaint in this cause be denied to the extent that such motion

seeks leave to file that material contained in paragraphs numbered I through VIII inclusive and also numbered XVI in the complaint attached thereto.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

R. D. MCILWAINE, III
First Assistant Attorney General

W. H. RYLAND
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219
May 29, 1969

CERTIFICATE OF SERVICE

I, R. D. McIlwaine, III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of the counsel for the Commonwealth of Virginia in the above-captioned matter, hereby certify that copies of this Brief of the Commonwealth of Virginia in Opposition to the Motion of the United States for Leave to File Complaint have been served upon counsel for the United States by depositing the same in the United States Post Office, with first-class postage prepaid, this 29th day of May, 1969, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530. All parties required to be served have been served.

First Assistant Attorney General

No. 35 Original

May 29, 1969 - Joiner of the State of Florida in brief of State of Maine in opposition filed. NOT PRINTED.

June 2, 1969 - Joiner of State of North Carolina in brief of State of Maine in opposition filed. NOT PRINTED.

FILE COPY

MAY 31 1969

JOHN F. DAVIS, CLERK

No. 35, Original

In the Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA

Brief of the State of Maine in Opposition to Motion of the United States of America for Leave to File Complaint, and Statement of States of New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida with Respect Thereto.

STATE OF MAINE,
JAMES S. ERWIN,
Attorney General,

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State House,
Augusta, Maine 04330

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No. 35, Original

In the Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET AL.

Brief of the State of Maine in Opposition to Motion of the United States of America for Leave to File Complaint

Comes now the State of Maine and pursuant to Supreme Court Rule 9 (5), files the following brief in opposition to the motion of the United States of America for leave to file its complaint in the above action:

I. THE COMPLAINT ALLEGES NO FACTS REVEALING THE EXISTENCE OF A CASE OR CONTROVERSY WITHIN THE MEANING OF ARTICLE III, SECTION 2 OF THE CONSTITUTION OF THE UNITED STATES.

The United States alleges that this cause is within the original jurisdiction of this Court by virtue of Article III, Section 2, Paragraph 2, of the Constitution of the United States and Title 28, United States Code, Section 1251 (b) (2). (Complaint, Paragraph I.) This jurisdictional allegation appears to be based solely on the naked allegations proffered in Paragraphs IV and V of the complaint, which, in substance, assert that the defendants claim some right adverse to the United States in the seabed and subsoil of the Atlantic Ocean

more than three geographic miles seaward from ordinary low-water mark, and that in the exercise of such rights, Maine has purported to grant exclusive oil and gas exploration rights in the area. These allegations are wholly unsubstantiated in the complaint and in the accompanying brief. In Maine's view, the only conceivable basis for the allegations sought to be advanced in Paragraphs IV and V of the complaint would seem to be the non-reply of Maine and the other defendant States to the Solicitor General's letter of March 19, 1969, which requested Maine and other states bordering on the Atlantic Ocean to disclaim all right or interest in the Atlantic Continental Shelf more than three miles from their respective coastlines or be joined in the instant cause. (Such letter is printed in the Appendix to this brief.) The Solicitor General also, it is true, makes reference in the brief of the United States (page 14) to alleged "repeated public assertions of . . . claims (by Maine) to vast submerged areas lying more than three miles seaward. . . ", but cites not one instance when or where or in what manner such alleged claims have been made.

The pyramiding of allegation upon unsubstantiated allegation, with such allegations, in turn, being based upon the non-reply to a letter and undocumented "public assertions", appears to be an inappropriate basis upon which to invoke the jurisdiction of this Court. This attempt wholly fails to reveal a situation arising to the dignity of the "case or controversy" which, this Court has consistently held, must exist in order to warrant exercise of original jurisdiction under the provisions of the United States Constitution and the United States Code cited by the Solicitor General.

In *United States v. West Virginia,* 295 U. S. 463 (1935), this Court stated:

> "General allegations that the State challenges the claim of the United States . . . and asserts a right superior to that of the United States . . . raise an issue too vague and ill-defined to admit of judicial determination." 295 U. S. 463, 474.

Maine submits that the complaint offered by the United States contains no more than "general allegations" similar to those rejected by this Court as a basis for original jurisdiction in the *West Virginia* case.

The defects of the complaint sought to be filed in the *West Virginia* case are present in the complaint sought to be filed here. According to the opinion in *West Virginia:*

> "The bill . . . neither asks the protection or alleges the invasion of any property right. It asserts no title in the United States . . . which might afford a basis for a suit to remove a cloud on title . . . [T]here is no allegation of any interference by the state, actual or threatened, with any of the land or property. . . " 295 U. S. 463, 471.

Using these guidelines as a test of the acceptability of the complaint which the United States here offers, it is apparent in the first instance that no state action, capable of construction as an invasion of any property right of the United States, is alleged. It may be said here that certain limited rights to engage in survey and exploratory activities have been granted by the State of Maine to a private company, but even these rights and any projected exercise thereof are subject to further review and approval by the State of Maine. Accordingly, the allegations in Paragraph VII of the complaint that the State of Maine by its conduct and claims is interfering with and obstructing, or threatening to obstruct, the orderly and effective exploration, leasing and development of said mineral resources is considerably premature.

To the best of Maine's knowledge, the private company referred to above has taken no action to date, under color of any document issued by the State of Maine, which could be interpreted as taking possession of any claim area or as engaging in mining or drilling operations.

It is helpful to compare Maine's actions and those of the other defendant states with those of other states in cases where this Court has chosen to exercise its original jurisdiction. For example, no situation exists in this case similar to that in *United States v. Utah,* 283 U. S. 64 (1931). There, the United States had:

> " . . . executed and delivered numerous prospecting permits covering portions of the river beds in question, giving to the permittees the exclusive rights of prospecting for petroleum, oil and gas minerals,

> and . . . the permittees (had) entered upon development work; . . . " 283 U. S. 64, 72 (1931).

Utah had leased portions of the same river beds. Thus, clear and conflicting claims of title were presented. Here, however, neither Maine nor any other defendant state has taken any action comparable to that taken by Utah. Maine has conveyed no leasehold interests predicated upon any underlying claim of title adverse to that of the United States. Maine's actions, with respect to granting permission for private survey or exploratory activity, have not infringed upon the rights of any Federal permittee or lessee. To Maine's knowledge there are none in this area. How, then, does Maine's action obstruct and interfere with "orderly and effective exploration, leasing and development of said mineral resources", as the United States alleges? (Complaint, Paragraph VII.)

Regardless of how firmly convinced the United States might be that at some unknown time in the future some as yet undefined action might be taken which will possibly involve exploring for minerals off the coast of Maine and the coasts of the other defendant states, until that time comes it must be abundantly clear that there is no intrusion upon a Federal interest, and that the alleged conflict between any sovereign state and the United States is quite hypothetical.

It is possible that initial mining operations off the Maine coast, if and when they are begun, will be within the area which the United States concedes to be encompassed by the boundaries of Maine. (Complaint, Paragraph III.) Thus, it is apparent that the facts in this case fall far short of creating a justiciable "case or controversy" as compared to those which led this Court to exercise its original jurisdiction in *Utah*.

Much less is this case like *United States v. California*, 332 U. S. 19 (1946), where this Court found a "controversy in the classic sense", 332 U. S. 19, 25, to exist where

> "(t)here is a claim by the United States, admitted by California, that California has invaded the title of paramount right asserted by the United States to a large area of land and that California has converted to its own use oil which was extracted from that land." 332 U. S. 19, 25.

The facts alleged in the case at bar fall far short of a classic controversy. The qualified authorization issued by Maine for private survey or exploratory activity has been assumed by Plaintiff to be an invasion of Federal rights, but only in the vaguest sense. Certainly the United States does not allege (as was the situation in the California case) that any defendant has converted any oil or gas from Atlantic offshore sites to its own use. In fact, no allegation is made that any such oil or gas exists or has been discovered.

California would appear to hold that without "conflicting claims of alleged invasions of interests in property and . . . conflicting claims of Governmental powers to authorize its use", 332 U. S. 19, 25, there is no justiciable controversy.

II. THE COMPLAINT STATES NO FACTUAL BASIS FOR AN ACCOUNTING.

Plaintiff alleges it is entitled to an accounting for all sums of money derived by the defendants from the area lying more than three geographical miles seaward from the ordinary low-water mark and from the outer limit of inland waters on the coast, which are properly owing to the United States. (Complaint, Paragraph VI.)

There is no allegation that the State of Maine or any other defendant has received any such sums of money or that any money is due and owing to the State from the area in question.

The State of Maine has not received any such money for which an accounting could be made. In the absence of any and all such sums of money or any obligation to pay the same, there is nothing for which an accounting can be made. Accordingly, in this area of inquiry there is likewise no controversy or justiciable issue to be determined by the Court.

III. THE COMPLAINT FAILS TO ALLEGE FACTS IN SUPPORT OF PLAINTIFF'S CLAIM OF URGENT NEED.

While it is true, as alleged in paragraph VII of the complaint, that Congress, by the Outer Continental Shelf Lands Act, declared the "urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the

outer Continental Shelf", it must be conceded by Plaintiff that the absence of such exploration and development in the Atlantic coastal area during the sixteen intervening years is not related in any way to interference of any kind by the State of Maine.

Again, in paragraph VIII of the complaint it is suggested there is urgent need for prompt and final settlement of the controversy because the fundamental question in issue relates to undefined aspects of the foreign policy of the United States.

While the State of Maine would not presume to challenge the right of the Plaintiff to determine matters of foreign policy, it would appear to be appropriate to suggest that this is basically the responsibility of the executive branch of the federal government rather than the judiciary. Especially is this true, we hasten to add, where the complaint is stated in terms so vague and general as to leave the State completely uninformed as to what specific elements of foreign policy are involved.

IV. CONCLUSION

The United States has failed to show that the actions of Maine or of any defendant state constitute a "conflicting claim" of any sort, beyond the mere allegation that such actions challenge Federal authority, an allegation that presents "an issue too vague and ill-defined to admit of judicial determination". *United States v. West Virginia*, 295 U. S. 463, 474. Without alleging how such actions are adverse to some Federal interest, the complaint falls short of alleging a case or controversy calling for the exercise of this Court's original jurisdiction. The complaint is therefore, at best, premature.

WHEREFORE, the State of Maine respectfully prays that the motion of the United States for leave to file its complaint in this action be denied.

Respectfully submitted,

STATE OF MAINE,
JAMES S. ERWIN,
Attorney General,

ROBERT G. FULLER, JR.,
Assistant Attorney General.

June , 1969.

Statement and Prayer of Remaining State Defendants

The States of New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida, defendants herein, concur and join in the foregoing brief of the State of Maine, and, for the reasons therein stated, likewise pray that the Motion of the United States for leave to file its complaint in this cause be denied.

STATE OF NEW HAMPSHIRE,
GEORGE S. PAPPAGIANIS,
Attorney General.

COMMONWEALTH OF MASSACHUSETTS,
ROBERT H. QUINN,
Attorney General.

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS,
HERBERT F. DESIMONE,
Attorney General.

STATE OF NEW YORK,
LOUIS J. LEFKOWITZ,
Attorney General.

STATE OF NEW JERSEY,
ARTHUR J. SILLS,
Attorney General.

STATE OF DELAWARE,
DAVID P. BUCKSON,
Attorney General.

STATE OF MARYLAND,
FRANCIS B. BURCH,
Attorney General.

COMMONWEALTH OF VIRGINIA,
ROBERT Y. BUTTON,
Attorney General.

STATE OF NORTH CAROLINA,
ROBERT B. MORGAN,
Attorney General.

STATE OF SOUTH CAROLINA,
DANIEL R. MCLEOD,
Attorney General.

STATE OF GEORGIA,
ARTHUR K. BOLTON,
Attorney General.

STATE OF FLORIDA,
EARL FAIRCLOTH,
Attorney General.

Appendix

Letter from the Solicitor General to the Attorneys General of the Atlantic seaboard states.

(Seal)

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C. 20530

March 19, 1969

Gentlemen,

This letter, addressed to the Attorneys General of the thirteen Atlantic seaboard States listed on page 3, follows my prior communication of February 25, 1969, and some replies received in the interim.

A few of the States involved have indicated a desire to postpone litigation for an indefinite period with a view to exploring a legislative resolution of the controversy. Such a prospect may be too remote and uncertain to justify further delay in initiating the legal proceedings outlined in my earlier letter. In prior meetings between representatives of the United States and the affected States, the view that the contemplated suit is the only realistic approach at this time was generally concurred in. At all events, in light of the pressing dispute between the United States and the State of Maine, and the Supreme Court's quite reasonable requirement that all States interested in the same question be joined as defendants, there does not appear to be any alternative but to file the proposed original action against all of the Atlantic seaboard States who assert claims in the Ocean beyond three miles from their respective coastlines.

The joinder of States other than Maine is, of course, premised on the assumption that each of them in fact claims submerged lands underlying the Atlantic more than three miles from its coastline. If we are mistaken in this assumption with respect to any of the States involved, you should promptly

advise me. In the absence of such a disclaimer, we are planning to file a complaint on behalf of the United States in the Supreme Court, joining all the listed States, on April 1, 1969, or as soon thereafter as the papers can be prepared.

Very truly yours,

/s Erwin N. Griswold
Erwin N. Griswold
Solicitor General

Certificate of Service

I certify that in compliance with Supreme Court Rule 33 (2) (a) I have this day served a copy of the foregoing brief upon the plaintiff, United States of America, by mailing such copy by air mail, with postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530.

ROBERT G. FULLER, JR.,
Assistant Attorney General,
State of Maine.

Dated:

(3533)

No. 35, Original

SEP 13 19

JOHN F. DAVIS,

IN THE

Supreme Court of the United States

October Term, 1968

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA and FLORIDA,

Defendants.

ANSWER OF DEFENDANT, THE STATE OF NEW YORK

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Defendant,
The State of New York

RUTH KESSLER TOCH
Solicitor General of the State
of New York

JULIUS L. SACKMAN
Assistant Attorney General of the State
of New York

The Capitol
Albany, New York 12224

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

IN THE

Supreme Court of the United States

October Term, 1968

No. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA and FLORIDA,

Defendants.

ANSWER OF DEFENDANT, THE STATE OF NEW YORK

Comes now the sovereign State of New York (hereinafter for brevity called "New York"), one of the defendants in this cause, by and through its Attorney General, Louis J. Lefkowitz, and in answer to the allegations contained in paragraphs of the Plaintiff's complaint numbered I through IV and VI through VIII thereof, as repeated and realleged in paragraph XII thereof under the heading *Fifth Cause of Action,* admits, denies and alleges as follows:

I.

As to Paragraph II of the Plaintiff's complaint, New York denies that Plaintiff has any proprietary rights over

the area therein described and asserts that New York now has and always has had full title thereto or full property interest therein.

II.

As to Paragraph III of the Plaintiff's complaint, New York alleges that the provisions of the Submerged Lands Act, 67 Stat. 29 (1953), speak for themselves, and, insofar as the allegations in said Paragraph III may imply that prior to the effective date of the Submerged Lands Act New York was without power to exercise dominion and control over the exploration of the seabed and subsoil underlying the marginal sea adjacent to its coast and the development of such natural resources as might be found in, on or about the same, New York denies them in their entirety.

III.

As to Paragraph IV of the Plaintiff's complaint, New York admits that it claims State sovereignty as well as a proprietary interest (subject to the National sovereignty) in the seabed and subsoil of the continental shelf underlying the Atlantic Ocean more than three geographic miles seaward from ordinary low-water mark and from the outer limit of inland waters; and, insofar as the said Paragraph IV may imply that the Plaintiff is empowered to assert any proprietary interest or claim in the above described submerged lands which is adverse to New York, New York denies them in their entirety.

IV.

As to Paragraph VI of the Plaintiff's complaint, New York admits that the Plaintiff is entitled to exercise National sovereignty over the area there described, but denies that Plaintiff has any proprietary rights therein; New York further alleges that it has received no sums of money from said area for which any accounting, even if due, could be made.

V.

As to Paragraph VII of the Plaintiff's complaint, New York denies that the Plaintiff has any proprietary interest in the area of the Outer Continental Shelf which can be injured or affected by any action by New York; and denies that any action has been taken by New York which interferes with or obstructs or threatens to obstruct the orderly and effective exploration, leasing and development of any natural resources in, on or about the Outer Continental Shelf.

VI.

As to Paragraph VIII of the Plaintiff's complaint, New York denies the existence of any urgent need for prompt and final settlement of the issues raised by this proceeding, and denies that any aspect of the Plaintiff's foreign policy is involved herein.

Affirmative Defense

By way of Affirmative defense, New York alleges:

VII.

That, as successor in title to the Crown of Holland and the Crown of England or to the successors in title of said sovereigns, New York, prior to its admission to the Union, ever since its admission to the Union, and at the present time, is and has been entitled to exercise dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line to the exclusion of any other political entity whatever, including the Plaintiff (subject, however, to the limits of National seaward sovereign jurisdiction of the Plaintiff); that the holding of title by New York and the power to exercise concomitant dominion and control is not prohibited by the Constitution of the United States; that the said title and power of New York has never, in fact or by operation of law, been delegated by New York to the Plaintiff; and that any attempt by the Plaintiff to assert such title or power with respect to New York constitutes a violation of the provisions of the Tenth Amendment to the Constitution of the United States and is void and of no effect.

WHEREFORE, NEW YORK prays that a decree be entered declaring the title and rights of the State of New York, both proprietary and sovereign, as against the Plaintiff, subject only to the latter's National sovereignty (which does not include any proprietary title, rights or powers), in the subsoil, seabed and natural resources underlying the Atlantic Ocean lying more than three geographical miles seaward from the ordinary low water mark and from the outer limit of inland waters to the edge of the Con-

tinental Shelf, and for such other and further relief as may be proper in the premises.

September 12, 1969.

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Defendant,
The State of New York

RUTH KESSLER TOCH
Solicitor General of the State
of New York

JULIUS L. SACKMAN
Assistant Attorney General of the State
of New York

The Capitol
Albany, New York 12224

SEP 1969

IN THE

Supreme Court of the United States

October Term, 1968

No. 35, Original

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF MAINE, *et als.*,

Defendants

Answer of the State of New Hampshire

STATE OF NEW HAMPSHIRE
GEORGE S. PAPPAGIANIS
Attorney General

WILLIAM F. CANN
Deputy Attorney General

DONALD A. INGRAM
Assistant Attorney General

State House Annex
Concord, New Hampshire 03301

THE CONCORD PRESS, INC., CONCORD, N. H.

IN THE

Supreme Court of the United States

October Term, 1968

No. 35, Original

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF MAINE, *et als.*,

Defendants

ANSWER OF THE STATE OF NEW HAMPSHIRE

Comes now the sovereign State of New Hampshire (hereinafter for brevity called "New Hampshire"), Defendant in this cause, by and through its Attorney General, George S. Pappagianis, and in answer to the allegations contained in the numbered paragraphs of the Plaintiff's complaint under the heading *Second Cause of Action*, admits, denies and alleges as follows:

I.

In answer to Paragraph I of the Plaintiff's complaint, New Hampshire alleges that such Paragraph in its entirety alleges nothing requiring answer.

II.

In answer to Paragraph II of the Plaintiff's complaint, New Hampshire denies each and every allegation in said Paragraph contained.

III.

In answer to Paragraph III of the Plaintiff's complaint, New Hampshire alleges that the provisions of the Sub-

merged Lands Act, 67 Stat. 29 (1953), speak for themselves, and, insofar as the allegations in said Paragraph may be construed to infer that prior to the effective date of the Submerged Lands Act New Hampshire was without power to exercise dominion and control over the exploration of the seabed and subsoil underlying the marginal sea adjacent to its coast and the development of such natural resources as might be found in, on or about the same, New Hampshire denies them in their entirety.

IV.

In answer to Paragraph IV of the Plaintiff's complaint, New Hampshire admits that it claims some interest in the seabed and subsoil of the Continental Shelf underlying the Atlantic Ocean more than three geographic miles seaward from ordinary low water marks and from the outer limit of inland waters, and, insofar as the allegations in said Paragraph may be construed to infer that the Plaintiff is entitled, in the exercise of its alleged sovereign rights in the above described submerged lands, to assert any claims with respect thereto which is adverse to New Hampshire, New Hampshire denies them in their entirety.

V.

In answer to Paragraph VI of the Plaintiff's complaint, New Hampshire denies each and every allegation in said Paragraph contained, and, answering further, alleges that New Hampshire has learned to show forced from and after the effect of any accounting, even if that could be made.

VI.

In answer to Paragraph VII of the Plaintiff's complaint, New Hampshire alleges that the portion of the Crane Continental Shelf Lands Act, 67 Stat. 462 (1953), that

by the Plaintiff, speaks for itself; denies that any action taken or contemplated by New Hampshire interferes with or obstructs or threatens to obstruct the orderly and effective exploration, leasing and development of any natural resources in, on or about the Outer Continental Shelf; denies that any such action will cause any injury to the Plaintiff; and alleges that the statement "The United States has no other adequate remedy" is a conclusion of law and requires no answer.

VII

In answer to Paragraph VIII of the Plaintiff's complaint, New Hampshire alleges that such Paragraph, in its entirety, is argument in support of the Plaintiff's invocation of this Court's jurisdiction; denies the existence of any urgent need for prompt and final settlement of the issues raised by this proceeding; and denies that any aspect of the Plaintiff's foreign policy is involved herein.

AFFIRMATIVE DEFENSE

By way of affirmative defense, New Hampshire alleges that if sometime the United States of America and that as successor in title to certain grantors of the Crown of England, New Hampshire is now and, prior to and ever since its admission to the Union, has been entitled to exercise dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line to the exclusion of any other political entity whatsoever, including the Plaintiff (subject, however, to the limits of national seaward jurisdiction established by the Plaintiff); that the power to exercise dominion and control is not prohibited to New Hampshire by the Constitution of the United States, has never in fact or by operation of law been delegated by New Hampshire to the Plaintiff, and that any attempt by the Plaintiff to

assert such power with respect to New Hampshire violates the provisions of the Tenth Amendment to the Constitution of the United States and is void and of no effect.

PRAYER

WHEREFORE, New Hampshire prays that a decree be entered that, as against New Hampshire, the Plaintiff possesses no right to exercise dominion and control over the exploration and development of such natural resources as may be found in, on and about, the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line and to the limit of national seaward jurisdiction; and for its costs.

STATE OF NEW HAMPSHIRE

GEORGE S. PAPPAGIANIS
Attorney General

WILLIAM F. CANN
Deputy Attorney General

DONALD A. INGRAM
Assistant Attorney General

September 11, 1969

CERTIFICATE OF SERVICE

I certify that in compliance with Supreme Court Rule 33(2) (a) I have this day served a copy of the foregoing answer upon the Plaintiff, United States of America, by mailing such copy by air mail, with postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, and that all parties have been served with a copy of the foregoing answer.

GEORGE S. PAPPAGIANIS
Attorney General
State of New Hampshire

Dated: September 11, 1969

COPY

SEP 15 19
JOHN F. DAVIS, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 35, ORIGINAL

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF MAINE, ET AL.,
Defendants.

ANSWER OF THE STATE OF MARYLAND

FRANCIS B. BURCH,
Attorney General of Maryland,
1200 One Charles Center,
Baltimore, Maryland 21201.

September 12, 1969

The Daily Record Co., Baltimore, Md. 21203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 35, ORIGINAL

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF MAINE, ET AL.,
Defendants.

ANSWER OF THE STATE OF MARYLAND

Comes now the sovereign State of Maryland (hereinafter for brevity called "Maryland"), defendant in this cause, by and through its Attorney General, Francis B. Burch, and in answer to the allegations contained in the numbered paragraphs of the Plaintiff's complaint under the heading *Eighth Cause of Action* admits, denies and alleges as follows.

I.

In answer to Paragraph I of the Plaintiff's complaint, Maryland alleges that such paragraph in its entirety alleges nothing requiring answer.

II.

In answer to Paragraph II of the Plaintiff's complaint, Maryland denies each and every allegation in said Paragraph contained.

III.

In answer to Paragraph III of the Plaintiff's complaint, Maryland alleges that the provisions of the Submerged Lands Act, 67 Stat. 29 (1953), speak for themselves, and, insofar as the allegations in said Paragraph may be construed to infer that prior to the effective date of the Submerged Lands Act Maryland was without power to exercise dominion and control over the exploration of the seabed and subsoil underlying the marginal sea adjacent to its coast and the development of such natural resources as might be found in, on or about the same, Maryland denies them in their entirety.

IV.

In answer to Paragraph IV of the Plaintiff's complaint, Maryland admits that it claims some interest in the seabed and subsoil of the Continental Shelf underlying the Atlantic Ocean more than three geographic miles seaward from ordinary low water mark and from the outer limit of inland waters; and, insofar as the allegations in said Paragraph may be construed to infer that the Plaintiff is empowered, in the exercise of its alleged sovereign rights in the above-described submerged lands, to assert any claim with respect thereto which is adverse to Maryland, Maryland denies them in their entirety.

V.

In answer to Paragraph V of the Plaintiff's complaint Maryland is without knowledge of any of the allegations contained therein.

VI.

In answer to Paragraph VI of the Plaintiff's complaint Maryland denies each and every allegation in said Paragraph contained.

VII.

In answer to Paragraph VII of the Plaintiff's complaint, Maryland alleges that the portion of the Outer Continental Shelf Lands Act, 67 Stat. 462 (1953), cited by the Plaintiff, speaks for itself; denies that any action taken by Maine and interferes with or obstructs or threatens to obstruct the orderly and effective exploration, leasing and development of any natural resources in, on or about the Outer Continental Shelf; denies that any such action will cause any injury to the Plaintiff; and alleges that the statement "The United States has no other adequate remedy" is a conclusion of law and requires no answer.

VIII.

In answer to Paragraph VIII of the Plaintiff's complaint, Maryland alleges that such Paragraph, in its entirety, is argument in support of the Plaintiff's invocation of this Court's jurisdiction; denies the existence of any urgent need for prompt and final settlement of the issues raised by this proceeding; and denies that any aspect of the Plaintiff's foreign policy is involved herein.

AFFIRMATIVE DEFENSE

By way of affirmative defense, Maryland alleges that as successor in title to Caecilius Calvert, Baron of Baltimore, grantee of King Charles I of England, by Letters Patent dated June 20, 1632, Maryland is now, and ever since its admission to the Union has been, entitled to exercise dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line to the limit of ten marine leagues to the exclusion of any other political entity whatsoever,

including the Plaintiff (subject, however, to the limits of the national seaward jurisdiction established by the Plaintiff); that the power to exercise dominion and control is not prohibited to Maryland by the Constitution of the United States, has never in fact or by operation of law been delegated by Maryland to the Plaintiff; and that any attempt by the Plaintiff to assert such power with respect to Maryland violates the provisions of the Tenth Amendment to the Constitution of the United States and is void and of no effect.

PRAYER

WHEREFORE, Maryland prays that a decree be entered declaring its rights as against the Plaintiff in the subsoil, seabed, and natural resources underlying the Atlantic Ocean lying more than three geographical miles seaward from the ordinary low water mark and from the outer limit of inland waters to the edge of the continental shelf.

FRANCIS B. BURCH,
Attorney General of Maryland.

September 12, 1969.

I HEREBY CERTIFY that on this 12th day of September, 1969, a copy of the foregoing Answer was mailed, postage prepaid, to Honorable John N. Mitchell, Attorney General of the United States, and Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, and to the Attorney General of each of the other 12 defendant states.

FRANCIS B. BURCH,
Attorney General.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE, *et al.*,

Defendants.

ANSWER OF THE STATE OF NEW JERSEY

Comes now the sovereign State of New Jersey (hereinafter for brevity called "New Jersey"), a defendant in this cause, by and through its Attorney General, Arthur J. Sills, and in answer to the allegations contained in the numbered paragraphs of the Plaintiff's complaint under the heading *First Cause of Action*, paragraphs 1 through 4 and 6 through 8 of which are made applicable to the State of New Jersey under the heading *Sixth Cause of Action*, admits, denies and alleges as follows:

I.

In answer to Paragraph I of the Plaintiff's complaint, New Jersey alleges that such paragraph in its entirety alleges nothing requiring answer.

II

In answer to Paragraph II of the Plaintiff's complaint New Jersey denies each and every allegation in said Paragraph contained.

III

In answer to Paragraph III of the Plaintiff's complaint New Jersey alleges that the provisions of the Submerged Lands Act, 67 Stat. 29 (1953), speak for themselves and insofar as the allegations in said Paragraph may be construed to infer that prior to the effective date of the Submerged Lands Act New Jersey was without power to exercise dominion and control over the navigable waters and the seabed and subsoil underlying the marginal sea adjacent to its coast and the development of such natural resources as might be found in, on or about the same, New Jersey denies them in their entirety.

IV.

In answer to Paragraph IV of the Plaintiff's complaint New Jersey admits that it claims some interest in the seabed and subsoil of the Continental Shelf underlying the Atlantic Ocean more than three geographic miles seaward from ordinary low-water mark and from the outer limit of inland waters; and, insofar as the allegations in said Paragraph may be construed to infer that the Plaintiff is empowered, in the exercise of its alleged sovereign rights in the above described submerged lands, to assert any claim with respect thereto which is adverse to New Jersey, New Jersey denies them in their entirety.

V.

In answer to Paragraph VI of the Plaintiff's complaint New Jersey denies each and every allegation in said Paragraph contained; and, answering further, alleges that New Jersey has received no sums derived from said area for which any accounting, even if due, could be made.

VI

In answer to Paragraph VII of the Plaintiff's complaint, New Jersey alleges that the portion of the Outer Continental Shelf Lands Act, 43 Stat. 465 (1953), cited by the Plaintiff, speaks for itself; denies that any action taken by New Jersey interfered with or obstructed or threatened to obstruct the orderly and effective exploration, leasing and development of any natural resources in or in about the Outer Continental Shelf; denies that any such action will cause any injury to the Plaintiff; and alleges that the statement "The United States has no other adequate remedy" is a conclusion of law and requires no answer.

VII

In answer to Paragraph VIII of the Plaintiff's complaint, New Jersey alleges that such Paragraph, in its entirety, is argument in support of the Plaintiff's invocation of this Court's jurisdiction; denies the existence of any urgent need for prompt and final settlement of the issues raised by this proceeding; and denies that any aspect of the Plaintiff's foreign policy is involved herein.

Affirmative Defense

By way of affirmative defense, New Jersey alleges that as successor in title to certain grantees of the Crown of England, New Jersey is now, and ever since its admission to the Union has been, entitled to exercise dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line to the exclusion of any other political entity whatsoever, including the Plaintiff (subject, however, to the limits of national seaward jurisdiction established by the Plaintiff); that the power to exercise dominion and

control is not prohibited to New Jersey by the Constitution of the United States, has never in fact or by operation of law been delegated by New Jersey to the Plaintiff; and that any attempt by the Plaintiff to assert such power with respect to New Jersey violates the provisions of the Tenth Amendment to the Constitution of the United States and is void and of no effect.

Prayer

WHEREFORE, New Jersey prays that a decree be entered that, as against New Jersey, the Plaintiff possesses no right to exercise dominion and control over the exploration and development of such natural resources as may be found in, on and about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line and to the limit of national seaward jurisdiction; and for its costs.

STATE OF NEW JERSEY

ARTHUR J. SILLS,
Attorney General

ELIAS ABELSON,
Assistant Attorney General.

SEP 15 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1968

No. 35, Original

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF MAINE, ET AL.,
Defendants.

ANSWER OF THE COMMONWEALTH OF VIRGINIA

ROBERT Y. BUTTON
Attorney General of Virginia

R. D. MCILWAINE, III
First Assistant Attorney General

W. H. RYLAND
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

September 15, 1969

Supreme Court of the United States

October Term, 1968

No. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE, ET AL.,

Defendants.

ANSWER OF THE COMMONWEALTH OF VIRGINIA

Now comes the Commonwealth of Virginia, one of defendants herein, by and through her Attorney General, and in answer to the allegations contained in the numbered paragraphs of the plaintiff's complaint in the Ninth Cause of Action, answers and says:

1. For answer to Paragraph I of the complaint this defendant admits that the plaintiff seeks to invoke the jurisdiction of this Court under the provisions of law set forth in said paragraph.

2. The allegations of Paragraph II of the complaint are denied.

3. For answer to Paragraph III of the complaint this defendant says that the provisions of the Submerged Lands Act, Public Law 31 of the 83d Congress, 67 Statutes at Large 29, speak for themselves and no answer to the allegations of said paragraph is required of this defendant.

4. The allegation of Paragraph IV of the complaint is admitted.

5. The allegations of Paragraph VI of the complaint are denied.

6. For answer to Paragraph VII of the complaint this defendant says that the provisions of the Outer Continental Shelf Lands Act, Public Law 212 of the 83d Congress, 67 Statutes at Large 462, 468, speak for themselves and no answer to said allegations of Paragraph VII of the complaint is required of this defendant. The remaining allegations of said Paragraph VII are denied.

7. For answer to Paragraph VIII of the complaint this defendant admits that plaintiff seeks to invoke the original jurisdiction of this Court but denies the existence of any urgent need for prompt and final settlement of the issues sought to be raised by the complaint and denies that any aspect of the plaintiff's foreign policy is herein involved.

AFFIRMATIVE DEFENSE

By way of affirmative defense, the Commonwealth of Virginia alleges that as successor in title to certain grantees of the Crown of England, she is now, and ever since the formation of the Union has been, entitled to exercise dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to her coast line to the exclusion of any other political

entity whatsoever, including the plaintiff; that the power to exercise dominion and control is not prohibited to the Commonwealth of Virginia by the Constitution of the United States, has never in fact or by operation of law been delegated by the Commonwealth of Virginia to the plaintiff; and that any attempt by the plaintiff to assert such power with respect to the Commonwealth of Virginia violates the provisions of the Tenth Amendment to the Constitution of the United States and is void and of no effect.

Now having fully answered, the Commonwealth of Virginia prays to be hence dismissed with her costs in this behalf expended.

COMMONWEALTH OF VIRGINIA

ROBERT Y. BUTTON
Attorney General of Virginia

R. D. MCILWAINE, III
First Assistant Attorney General

W. H. RYLAND
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

September 15, 1969

CERTIFICATE OF SERVICE

I, R. D. McIlwaine, III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of the counsel for the Commonwealth of Virginia in the above-captioned matter, hereby certify that copies of this Answer of the Commonwealth of Virginia have been served upon counsel for the United States by depositing the same in the United States Post Office, with first-class postage prepaid, this 15th day of September, 1969, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530. All parties required to be served have been served.

R. D. McIlwaine III

R. D. McIlwaine, III
First Assistant Attorney General

In The

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 35, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA.

ANSWER OF DEFENDANT NORTH CAROLINA

The defendant, State of North Carolina, by Robert Morgan, the Attorney General of North Carolina, in answer to the tenth cause of action set forth in paragraph XVII of the complaint, repeating and realleging the allegations contained in paragraphs I through IV, and VI through VIII of plaintiff's first cause of action, states.

I

The allegations contained in paragraphs I, IV and VIII of the complaint as they relate to the State of North Carolina in paragraph XVII of the complaint are admitted, except that portion of paragraph VIII stating ". . . because the fundamental question in issue relates to aspects of the foreign policy of the United States . . ." which allegation, set out in quotes herein, is denied.

II

The allegations contained in paragraphs II, III, VI, and VII

of the complaint as they relate to the defendant State of North Carolina in paragraph XVII of the complaint are denied; except such portions thereof which are specifically admitted in the State of North Carolina's further answer, hereinafter set forth.

AND FOR A FURTHER ANSWER, DEFENSE AND COUNTERCLAIM, THE DEFENDANT STATE OF NORTH CAROLINA ALLEGES AND SAYS:

I

It admits that the 83rd Congress of the United States of America did on May 22, 1953, enact Public Law 31, known as the Submerged Lands Act, 67 Statutes at Large 29, and by said law, the United States did release and quitclaim all rights and claims the United States of America had to the submerged lands, subsoils, and minerals lying beneath the ocean waters of the Atlantic Ocean up to three geographic miles from the low-water mark of North Carolina's shores.

II

It denies that the United States of America acquired, or could acquire, by unilateral legislative enactment of the Congress of the United States any right, title or ownership interest to the submerged lands lying beneath the ocean waters of the Atlantic Ocean adverse to the defendant State of North Carolina's rights, title or ownership interests therein whether within three miles or more than three miles from the low-water mark of North Carolina's shores except in a manner prescribed by Article I, Section 8, Paragraph 17 of the Constitution of the United States of America.

III

To the extent that the Congress of the United States of America has attempted to acquire such right, title, or ownership interest in the submerged lands lying off North Carolina's shores adverse to defendant North Carolina's rights, title, or ownership interest by unilateral act of the Congress of the United States by the Submerged Lands Act, said acts and

law are unconstitutional in that said acts and law are in violation of Article I, Section 8, Paragraph 17; Article 4, Section 3; and the Ninth and Tenth Amendments to the Constitution of the United States of America.

IV

It admits that the 83rd Congress of the United States of America did on August 7, 1953 enact Public Law 212, known as the Outer Continental Shelf Lands Act, 67 Statutes at Large 462, and therein declared the "urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the outer continental shelf" and provided that such need should be met by the issuance of mineral leases in that area by the Secretary of the Interior to private operators; and further admits that there is such "urgent need" as declared by the Congress.

V

If the Secretary of the Interior could issue mineral leases in the aforesaid area to private operators pursuant to said law, then he could do so only as an agent of the true owner of the said suberged lands, to wit: the State of North Carolina which is the owner of the said submerged lands and all minerals contained therein or thereunder.

VI

It denies that the United States of America is the owner of said submerged lands and denies that the Secretary of Interior could issue any such leases and retain the income or profits from such leases to the use and benefit of the United States of America or to the Interior Department, said income or profits from such leases, let or to be let, by the Secretary of Interior pursuant to the Outer Continental Shelf Lands Act which arise out of such activity being the property of the defendant State of North Carolina.

VII

It claims all title, right, and ownership interest in said sub-

merged lands, soils, minerals, income and profits from whatever source, as being vested in the State of North Carolina through a succession in a chain of title to such lands from the Charter of James I to the Virginia Company in 1606 to the present date.

VIII

The defendant North Carolina denies that the United States of America acquired or could acquire by unilateral legislative enactment of the Congress of the United States in enacting the Outer Continental Shelf Lands Act, aforesaid, any right, title or ownership interest to the submerged lands lying beneath the ocean waters of the Atlantic Ocean adverse to the defendant State of North Carolina's rights, title or ownership interests therein whether within three miles or more than three miles from the low-water mark of North Carolina's shores; and to the extent that the Congress of the United States of America has attempted to acquire such right, title, or ownership interets in the submerged lands lying off North Carolina's shores adverse to defendant North Carolina's rights, title, or ownership interest by unilateral act of the Congress of the United States said act is unconstitutional in that said act is in violation of Article I, Section 8, Paragraph 17; Article 4, Section 3 of the Constitution of the United States of 1787; and the Ninth and Tenth Amendments to the Constitution of the United States of America.

IX

It shows unto the Court in 1947, the General Assembly of North Carolina did enact a law declaring the ". . . eastern limit and boundary of the State of North Carolina on the Atlantic seaboard [to] have always been . . . one marine league eastward from the Atlantic seashore, measured from the extreme low water mark . . ." and so declared the eastern boundary of North Carolina to be so fixed, (Chapter 1031, 1947 Session Laws of North Carolina, N. C. Gen. Stat. Section 141-6); and further shows that the General Assembly was acting pursuant

to Article I, Section 24, of the N. C. Constitution of 1868 which declared that the "limits and boundaries of the State shall be and remain as they now are."

X

To the extent, if any, of any inconsistency between the laws enacted by the General Assembly and the North Carolina Constitution; and any inconsistency between the laws of North Carolina and of the United States of America, said inconsistency can only be resolved by a judicial determination of the original Eastern boundary of defendant North Carolina at the time of its entry into the Federal Union in 1789.

XI

Such unilateral declarations by legislatures, whether Federal or State, are not conclusive of the matter of the State's offshore boundary nor binding on either plaintiff or defendant in this Cause; and, further alleges that rights to property beneath the Atlantic Ocean can be made only by a determination of the boundary of the State at the time of its entry into the Federal Union together with a determination of whether subsequent to that date the State has ceded any of its property rights to the Federal government in the manner prescribed in Article I, Section 8, Paragraph 17, of the Constitution of the United States of America.

XII

It has never ceded any property rights it had in the lands underlying the Atlantic Ocean at the time of its entry into the Federal Union in 1789, to the United States of America; nor has the United States acquired any such property rights as had by North Carolina since that date, in a manner prescribed by the Constitution of the United States of America.

WHEREFORE, defendant, North Carolina, prays the Court for a determination of its proper historic eastern boundary which existed at the time of its entry into the Federal Union, and for judgment that the defendant North Carolina presently

is the owner of such submerged lands, subsoil, and mineral rights, and has the right to receive the profits and income, if any, so derived from the aforesaid lands within its historic boundary; and having fully answered the complaint of the plaintiff, that defendant have such other and further relief as is deemed proper, and that the costs of this action be taxed against the plaintiff, United States of America.

This the 11th day of September, 1969.

ROBERT MORGAN
Attorney General

Jean A. Benoy
Deputy Attorney General

Thomas J. Bolch
Special Assistant

FILE COPY

Office Supreme Court,
FILED
SEP 15
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

October Term, 1968

No. 35, Original

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF MAINE, ET AL.,
Defendants.

ANSWER OF THE STATE OF FLORIDA

STATE OF FLORIDA
Earl Faircloth
Attorney General

T. T. Turnbull
Chief Trial Counsel
State of Florida

The Capitol
Tallahassee, Florida 32304

IN THE

Supreme Court of The United States

No. 35, Original

UNITED STATES OF AMERICA, Plaintiff,

v.

STATE OF MAINE, and others
(including the State of Florida), Defendants.

ANSWER OF THE STATE OF FLORIDA

I

The jurisdiction of this Court has been established and no answer is made to paragraph I of the complaint.

II

The State of Florida does not deny that the United States is entitled to exercise a portion of its sovereign rights over the seabed and subsoil underlying the Atlantic Ocean to the outer edge of the continental shelf, but does deny that this is an exclusive rights, insofar as Florida is concerned, from the low-water mark, outward in the Atlantic Ocean for a distance of only three (3) geographic miles, as will more fully appear in paragraph III.

III

Insofar as the ultimate and legal facts are alleged in paragraph III, the same are admitted. However, the State of Florida positively avers that in the case of *United States v. Florida*, 363 U.S. 121; 80 S. Ct. 1026; 4 L. Ed 2d 1096;

decided May 23, 1960 (the amended complaint having been filed in November, 1957), this Court has sustained and upheld Florida's historic boundary on the Atlantic Coast, as well as the Gulf Coast, such boundary having been approved by the Congress upon Florida's re-entry into the Union in 1868. The boundary approved by this Court for the State of Florida is contained in Article I of the Constitution of 1868 and is completely stated from that document as follows:

> "The boundaries of the State of Florida shall be as follows: Commencing at the mouth of the river Perdido; from thence up the middle of said river to where it intersects the south boundary line of the State of Alabama, and the thirty-first degree of north latitude; then due east to the Chattahoochee river; then down the middle of said river to the Atlantic Ocean; thence southeastwardly along the coast to the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands; thence northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from the land, to a point west of the mouth of the Perdido river; thence to the place of beginning."

IV

Florida claims, by virtue of its historic boundaries, to the Gulf Stream, wherever the same may be located, recognizing however that the Gulf Stream is a variable boundary, but variable boundaries are not frowned upon by the law when such boundaries may be accurately determined from time to time, and asserts further that by reason of the decision in *United States v. Florida, supra,* this is an established and confirmed boundary and therefore denies the allegations of paragraph IV of the complaint.

V

Answering paragraph VI of the complaint: Paragraph VI of the complaint is denied and Florida asserts that she does not now nor has she ever asserted any claim but its historic and constitutional boundaries.

VI

Answering paragraph VII of the complaint: The allegations of paragraph VII are denied, except insofar as the statement of the law is concerned, which statement is admitted to be true. Florida avers that there are no oil and gas leases on the Atlantic Coast of Florida and none are now proposed to be, even within Florida's historic and legally constituted boundaries.

VII

Answering paragraph VIII of the complaint: Paragraph VIII of the complaint requires no answer. Florida avers that the United States, in the case of *U.S. v. Florida, supra*, has already brought Florida before this Court and this Court has already determined Florida's boundary.

VIII

Answering paragraph XX of the complaint: Relating to the term "Atlantic Ocean," Florida denies that this term includes the Straits of Florida and asserts that geographers, navigators and scientists generally have determined and historically have included the Straits of Florida as a part of the Gulf of Mexico. Florida asserts that there is doubt as to the location of the confluence of the Gulf of Mexico and the Atlantic Ocean and avers that this confluence is located at a point on the landmast of Florida approximating the location of Palm Beach, Florida, extending therefrom in a southeasterly direction. Thereupon, Florida further alleges that all water areas surrounding Florida southerly from this point, including its Keys and its insular possessions, also to include the Marquesas and Dry Tortugas, lie within the confines of the Gulf of Mexico.

IX

There is no controversy between the State of Florida and the United States of America in this cause that has not already been firmly and positively determined by this Court. Admittedly, there are areas which under the case of *United States v. Florida, supra*, need positive delineation, which may

well be done not in this cause, but in the original case of which this Court has retained jurisdiction.

WHEREFORE, Florida prays dismissal from this cause.

DATED this 12th day of September, 1969.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General

T.T. Turnbull
Chief Trial Counsel

CERTIFICATE OF SERVICE

I certify that in compliance with Supreme Court Rules 34 (5) and 50 (2), I have this day served a copy of the foregoing Answer of the State of Florida on the Honorable John N. Mitchell, Attorney General of the United States, and Erwin N. Griswold, Solicitor General of the United States and on all of the parties to this action.

Dated this 12th day of September, 1969.

T.T. TURNBULL
Chief Trial Counsel
Attorney General's Office
State of Florida

No. 35, Original.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF MAINE, ET ALS.

Answer of the State of Delaware.

Comes now the sovereign State of Delaware, a defendant in this cause, by and through its Attorney General, David P. Buckson, and in answer to the allegations contained in the numbered paragraphs of the Plaintiff's complaint under the heading *Seventh Cause of Action,* admits, denies and alleges as follows:

I.

In answer to Paragraph I of the Plaintiff's complaint, Delaware alleges that such paragraph in its entirety alleges nothing requiring answer.

II.

In answer to Paragraph II of the Plaintiff's complaint, Delaware denies each and every allegation in said Paragraph contained.

III.

In answer to Paragraph III of the Plaintiff's complaint, Delaware alleges that insofar as the allegations in Paragraph III may be construed to imply that prior to the effective date of the Submerged Lands Act, 67 Stat. 29 (1953), Delaware was without power to exercise dominion and control over the exploration of the seabed and subsoil underlying the marginal sea adjacent to its coast and the development of such natural resources as might be found in, on or about the same, Delaware denies them in their entirety.

IV.

In answer to Paragraph IV of the Plaintiff's complaint, Delaware admits that it claims some interest in the seabed and subsoil of the Continental Shelf underlying the Atlantic Ocean more than three geographic miles seaward from ordinary low-water mark and from the outer limit of inland waters; and, insofar as the allegations in said paragraph may be construed to imply that the Plaintiff is empowered, in the exercise of its alleged sovereign rights in the above described submerged lands, to assert any claim with respect thereto which is adverse to Delaware, Delaware denies them in their entirety.

V.

In answer to Paragraph VI of the Plaintiff's complaint, Delaware denies each and every allegation in said paragraph contained; and, answering further, alleges that Delaware has received no sums derived from said area for which any accounting, even if due, could be made.

VI.

In answer to Paragraph VII of the Plaintiff's complaint, Delaware alleges that the portion of the Outer Con-

tinental Shelf Lands Act, 67 Stat. 462 (1953), cited by the Plaintiff, speaks for itself; denies that any action taken by Delaware interferes with or obstructs or threatens to obstruct the orderly and effective exploration, leasing and development of any natural resources in, on or about the Outer Continental Shelf; denies that such action will cause any injury to the Plaintiff; and alleges that the statement "The United States has no other adequate remedy" is a conclusion of law and requires no answer.

VII.

In answer to Paragraph VIII of the Plaintiff's complaint, Delaware alleges that such paragraph, in its entirety, is argument in support of the Plaintiff's invocation of this Court's jurisdiction; denies the existence of any urgent need for prompt and final settlement of the issues raised by this proceeding, and denies that any aspect of the Plaintiff's foreign policy is involved herein.

AFFIRMATIVE DEFENSE.

By way of affirmative defense, Delaware alleges that as successor in title to certain grantees of the Crown of England, Delaware is now, and ever since its formation as a separate colony, entitled to exercise dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line to the exclusion of any other political entity whatsoever, including the Plaintiff (subject, however, to the limits of national seaward jurisdiction established by the Plaintiff); that the power to exercise dominion and control is not prohibited to Delaware by the Constitution of the United States, has never in fact or by operation of law been delegated by Delaware to the Plaintiff; and that any

attempt by the Plaintiff to assert such power with respect to Delaware violates the provisions of the Tenth Amendment to the Constitution of the United States and is void and of no effect.

PRAYER.

WHEREFORE, Delaware prays that the Plaintiff's complaint be dismissed with prejudice, and for its costs.

STATE OF DELAWARE,

DAVID P. BUCKSON,
Attorney General,
FLETCHER E. CAMPBELL, JR.,
Deputy Attorney General.

FILE COPY

FILED
SEP 16 1968
JOHN F. DAVIS, CLERK

No. 35. Original

Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES OF AMERICA, PLAINTIFF,

versus

STATE OF MAINE, ET AL.

ANSWER OF THE STATE OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA,
DANIEL R. McLEOD,
Attorney General,

EDWARD B. LATIMER,
Assistant Attorney General,
Hampton State Office Bldg.,
P. O. Box 11537,
Columbia, S. C. 29211.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

No. 35. Original

Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES OF AMERICA, PLAINTIFF,

versus

STATE OF MAINE, ET AL.

ANSWER OF THE STATE OF SOUTH CAROLINA

Comes now the sovereign State of South Carolina (hereinafter for brevity called "South Carolina"), a defendant in this cause, by and through its Attorney General, Daniel B. McLeod, and in answer to the allegations contained in the numbered paragraphs of the Plaintiff's complaint under the heading **Second Cause of Action**, admits, denies and alleges as follows:

I

In answer to Paragraph I of the Plaintiff's complaint, South Carolina alleges that such paragraph in its entirety alleges nothing requiring answer.

II

In answer to Paragraph II of the Plaintiff's complaint, South Carolina denies each and every allegation in said Paragraph contained.

III

In answer to Paragraph III of the Plaintiff's complaint, South Carolina alleges that the provisions of the Submerged Lands Act, 67 Stat. 29 (1953), speak for themselves, and, insofar as the allegations in said Paragraph may be construed to infer that prior to the effective date of the Submerged Lands Act South Carolina was without power to exercise dominion and control over the exploration of the seabed and subsoil underlying the marginal sea adjacent to its coast and the development of such natural resources as might be found in, on or about the same, South Carolina denies them in their entirety.

IV

In answer to Paragraph IV of the Plaintiff's complaint, South Carolina admits that it claims some interest in the seabed and subsoil of the Continental Shelf underlying the Atlantic Ocean more than three geographic miles seaward from ordinary low-water mark and from the outer limit of inland waters; and, insofar as the allegations in said Paragraph may be construed to infer that the Plaintiff is empowered, in the exercise of its alleged sovereign rights in the above described submerged lands, to assert any claim with respect thereto which is adverse to South Carolina, South Carolina denies them in their entirety.

V

In answer to Paragraph VI of the Plaintiff's complaint, South Carolina denies each and every allegation in

said Paragraph contained; and, answering further, alleges that South Carolina has received no sums derived from said area for which any accounting, even if due, could be made.

VI

In answer to Paragraph VII of the Plaintiff's complaint, South Carolina alleges that the portion of the Outer Continental Shelf Lands Act, 67 Stat. 462 (1953), cited by the plaintiff, speaks for itself; denies that any action taken by South Carolina interferes with or obstructs or threatens to obstruct the orderly and effective exploration, leasing and development of any natural resources in, on or about the Outer Continental Shelf; denies that any such action will cause any injury to the Plaintiff; and alleges that the statement "The United States has no other adequate remedy" is a conclusion of law and requires no answer.

VII

In answer to Paragraph VIII of the Plaintiff's complaint, South Carolina alleges that such paragraph, in its entirety, is argument in support of the Plaintiff's invocation of this Court's jurisdiction; denies the existence of any urgent need for prompt and final settlement of the issues raised by this proceeding; and denies that any aspect of the Plaintiff's foreign policy is involved herein.

Comes now the sovereign State of South Carolina (hereinafter for brevity called "South Carolina"), a defendant in this cause, by and through its Attorney General, Daniel R. McLeod, and in answer to the allegations contained in the numbered paragraphs of the Plaintiff's complaint under the heading **Second Cause of Action**, admits, denies and alleges as follows:

In answer to Paragraph XVIII of the Plaintiff's complaint, South Carolina alleges that such paragraph in its entirety alleges nothing requiring answer.

AFFIRMATIVE DEFENSE

By way of affirmative defense, South Carolina alleges that as successor in title to certain grants and grantees of the Crown of England, South Carolina is now, and ever since its admission to the Union has been, entitled to exercise dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line to the exclusion of any other political entity whatsoever, including the Plaintiff (subject, however, to the limits of national seaward jurisdiction established by the Plaintiff); that the power to exercise dominion and control is not prohibited to South Carolina by the Constitution of the United States, has never in fact or by operation of law been delegated by South Carolina to the Plaintiff; and that any attempt by the Plaintiff to assert such power with respect to South Carolina violates the provisions of the Tenth Amendment to the Constitution of the United States and is void and of no effect.

WHEREFORE, South Carolina prays that the Plaintiff's complaint be dismissed with prejudice, and for its costs.

THE STATE OF SOUTH CAROLINA,

/s/ DANIEL R. McLEOD,
Attorney General,

/s/ EDWARD B. LATIMER,
Assistant Attorney General.

Hampton State Office Building,
P. O. Box 11537,
Columbia, South Carolina 29211.
15 September, 1969.

CERTIFICATION

I hereby certify that copies of this Answer have been served upon counsel for all parties by depositing the same in the United States Post Office, with first-class postage prepaid, this date, pursuant to the provisions of the Rules of the Supreme Court of the United States, as follows: Honorable John F. Davis, Clerk, U. S. Supreme Court, Washington, D. C., 20543; Honorable John N. Mitchell, Attorney General of the United States, Department of Justice, Washington, D. C. 20530; Honorable Erwin N. Griswold, Solicitor General of the United States, Justice Department, Washington, D. C. 20530; Honorable James S. Erwin, Attorney General of Maine, Department of the Attorney General, Augusta, Maine 04330; Honorable Arthur J. Sills, Attorney General of New Jersey, State Capitol, Trenton, New Jersey; Honorable David P. Buckson, Attorney General of Delaware, Kirk Building, P. O. Box 752, Dover, Delaware 19901; Honorable Arthur K. Bolton, Attorney General of Georgia, 132 State Judicial Building, Atlanta, Georgia, 30334; Honorable Francis B. Burch, Attorney General of Maryland, One Charles Center, Baltimore, Maryland 21201; Honorable Robert H. Quinn, Attorney General of Massachusetts, State House, Boston, Massachusetts 02133; Honorable Robert Morgan, Attorney General of North Carolina, Justice Building, Raleigh, North Carolina 27602; Honorable Louis J. Lefkowitz, Attorney General of New York, State Capitol, Albany, New York 12225; Honorable Robert Y. Button, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia 23219; Honorable Herbert F. DeSimone, Attorney General of Rhode Island, Providence County Court House, Providence, Rhode Island 02903; Honorable Earl Faircloth, Attorney General of Florida, State Capitol, Tallahassee, Florida 32304; and Honorable George S. Pappa-

gianis, Attorney General of New Hampshire, State House Annex, Concord, New Hampshire 03301.

STATE OF SOUTH CAROLINA,

DANIEL R. McLEOD,
Attorney General,

EDWARD B. LATIMER,
Assistant Attorney General,
Hampton State Office Bldg.,
P. O. Box 11537,
Columbia, S. C. 29211.

15 September, 1969.

FILE COPY

FILED
SEP 17 1969
JOHN F. DAVIS, CLERK

No. 35, Original

In the
Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET ALS.

Answer of the State of Maine

STATE OF MAINE,
JAMES S. ERWIN,
Attorney General,
ROBERT G. FULLER, JR.,
Assistant Attorney General,
State House,
Augusta, Maine 04330

No. 35, Original

In the Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET ALS.

Answer of the State of Maine

Comes now the sovereign State of Maine (hereinafter for brevity called "Maine"), principal defendant in this cause, by and through its Attorney General, James S. Erwin, and in answer to the allegations contained in the numbered paragraphs of the Plaintiff's complaint under the heading *First Cause of Action*, admits, denies and alleges as follows:

I.

In answer to Paragraph I of the Plaintiff's complaint, Maine alleges that such paragraph in its entirety alleges nothing requiring answer.

II.

In answer to Paragraph II of the Plaintiff's complaint, Maine denies each and every allegation in said Paragraph contained.

III.

In answer to Paragraph III of the Plaintiff's complaint, Maine alleges that the provisions of the Sub-

merged Lands Act, 67 Stat. 29 (1953), speak for themselves, and, insofar as the allegations in said Paragraph may be construed to infer that prior to the effective date of the Submerged Lands Act Maine was without power to exercise dominion and control over the exploration of the seabed and subsoil underlying the marginal sea adjacent to its coast and the development of such natural resources as might be found in, on or about the same, Maine denies them in their entirety.

IV.

In answer to Paragraph IV of the Plaintiff's complaint, Maine admits that it claims some interest in the seabed and subsoil of the Continental Shelf underlying the Atlantic Ocean more than three geographic miles seaward from ordinary low-water mark and from the outer limit of inland waters; and, insofar as the allegations in said Paragraph may be construed to infer that the Plaintiff is empowered, in the exercise of its alleged sovereign rights in the above described submerged lands, to assert any claim with respect thereto which is adverse to Maine, Maine denies them in their entirety.

V.

In answer to Paragraph V of the Plaintiff's complaint, Maine denies each and every allegation therein contained; but alleges that it has granted to a private corporation a conditional license to explore for minerals, oil and gas in, and to take the same from, certain lands submerged in the Atlantic Ocean, some portion of which lands may lie more than three geographic miles seaward from the ordinary low-water mark and from the outer limit of inland waters.

VI.

In answer to Paragraph VI of the Plaintiff's complaint, Maine denies each and every allegation in said Paragraph contained; and, answering further, alleges

that Maine has received no sums derived from said area for which any accounting, even if due, could be made.

VII.

In answer to Paragraph VII of the Plaintiff's complaint, Maine alleges that the portion of the Outer Continental Shelf Lands Act, 67 Stat. 462 (1953), cited by the plaintiff, speaks for itself; denies that any action taken by Maine interferes with or obstructs or threatens to obstruct the orderly and effective exploration, leasing and development of any natural resources in, on or about the Outer Continental Shelf; denies that any such action will cause any injury to the Plaintiff; and alleges that the statement "The United States has no other adequate remedy" is a conclusion of law and requires no answer.

VIII.

In answer to Paragraph VIII of the Plaintiff's complaint, Maine alleges that such paragraph, in its entirety, is argument in support of the Plaintiff's invocation of this Court's jurisdiction; denies the existence of any urgent need for prompt and final settlement of the issues raised by this proceeding, and denies that any aspect of the Plaintiff's foreign policy is involved herein.

AFFIRMATIVE DEFENSE

By way of affirmative defense, Maine alleges that as successor in title to certain grantees of the Crown of England, Maine is now, and ever since its admission to the Union has been, entitled to exercise dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line to the exclusion of any other political entity whatsoever, including the Plaintiff (subject, however, to the limits of national seaward jurisdiction established by the Plaintiff); that the

power to exercise dominion and control is not prohibited to Maine by the Constitution of the United States, has never in fact or by operation of law been delegated by Maine to the Plaintiff; and that any attempt by the Plaintiff to assert such power with respect to Maine violates the provisions of the Tenth Amendment to the Constitution of the United States and is void and of no effect.

PRAYER

WHEREFORE, Maine prays that a decree be entered that, as against Maine, the Plaintiff possesses no right to exercise dominion and control over the exploration and development of such natural resources as may be found in, on and about the sea bed and subsoil underlying the Atlantic Ocean adjacent to its coastline and to the limit of national seaward jurisdiction; and for its cost.

STATE OF MAINE,
JAMES S. ERWIN,
Attorney General

ROBERT G. FULLER, JR.,
Assistant Attorney General

Dated: September 15, 1969

CERTIFICATE OF SERVICE

I certify that in compliance with Supreme Court Rule 33(2) (a) I have this day served a copy of the foregoing answer upon the plaintiff, United States of America, by mailing such copy by air mail, with postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530.

ROBERT G. FULLER, JR.,
Assistant Attorney General
State of Maine.

Dated: September 15, 1969

FILE COPY

SEP 15 1969

JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. 35, Original

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATE OF MAINE, *et als.*

ANSWER OF THE STATE OF RHODE ISLAND

STATE OF RHODE ISLAND
HERBERT F. DE SIMONE
Attorney General
W. SLATER ALLEN, JR.
Assistant Attorney General
Providence County Court House
250 Benefit Street
Providence, Rhode Island

Blanchard Press, Inc., Boston, Mass. — Law Printers

In the
Supreme Court of the United States

OCTOBER TERM, 1968

No. 35, Original

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATE OF MAINE, *et als.*

Answer of the State of Rhode Island

Now comes the State of Rhode Island and Providence Plantations (hereinafter for brevity "Rhode Island"), defendant in the above entitled matter, acting by and through its Attorney General, Herbert F. De Simone and answers the allegations contained in the fourth cause of action in the complaint as follows:

I

First Defense

1. Rhode Island admits that the complaint, by Paragraph I, sufficiently invokes the subject matter jurisdiction of this Honorable Court.

2. Rhode Island denies each and every allegation contained in paragraph II of the complaint.

3. Rhode Island admits the enactment and approval of Public Law 31, 83rd Congress, known as the Submerged Lands Act, 67 stat. 29 (1953); Rhode Island denies that by such enactment and approval, P.L. 31, 83rd Congress had the legal effect alleged in Paragraph III of the complaint, except as to the release of claims alleged in said paragraph. Rhode Island further answers that to the extent P.L. 31, 83rd Congress purports on its face to reserve to the United States of America title and ownership of Submerged Lands said Act is void as repugnant to the United States Constitution, Articles of Amendment, Article X.

4. Rhode Island admits the allegations contained in Paragraph IV of the complaint except that to the extent the allegations of Paragraph IV of the complaint may be construed to infer that the plaintiff is empowered to assert any claim in the above described submerged lands which is adverse to Rhode Island, denies them in their entirety.

5. Rhode Island denies each and every allegation contained in Paragraph VI of the complaint.

6. Rhode Island admits the enactment and approval of P.L. 212, 83rd Congress known as the Outer Continental Shelf Lands Act, 67 stat. 462, 468 and further answers that said act speaks for itself.

Rhode Island denies that it is unlawfully interfering with or will unlawfully obstruct the plaintiff as alleged in Paragraph VII of the complaint, it denies that it unlawfully threatens to obstruct or interfere with the orderly and effective exploration, leasing and development of mineral resources as alleged in said paragraph and denies that a threatened action of Rhode Island wiill damage the plantiff.

7. In answer to Paragraph VIII of the plaintiff's com-

plaint, Rhode Island alleges that such paragraph, in its entirety, is argument in support of the plaintiff's invocattion of this Court's jurisdiction, denies the existence of any urgent need for prompt and final settlement of the issues raised by this proceeding, and denies that any aspect of the plaintiff's fooreign policy is involved herein.

II

Second Defense

Rhode Island alleges, an as affirmative defense, that on March 14, 1643 and on July 8, 1663 the then King of England granted to diverse persons (constituting by those grants the body politic then and thereafter named Rhode Island and Providence Plantations) charters; granted to Rhode Island, military and proprietary autonomy over the abutting portion of the Atlantic Ocean. Rhode Island further alleges that by those charters, Rhode Island was thereby authorized to defend and safeguard itself by force of arms, as well as by sea as by land.

Rhode Island further alleges that the power and authority hereinabove affirmatively alleged was not so delimited by its ratification of the Constitution of the United States as to exclude Rhode Island from domimium and ownership over the submerged lands of the Atlantic Ocean adjacent to it.

Further, Rhode Island alleges that it has never in fact or by operation of law delegated or granted to the plaintiff, domimium or ownership over the submerged lands of the Atlantic Ocean adjacent to Rhode Island; any act of Congress arrogating to the plaintiff such submerged lands is void as repugnant to United States Constitution, Articles of Amendment, Article X.

III

Third Defense

Rhode Island alleges, as an affirmative defense, that on May 4, 1776 it declared itself independent of the Crown of England and thereafter exercised wholly and entirely sovereign imperium and dominium over the submerged lands and waters of the Atlantic Ocean adjacent to it. Rhode Island further alleges that it never thereafter in fact or by operation of law granted or delegated to the plaintiff dominium or ownership over the submerged lands of the Atlantic Ocean adjacent to it. Rhode Island further alleges that an act of Congress arrogating to the United States dominium or ownership over the submerged lands of the Atlantic Ocean adjacent to Rhode Island is void as repugnant to United States Constitution, Articles of Amendment, Article X.

Prayer

Wherefore, Rhode Island prays that a decree be entered declaring that Rhode Island have the rights of ownership and control of sub-soil, sea bed and natural resources underlying the Atlantic Ocean within and without any point three (3) geographical miles seaward from the ordinary low water mark, subject only to reasonable regulation by the plaintiff in the exercise of its rights of regulating intererstate and foreign commerce, the waging of war, the making of treaties, and the defense of the shores.

STATE OF RHODE ISLAND
(s) HERBERT F. DE SIMONE
Attorney General
(s) F. DE SIMONE
(s) W. SLATER ALLEN, JR.
Assistant Attorney General

SEP 22 1
JOHN F. DAVIS,

IN THE

Supreme Court of the United States

October Term 1968

No. 35 Original

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF MAINE, et al.,
Defendants.

DEFENSES AND ANSWER OF THE STATE OF GEORGIA

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, JR.
Exec. Assistant Attorney General

ALFRED L. EVANS, JR.
Assistant Attorney General

LARRY D. RUSKAUP
Assistant Attorney General

IN THE

Supreme Court of the United States

October Term 1968

No. 35 Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE, et al.,

Defendants.

DEFENSES AND ANSWER OF THE STATE OF GEORGIA

COMES NOW the State of Georgia, a defendant in the above styled proceeding, and makes this its defenses and answer to the complaint as follows:

FIRST DEFENSE

The State of Georgia moves that the complaint be dismissed as to itself under Rule 12 of the Federal Rules of Civil Procedure, or, in the alternative that it be dropped as a party-defendant under Rule 21 of the Federal Rules of Civil Procedure for want of jurisdiction, on the ground that the complaint fails to allege any facts showing the existence of a case or controversy within the meaning of Article III, Section 2 of the Constitution of the United States between plaintiff and this defendant.

SECOND DEFENSE

The State of Georgia moves that the complaint be dismissed as to itself under Rule 12 of the Federal Rules of Civil Procedure, or, in the alternative that it be dropped as a party-defendant under Rule 21 of the Federal Rules of Civil Procedure, for failure to state a claim against this defendant upon which relief can be granted.

THIRD DEFENSE

The State of Georgia answers plaintiff's complaint as follows:

1.

Paragraph I of the complaint sets forth legal assertions requiring no answer, but this defendant denies that jurisdiction is properly invoked with respect to the State of Georgia.

2.

The allegations of Paragraph II of the complaint are denied.

3.

Paragraph III of the complaint consists of legal conclusions requiring no answer, but this defendant denies that it was without power to exercise dominion and control over the exploration of the seabed and subsoil underlying the marginal sea adjacent to its coast or in the development of such natural resources as might be found therein before the effective date of 67 Stat. 29 (1953).

4.

The allegations of Paragraph IV of the complaint are admitted.

5.

The allegations of Paragraph V of the complaint are not asserted against the State of Georgia.

6.

The allegations of Paragraph VI of the complaint are denied, and in further answer thereto this defendant shows the Court that it has received no sums from exploration or exploitation of the described area of seabed and subsoil.

7.

In answer to Paragraph VII of the complaint this defendant admits the first sentence thereof but denies each and every other allegation of such paragraph.

8.

The allegations of Paragraph VIII of the complaint are denied.

FOURTH DEFENSE

Answering the complaint further, the State of Georgia shows the Court that as successor in title to certain grantees of the Crown of England, it is now, and at all times since its declaration of independence from the Crown of England has been, entitled to exercise dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line to the exclusion of any other political entity whatsoever, including plaintiff; that the power to exercise such dominion and control respecting seabed and subsoil is not prohibited to the State of Georgia by the Constitution of the United States, has never been sold, granted or transferred by

the State of Georgia to the plaintiff, and is reserved to the State of Georgia by the Tenth Amendment to the Constitution of the United States.

FIFTH DEFENSE

Answering the complaint further the State of Georgia shows that if by virtue of its adoption of the Constitution or membership in the Union, it did in any way relinquish, grant or transfer to plaintiff its right to exercise dominion and control over the exploration and development of such natural resources as might be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line, such rights of dominion were reacquired by the 1802 cession of the United States to the State of Georgia of whatever claim, right or title the United States may have had in such soil or lands, such cession being a consideration and condition of Georgia's cession to the United States of those lands lying west of its present boundary with the State of Alabama.

WHEREFORE, having fully answered and presented this its defenses and answer to plaintiffs' complaint the State of Georgia prays that the complaint be dismissed and the prayers denied with respect to the State of Georgia.

ARTHUR K. BOLTON
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HAROLD N. HILL, JR.
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ALFRED L. EVANS
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No. 35, Original

In the Supreme Court of the United States

October Term, 1968

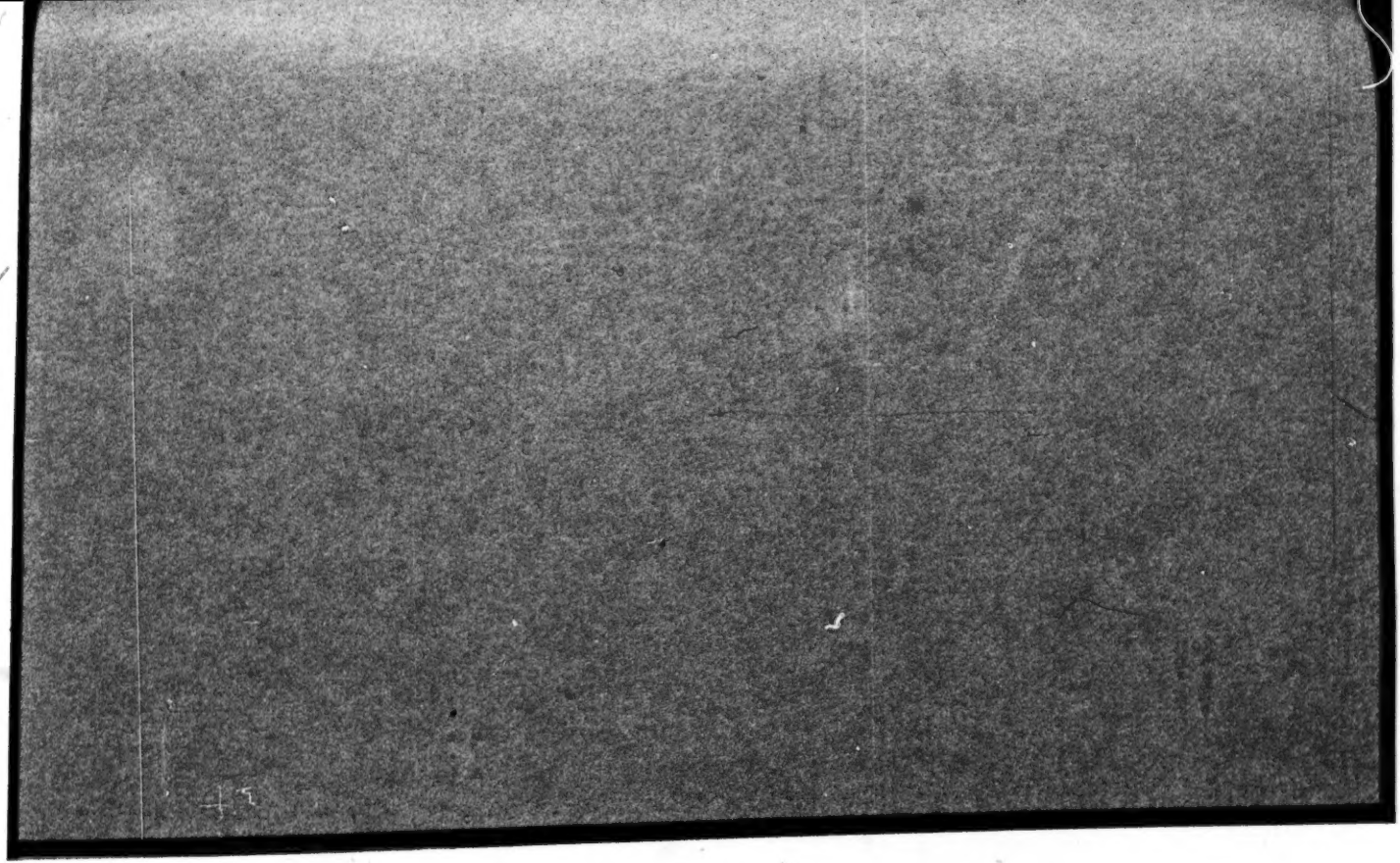
United States of America, plaintiff

v.

States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida

Answer of the Commonwealth of Massachusetts

Robert H. Quinn
Attorney General
Thomas J. Crowley
Assistant Attorney General
Harold Putnam
Assistant Attorney General



In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 35, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA

ANSWER OF THE COMMONWEALTH OF MASSACHUSETTS

Now comes the Commonwealth of Massachusetts (hereinafter called "Massachusetts"), a defendant in this cause, by and through its Attorney General, Robert H. Quinn, and in answer to the allegations contained in the Plaintiff's complaint under the heading *Third Cause of Action,* paragraph X, admits, denies and alleges as follows:

I.

In answer to Paragraph I of the Plaintiff's complaint, Massachusetts alleges that such paragraph alleges nothing requiring answer.

II.

In answer to Paragraph II of the Plaintiff's complaint,

Massachusetts denies each and every allegation in said Paragraph in its entirety.

III.

In answer to Paragraph III of the Plaintiff's complaint, Massachusetts neither admits nor denies the allegations of said Paragraph but alleges that the provisions of Public Law 31 of the 83rd Congress, known as the Submerged Lands Act, 67 Statutes at Large (1953), speak for themselves.

IV.

In answer to Paragraph IV of the Plaintiff's complaint, Massachusetts admits that it claims some right, title or interest in the seabed and subsoil of the continental shelf underlying the Atlantic Ocean more than three (3) geographic miles seaward from the ordinary low-water mark and from the outer limit of inland waters; and, insofar as the allegations in said Paragraph may be construed to infer that the Plaintiff is empowered in the exercise of its alleged sovereign rights in such described submerged lands, to assert any claim with respect thereto which is adverse to Massachusetts, Massachusetts denies them in their entirety.

VI.

In answer to Paragraph VI of the Plaintiff's complaint, Massachusetts denies each and every allegation in said Paragraph in its entirety, and further answering, states that it has granted no rights in the area lying more than three (3) geographical miles seaward from the ordinary low-water mark and from the outer limit of inland waters

on the coast, and has received no sums for which any accounting could be made.

VII.

In answer to Paragraph VII of the Plaintiff's complaint, Massachusetts alleges the provisions of Public Law 212 of the 83rd Congress, known as the Outer Continental Shelf Lands Act, 67 Statutes at Large 462, 468 (1953), speak for themselves, and further answering, Massachusetts denies that it, by its conduct or claims is interfering with and obstructing, or threatens to obstruct the orderly and effective exploration, leasing and development of said mineral resources, or will continue to so interfere or obstruct or so threaten to obstruct; and further answering, Massachusetts denies that any such action will cause any injury to the Plaintiff; and further answering, Massachusetts neither admits nor denies the statement "The United States has no other adequate remedy" but calls upon the Plaintiff to prove the same.

VIII.

In answer to Paragraph VIII of the Plaintiff's complaint, Massachusetts denies there is urgent need for prompt and final settlement of the controversy, denies that the fundamental question in issue relates to aspects of the foreign policy of the United States, and admits the allegation that only in this Court is it possible to join all defendant States whose participation is necessary to the orderly adjudication of issues in which they have a common interest.

AFFIRMATIVE DEFENSE

By way of the affirmative defense, Massachusetts alleges that as successor in title to certain royal charters of the

Crown of England, Massachusetts is now, and since its entry into the Union has been, entitled to exercise exclusive dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line, subject to the limits of national seaward jurisdiction established by the Plaintiff; and further, that the power to exercise such exclusive dominion and control is neither delegated to the Plaintiff nor prohibited to Massachusetts by the Constitution of the United States and that any attempt by the Plaintiff to assert any power to exercise any such dominion and control with respect to Massachusetts violates the provision of the Tenth Amendment to the Constitution of the United States and is therefore void and of no effect.

WHEREFORE, Massachusetts prays that a decree be entered declaring the rights of Massachusetts as against the Plaintiff to exercise exclusive dominion and/or control in, on, or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coastline, and further that the Plaintiff's complaint be dismissed, that Massachusetts be awarded its costs, and for such other and further relief as may be proper in the premises.

COMMONWEALTH OF MASSACHUSETTS
ROBERT H. QUINN
Attorney General
THOMAS J. CROWLEY
Assistant Attorney General
HAROLD PUTNAM
Assistant Attorney General

SEPTEMBER, 1969

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 35, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA

MOTION FOR JUDGMENT

The United States of America moves the Court for judgment as prayed in the complaint on the ground that there is no genuine issue as to any material fact and the United States is entitled to judgment as a matter of law.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1970.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 35, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA, AND FLORIDA

BRIEF FOR THE UNITED STATES IN SUPPORT OF MOTION FOR JUDGMENT

JURISDICTION

The jurisdiction of this Court rests upon Article III,, sec. 2, cl. 2, of the Constitution and Title 28, United States Code, Section 1251(b)(2).

STATUTES INVOLVED

1. The Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301–1315, provides in pertinent part:

> SEC. 2. When used in this Act—
>
> (a) The term "lands beneath navigable waters" means—
>
> * * * * *
>
> (2) all lands permanently or periodically covered by tidal waters up to but not above

the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 4 hereof but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

* * * * *

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters,

clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

* * * * *

(g) The term "State" means any State of the Union; [67 Stat. 29, 43 U.S.C. 1301]

* * * * *

SEC. 3. *Rights of the States.*—

(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof; [67 Stat. 30, 43 U.S.C. 1311]

* * * * *

SEC. 4. *Seaward Boundaries.*—

The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may ex-

tend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress. [67 Stat. 31, 43 U.S.C. 1312]

* * * * *

SEC. 9. Nothing in this Act shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 2 hereof, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is hereby confirmed. [67 Stat. 32, 43 U.S.C. 1302]

2. The Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331–1343, provides in pertinent part:

SEC. 2. Definitions.—When used in this Act—

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 2 of the Submerged Lands Act (Public Law 31, Eighty-third Congress, first session), and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

* * * * *

SEC. 3. Jurisdiction Over Outer Continental Shelf.—

(a) It is hereby declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act. [67 Stat. 462, 43 U.S.C. 1332]

QUESTION PRESENTED

Whether the right to explore and exploit the natural resources of the continental shelf underlying the Atlantic Ocean beyond three miles from the coast line belongs to the United States or to the defendant States.

STATEMENT

This suit was brought to establish, as against the defendant States, the rights of the United States in the lands and natural resources of the bed of the Atlantic Ocean more than three geographical miles seaward from the coast line. The complaint alleges (pp. 4, 6–9) that prior to May 22, 1953, the United States had, as against the defendant States, exclusive sovereign rights over the seabed and subsoil under-

lying the Atlantic Ocean, extending seaward from the ordinary low-water mark and from the outer limit of inland waters on the coast to the outer edge of the continental shelf, for the purpose of exploring the area and exploiting its natural resources; that in 1953, by the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301–1315, Congress gave the defendant States ownership of the bed of the three-mile territorial sea within their boundaries;[1] and that otherwise the situation in the Atlantic Ocean remains as it was. The complaint further alleges (pp. 4–9) that the defendant States claim rights in the seabed and subsoil of the continental shelf, more than three miles seaward from the ordinary low-water mark and from the outer limit of inland waters, adverse to the United States, and specifically (p. 5) that the defendant State of Maine has purported to grant exclusive oil and gas exploration and exploitation rights in approximately 3.3 million acres of submerged land of the Atlantic Ocean in the area in controversy. It alleges (pp. 5–9) that these adverse claims and actions interfere with federal development of the area under the Outer Continental Shelf Lands Act, 67 Stat. 462. The prayer (p. 10) is for a declaration of the exclusive rights of the United States, as against the defendant States, in the subsoil, seabed, and natural

[1] Section 4 of the Submerged Lands Act, 43 U.S.C. sec. 1312, confirmed the boundary of each of the original States as a line three geographical miles distant from its coast line, and approved and confirmed past or future claims to that distance by other States. Eleven of the defendants are original States. Maine and Florida are not, but have claimed boundaries at least three miles from the coast.

resources underlying the Atlantic Ocean, including the Straits of Florida, more than three geographical miles from the ordinary low-water line and from the outer limit of inland waters, and for an accounting and other proper relief.

Following the Court's order of June 16, 1969, allowing the complaint to be filed, 395 U.S. 955, answers were filed by all the defendant States. The answers differ somewhat in form, but in essence they all deny the rights alleged by the United States and assert in the several States, independently of the Submerged Lands Act, the exclusive right to explore and exploit the natural resources of the seabed adjacent to their respective coasts, beyond as well as within the three-mile limit. All the defendants deny that the United States is entitled to an accounting, and Maine, New Hampshire, Massachusetts, New York, New Jersey, Delaware, South Carolina, and Georgia specifically deny having derived any sums from the disputed area. Maine admits to having given an exploration license covering certain seabed lands, "some portion of which lands may lie more than three geographic miles seaward" from the coast line. Me. Ans., par. V, p. 2. Massachusetts, against whom no such allegation was made, also denies having granted rights in the seabed more than three miles from the coast line. Mass. Ans., par. VI, pp. 2–3.

In addition to those denials, all the defendants except Florida assert as an affirmative defense that they are entitled, as successors to grantees of the British Crown (and also, in the case of New York, the Dutch Crown), to control exploitation of the natural resources of the seabed, within the seaward limits of national

jurisdiction established by the United States. Rhode Island also asserts as a separate defense that it acquired *dominium* and *imperium* over the adjacent seabed by virtue of its declaration of independence from the British Crown, May 4, 1776. R.I. Ans., Third Defense. Georgia alleges as a first defense that the complaint fails to show a case or controversey (Ga. Ans., p. 1); as a second defense, that the complaint fails to state a claim on which relief can be granted (Ga. Ans., p. 2); and as a fifth defense, that any rights the United States may have had in the disputed area were transferred to Georgia by the boundary settlement agreement of 1802 (Ga. Ans., p. 4). Without stating it as a separate defense, Florida alleges that in *United States* v. *Florida,* 363 U.S. 121, this Court sustained Florida's boundary in the Atlantic Ocean, as well as in the Gulf of Mexico, as described in the State's 1868 Constitution; that that boundary runs "southeastwardly along the coast to the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands"; and that the Gulf of Mexico meets the Atlantic Ocean in the vicinity of Palm Beach, Florida. Fla. Ans., pars. III–IV, VII–IX, pp. 1–4.

ARGUMENT

A. INTRODUCTION AND SUMMARY

The issue in this case is whether the United States has, as against the defendant States, the exclusive right to explore and exploit the natural resources of the continental shelf under the Atlantic Ocean, more than

three miles from the coast line.[2] Our submission is that no Atlantic Coast State can have rights in submerged lands beyond three miles; each of the defendant States, on the other hand, claims beyond that limit. That is the controversy tendered to the Court on the present motion, pretermitting for the moment any possible disputes about the exact location of the three-mile line (if the United States prevails) or the actual limit of each State's rights beyond the three-mile belt (if any such claim is sustainable).

We establish first (*infra*, pp. 12–20) that this disagreement between sovereigns presents a justiciable controversy, fully ripe for adjudication. And we suggest that the Court itself should rule on the present motion, without reference to a Special Master.

Next (*infra*, pp. 20–30) we turn to the claim of the States of the Atlantic Coast that they have held, and still retain, rights in the continental shelf, both within the three-mile belt and beyond, since before the formation of the Union or their admission to it. We answer that this contention is effectively foreclosed by the Court's decisions regarding State claims in the Pacific Ocean and the Gulf of Mexico, and is, at all events, without merit. Specifically, we note that the concept of exploitive rights in the marginal sea was unknown at the time and, moreover, that whatever rights in the seabed may have existed passed to the United

[2] The "coast line" is a political line comprising two elements: the line of ordinary low water along the open coast, and, elsewhere, lines marking the outer limits of inland waters. Submerged Lands Act, sec. 2(c), 67 Stat. 29, 43 U.S.C. 1301(c); *United States* v. *Louisiana*, 363 U.S. 1, 66, fn. 108.

States as an aspect of external sovereignty upon the formation of the Union.

We then (*infra*, pp. 30–39) consider what grants Congress may subsequently have made to the States which might support the present claims. We find that only the Submerged Lands Act of 1953 is relevant, and that the grant there made is expressly limited to three miles in the Atlantic Ocean. Finally, we take up and answer the special claim advanced by Georgia under the boundary settlement agreement of 1802.

B. THE NATURAL RESOURCES OF THE CONTINENTAL SHELF, ALTHOUGH BEYOND THE TERRITORIAL LIMITS OF THE UNITED STATES, ARE SUBJECT TO JUSTICIABLE RIGHTS WHICH MAY PROPERLY BE ADJUDICATED ON THE PRESENT MOTION

The national boundary of the United States is at the outer limit of the territorial sea, three geographical miles from the coast line. The area here in dispute is entirely seaward of that limit, but international law recognizes the exclusive right of a coastal nation to control exploitation of the natural resources of the continental shelf beyond its territorial sea. Internationally, the rights of a coastal nation over its continental shelf are now stated in the Convention on the Continental Shelf, 15 U.S.T. (Pt. 1) 471.[3] The internal allocation

[3] Article 1 of the Convention defines the term "continental shelf":

> For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent

of that right as between Nation and State is a domestic concern [4] and is a proper subject of adjudication.

Domestically the United States' jurisdiction over the natural resources of the continental shelf was first asserted by Presidential Proclamation No. 2667, September 28, 1945, 59 Stat. 884.[5] That was followed in 1953 by the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301–1315, which gave the coastal States the submerged lands and resources within their boundaries, not exceeding three geographical miles from the coast line in the Atlantic or Pacific or three leagues

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waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands. [15 U.S.T. (Pt. 1) 473.]

Article 2 then provides:

1. The coastal State [*i.e.*, Nation] exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation. [15 U.S.T. (Pt. 1) 473.]

[4] See Hearings, S. Committee on Interior and Insular Affairs, S.J. Res. 13, 83d Cong., 1st Sess. (1953) 1067.

[5] The Proclamation was accompanied by a press release that defined the "continental shelf" as being generally considered to include the submerged land contiguous to the continent and covered by no more than 100 fathoms (600 feet) of water. The press release also made clear that the Proclamation "does not touch upon the question of Federal versus State control." S. Rept. No. 411, 83d Cong., 1st sess. (1953) 53 (Cong. Doc. Ser. No. 11660).

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(nine miles) in the Gulf of Mexico, and which again asserted the jurisdiction and control of the United States over natural resources of the continental shelf seaward of those limits (§ 9, 43 U.S.C. 1302). Administration of the latter rights was provided, in the same year, by the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331–1343. This Court has previously adjudicated the right to the natural resources of the continental shelf as between the United States and coastal States. *United States* v. *Louisiana,* 340 U.S. 899; *United States* v. *Texas,* 340 U.S. 900; *United States* v. *Louisiana et al.,* 364 U.S. 502; *United States* v. *California,* 382 U.S. 448; *Texas Boundary Case,* 394 U.S. 836. Such an adjudication is equally appropriate here.

2. There is, accordingly, no merit to the suggestion advanced by Georgia (Ans., pp. 1–2) that the present complaint does not reveal a case or controversy and fails to state a claim on which relief can be granted. The complaint alleges that the United States has exclusive rights to explore and exploit the natural resources of the continental shelf more than three geographic miles from the coast line, and that the defendant States claim rights adverse to those of the United States. Complaint, p. 4. As to Maine, there is a further allegation that the State has purported to grant exclusive oil and gas exploration and exploitation rights in the disputed area (Complaint, p. 5), reflecting a situation indistinguishable from that held to create a justiciable case or controversy in *United States* v. *California,* 332 U.S. 19, 24–26. It is true that there is no allegation that any other of the defendant

States has similarly purported to exercise control over the disputed area; but in this respect their situation is like that of Texas, Mississippi, Alabama, and Florida, in *United States* v. *Louisiana et al.,* where the Court held that States that might want to make claims similar to that of Louisiana, even though they had taken no affirmative action, were not only proper parties but were so essential to a proper disposition of the case that it could not proceed without them. *United States* v. *Louisiana,* 354 U.S. 515. Georgia admits that it asserts a claim adverse to that alleged by the United States. Ga. Ans., p. 2, Third Defense, par. 4. Nothing more is required to present a justiciable controversy.

3. Nor is there any substance to Florida's plea that the case should be dismissed as to that State because this Court's decision in *United States* v. *Florida,* 363 U.S. 121, has already delimited Florida's rights to submerged lands and natural resources under the Atlantic Ocean (subject to possible need for supplemental proceedings to identify the defined boundary with precision). Fla. Ans., pp. 1–4, pars. III, IV, VII, IX. Florida alleges that that decision sustained Florida's right to a boundary in the Atlantic Ocean as described in Article I of the Florida Constitution of 1868, from the Chattahoochee River "southeastwardly along the coast to the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands * * *." Fla. Ans., pp. 1–2, par. III. The fact is, however, that neither the opinion cited, nor the decree subsequently entered pursuant thereto, 364 U.S. 502, supports Florida's contention.

The Court made itself clear in the opinion: in quoting the maritime portion of the Florida boundary as described in Article I of the Florida Constitution of 1868, only the portion relating to the Gulf of Mexico was italicized, indicating that this was the part with which the opinion was concerned. *United States* v. *Florida,* 363 U.S. 121, 123–124, fn. 4. Indeed, throughout the opinion, the Court repeatedly limited its discussion to the Gulf of Mexico, and in summing up its conclusion it said (363 U.S. 121 at 129):

> We hold that the Submerged Lands Act grants Florida a three-marine-league belt of land *under the Gulf,* seaward from its coastline, as described in Florida's 1868 Constitution. [Emphasis added.]

Similarly, the decree provided (364 U.S. 502, 503):

> 2. As against the United States, the defendant States are respectively entitled to all the lands, minerals and other natural resources *underlying the Gulf of Mexico,* extending seaward from their coast lines for a distance of three leagues in the case of Texas and Florida and three geographic miles in the case of Louisiana, Mississippi and Alabama * * *. [Emphasis added.]

Beyond quoting the entire maritime boundary description of the Florida Constitution (363 U.S. at 123–124, fn. 4), the Court made no reference to the State's boundary in the Atlantic, and its conclusion that Congress had "approved" the 1868 boundary, within the meaning of the Submerged Lands Act, could be significant only as to the Gulf boundary, where historic boundaries could entitle a State to more than three miles of submerged lands. In the

Atlantic, the Submerged Lands Act itself approved boundaries out to a distance of three miles, and excluded greater claims, so that historic boundaries were irrelevant. *Infra,* pp. 31–32.

It is true that Florida's entire maritime boundary, including the Straits of Florida and the Atlantic coast, was put in issue by the amended complaint and Florida's answer in *United States* v. *Louisiana et al.,* No. 11, Orig., October Term, 1957 (now No. 9, Orig.). Amended Complaint, pp. 16–18; Defenses [of Florida] to Amended Complaint, p. 2, First Defense pars. 2, 4–5. And it may be that questions as to the Atlantic boundary are still pending before the Court in that case under the Court's retained jurisdiction. See 364 U.S. 502, 504. That, however, is no bar to resolution of the issue in this case, where rights underlying the Atlantic Ocean will be determined for all other States on a ground that may well affect Florida's claim. While the inclusion or exclusion of Florida as a party in this case is of little moment to the United States, we deemed it appropriate to join that State here, rather than re-open proceedings in No. 9, Original, for this purpose, since that case is otherwise concerned only with rights in the Gulf of Mexico.[6]

4. And, finally, there is—at least at this stage—no occasion to refer the case to a Special Master. The

[6] The further question raised by Florida (Fla. Ans., p. 3, par. VIII), of where its Atlantic and Gulf boundaries meet, appears to be the sort of interpretative detail that may more appropriately be left for supplemental proceedings hereafter. Cf. *United States* v. *Louisiana et al., supra,* 363 U.S. at 79; *United States* v. *California, supra,* 332 U.S. at 25–26. In no event should any dispute on this score require present reference of the case to a Special Master or otherwise delay resolution of the basic controversy.

question our motion tenders is *not* where the three-mile limit of State ownership of submerged lands is located as to each of the defendants—the kind of issue now before a Special Master in No. 9, Original, with respect to the State of Louisiana. So far as the pleadings disclose, the parties in this case are not in dispute on that matter. The critical question here is one of law, not geography: whether the Atlantic Coast States are restricted to the three-mile grant of the Submerged Lands Act or may prove good claims farther seaward.

As the remainder of this brief will indicate, our view is that any claims beyond three miles are foreclosed by prior decisions of this Court, which form the predicate for subsequent Congressional action. Thus, the threshold question is whether the Court is disposed to reconsider the premise of what has gone before. Obviously, no Special Master can aid in that determination. Nor is the task very different if the Court acquiesces in the invitation to revisit familiar ground. The proposition that—except by later Congressional grant—the original States acquired no property in the marginal sea, or beyond, turns on official history, the documents evidencing which are subject to judicial notice.

Accordingly, we believe the present motion is appropriate. If, after considering briefs and oral arguments by the parties—supplemented by whatever historical materials are deemed relevant—the Court should conclude that no State claim in the continental shelf beyond three miles is sustainable, the United States would be entitled to judgment quieting its ex-

clusive rights and enjoining State interference seaward of that line. That would be a practical end of the case, at least until such time as valuable mineral discoveries and irreconcilable disagreements required the Court to fix the exact location of the dividing line on the ground.

If, on the other hand, the Court were to conclude that State claims beyond three miles in the Atlantic are legally tenable, two options would be open. The Court might well now resolve itself the ultimate validity and extent of such claims—as it did in comparable circumstances in *United States* v. *Louisiana*, 363 U.S. 1, and *United States* v. *Florida*, 363 U.S. 121. Or it might refer all or part of the remaining questions to a Special Master. Cf. *Louisiana Boundary Case*, 394 U.S. 11. But, even on this hypothesis (which we frankly view as unlikely), it seems to us that all interests would have been served by the Court's initial ruling on the present motion. Indeed, confronted with this Court's prior decisions, it is difficult to appreciate how a Special Master could intelligently deal with a blanket reference and fashion a recommendation without special guidance as to what is subject to being re-opened.

So saying, we do not ask the Court to grant our motion summarily. We expect that the defendant States will respond promptly on the question of procedure, perhaps suggesting referral of the entire controversy to a Special Master. Thereupon, we would anticipate a ruling from the Court indicating the course of further proceedings. If the Court should agree with us that present reference to a Special Master is inappropriate, we

suggest the defendant States be allowed a substantial period (say to June 1) to file a brief and documents in response to the present submission, that the United States be permitted to reply thereafter (say by September 1),[7] and that oral argument be scheduled for the opening of the next Term.

C. EXCEPT AS GRANTED BY CONGRESS SINCE STATEHOOD, THE COASTAL STATES HAVE NO RIGHTS IN THE SUBMERGED LANDS OR NATURAL RESOURCES SEAWARD OF THE COASTLINE

We consider in a moment what grants of submerged lands underlying the ocean Congress has made to the Atlantic Coast States (*infra*, pp. 30–39). But, as we understand their claims, none of the defendant States, except only Georgia on an alternative basis, rests its claim beyond three miles from the coastline on any Congressional action since statehood.[8] Their assertion is, rather, that they have continuously held rights in the continental shelf—both within and beyond the three-mile territorial sea—since before the formation of the Union, or their admission to it, and that these rights exist quite independently of any subsequent grant from the United States. That proposition, however, has been unequivocally rejected by this Court in

[7] The United States views the present brief in support of its motion for judgment as an opening brief, and, accordingly, asks only an opportunity to reply to the submission of the defendant States, if that seems appropriate.

[8] The Act of June 25, 1868, 15 Stat. 73, relied on by Florida as a congressional approval of the State's boundary at the edge of the Gulf Stream as claimed by the Florida Constitution of 1868, goes only to the location of the state boundary, not to the ownership of the submerged lands and resources.

deciding comparable claims in the Pacific Ocean and the Gulf of Mexico and is, at all events, unsound.

1. In *United States* v. *California,* 332 U.S. 19 and 804, decided prior to the Submerged Lands Act, the Court held that the United States, rather than the State, had paramount rights in the submerged lands and natural resources underlying the territorial sea, seaward of the ordinary low-water line and outer limit of inland waters. California had claimed title to those submerged lands and resources on the ground that it was entitled to stand in that respect on an equal footing with the original States, as Alabama had been held entitled, with respect to lands under the navigable waters of Mobile Bay, in *Pollard* v. *Hagan,* 3 How. 212. In support of that thesis, California discussed at length the colonial charters and post-revolutionary rights of the original States, in an effort to show that they had such rights as California claimed. The Court held the claim of "equal footing" to be unavailing, because it concluded that the original States themselves had no rights in the submerged lands or natural resources seaward of the low-water line and outer limit of inland waters. Pointing out that as late as 1876 there was still considerable doubt in England about the scope and even the existence of the territorial sea, the Court said (332 U.S. at 31–32; footnotes omitted):

> From all the wealth of material supplied * * * we cannot say that the thirteen original colonies separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it. * * *

> At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders. * * * Neither the English charters granted to this nation's settlers, nor the treaty of peace with England, * * * showed a purpose to set apart a three-mile ocean belt for colonial or state ownership. * * *

The Court went on to hold that the concept of a territorial sea arose and gained international acceptance after the formation of the Union, largely as a result of the efforts of the United States. Both because acquisition of the territorial sea had thus been accomplished by the national government rather than by the States, and because the territorial sea was primarily affected by national concerns of defense, international relations, and external sovereignty, the Court held that rights in the submerged lands and resources of the territorial sea (unlike inland navigable waters) should be considered attributes of national sovereignty, rather than of state sovereignty. 332 U.S. at 33–36.

Three years after the *California* decision, the Court made similar holdings with respect to Louisiana and Texas. *United States* v. *Louisiana,* 339 U.S. 699; *United States* v. *Texas,* 339 U.S. 707. Louisiana sought to differentiate its case from California's because Louisiana Act 55 of 1938, 49 La. Rev. Stats. (1950) 1–3, had purported to extend the State's boundary to a distance of 27 miles from the coast line. The Court rejected that distinction, saying (339 U.S. at 705), "The matter of state boundaries has no bear-

ing on the present problem." It pointed out that the predominance of national interests over state interests increased rather than diminished as one moved farther seaward, so that the State's purported extension of its boundaries (the validity of which the Court did not consider) merely emphasized the strength of the federal claim over the state claim where the seabed was concerned.

Texas likewise sought to differentiate its case from California's, its ground being that until its admission to the Union as a State, Texas had been an independent republic which, by its Act of December 19, 1836, 1 Laws Rep. Tex. 133, had claimed a 3-league territorial sea where it exercised all the elements of external as well as domestic sovereignty. The Court rejected that distinction also, holding that when Texas became a State of the Union, it necessarily did so on an equal footing with the original States, so that its relinquishment of national sovereignty to the Federal Government carried with it all the attendant attributes, including exclusive rights in the submerged lands and resources of the territorial sea. *United States* v. *Texas, supra,* 339 U.S. at 716–720.

Thus, while the Court has not yet directly adjudicated the rights of the original States, its conclusion that they had no rights in the submerged lands or resources of the territorial sea was the ground of decision in each of the foregoing cases. Indeed, because the ruling predictably would affect their own claims, some of the Atlantic Coast States participated, directly or indirectly, in the first *California* case as *amici curiae.* See 332 U.S. at 21–22. So,

also, although the Congress did not purport to foreclose greater claims, the underlying premise of the Submerged Lands Act—which in 1953 granted a three mile belt to the States bordering on the Atlantic Ocean—is that the present defendants theretofore held no rights in the bed of the territorial sea and thereafter would hold none farther seaward, where federal administration was provided for under the Outer Continental Shelf Lands Act enacted in the same year. And that has, of course, been the premise of all the subsequent decisions in this Court applying the Submerged Lands Act in the Pacific Ocean and the Gulf of Mexico—an exercise in futility if that statute does not define the outward limit of State rights in the continental shelf. See *United States* v. *Louisiana et al.*, 363 U.S. 1; *United States* v. *Florida*, 363 U.S. 121; *United States* v. *California*, 382 U.S. 448; *United States* v. *Louisiana et al.* (Texas), 389 U.S. 155; *Texas Boundary Case*, 394 U.S. 1; *Louisiana Boundary Case*, 394 U.S. 11.

In our view, there is no occasion to re-examine all that has gone before, with the risk of unsettling important property rights adjudicated by this Court on a consistent understanding in which the Congress has acquiesced. Accordingly, we submit that the claims of the defendant States beyond three miles from their coastlines properly may be rejected on the basis of prior decisions without further inquiry. But, even if the underlying assumptions of the controlling cases were to be reconsidered, we believe the same result is compelled.

2. The first hurdle to the present claims advanced by the Atlantic States—which, with one exception,

depend, directly or indirectly, on the proposition that at, or before, the formation of the Union the original colonies acquired rights in the continental shelf—is that such a concept was not then recognized in international law, and certainly not in English law, upon which the claims must rest. Indeed, the then prevailing English rule was that the rights of the Crown stopped at the water's edge.

That such was the law in Great Britain itself even a century later is authoritatively settled by the decision of the House of Lords in *The Queen* v. *Keyn* (1876), L.R. 2. Exch. Div. 63, cited by this Court in the first *California* case (332 U.S. at 33). But perhaps of more immediate relevance to the question whether the same rule applied to British colonies are recent judgments of the Supreme Court of Canada and of the High Court of Australia, two courts whose position in the British Commonwealth entitle their views to particular respect.

The Supreme Court of Canada, adjudicating a dispute between Canada and the Province of British Columbia similar to the present case, recently concluded, after an exhaustive review of the British authorities, that British colonial charters did not include any territorial sea, and indeed that the "realm of England" stopped at the low-water line until some time subsequent to the Territorial Waters Jurisdiction Act of 1878, c. 73. *Re: Offshore Mineral Rights of British Columbia* [1967] Canada L. Rep. (S. Ct.) 792, 65 D.L.R. (2d) 363. In its joint opinion, the court said of the Territorial Waters Jurisdiction Act, which extended admiralty jurisdiction to offenses committed on the open sea

within a marine league (three miles) of the coast ([1967] Canada L. Rep. (S. Ct.) at 805, 65 D.L.R. (2d) at 364):

> The Act did no more than deal with what was regarded as a gap in the Admiral's jurisdiction. It did not enlarge the realm of England, nor did it purport to deal with the juridical character of British territorial waters and the sea-bed beneath them.
>
> We have to take it, therefore, that even after the enactment of the *Territorial Waters Jurisdiction Act* the majority opinion in *Reg.* v. *Keyn* that the territory of England ends at low-water mark was undisturbed.

The court went on to hold that such jurisdiction as was asserted over the territorial sea pertained to external sovereignty and remained in the crown, with only limited authority delegated to the Dominion of Canada, at least until 1919, and that it passed directly from the Crown to the Dominion when Canada became a sovereign State, at some time between 1919 and 1931.

> The sovereign State which has the property in the bed of the territorial sea adjacent to British Columbia is Canada. At no time has British Columbia, either as a colony or a province, had property in these lands. [(1967) Canada L. Rep. (S. Ct.) at 816, 65 D.L.R. (2d) at 375.]

Still more recently, the same view of the territorial limits of the "realm of England" and of the British colonies has been expressed in seriatim opinions of Barwick, C. J., and Windeyer, J., in the case of *Bonser* v. *La Macchia*, 43 Aust. L.J. Rep. 411, de-

cided by the High Court of Australia on August 6, 1969.[9] The actual issue in that case was whether a commonwealth statute regulating fishing in "Australian waters beyond territorial limits" could apply at a point 6½ miles off the coast, and the decision turned on an interpretation of statutory language that is not relevant here. However, in the course of his discussion, Chief Justice Barwick said (*id.* at 414):

> I cannot read the majority decision in *Reg.* v. *Keyn* (*The Franconia*) (1876), 2 Ex. D.63, in any other sense than that at common law the realm ended at the edge of the sea and that it did not extend to the bed of the sea, i.e., to any portion of the earth's crust adjacent to the realm covered at low tide, nor did it extend to the waters which washed the shores. * * *
>
> * * * * *
>
> I think it is essential to bear in mind that when colonies were formed all that relevantly occurred was that a specified land mass was placed at the outset under governorship, and later, under the control of a legislature. The instruments setting up the colonies did not in terms include as territory and subject to colonial governorship any part of the bed of the sea or the superincumbent waters. * * *
>
> I respectfully agree with the conclusion drawn in connexion with the seabed and the waters above it adjacent to the Province of British Columbia by the Supreme Court of Canada in *Reference re Ownership of Off-*

[9] Copies of the opinions have been lodged with the Court and given counsel for defendants.

> *Shore Mineral Rights* (1968), 65 D.L.R. (2d) 353, at pp. 365 and 366–367 and with the reasons which were given for that conclusion. It is quite clear historically, if one examines the descriptions of the territory placed under governorship, that the territory of the original colony of New South Wales except as to certain islands of the Pacific did not extend beyond low water mark on the eastern coastline of the Continent and of the Island of Tasmania: and that as each of the colonies of Victoria and Queensland were severed from it, the territory of those colonies by description also ended at low water mark. The same can be said of the other Australian colonies. Thus the reasons given in the Canadian case are applicable to the circumstances of those colonies.

Windeyer, J., after expressing similar views in his separate opinion, concluded (*id.* 430–431):

> The view I have expressed accords with the decision of the Supreme Court of Canada which I have already mentioned. It accords too with what I take to be the general tenor of present-day doctrines of federalism in the United States: see *United States* v. *California* (1947), 332 U.S. 19, 38; *United States* v. *Louisiana* (1950), 339 U.S. 699; *United States* v. *Texas* (1950), 339 U.S. 707, 716; cf. *Alabama* v. *Texas* (1954), 347 U.S. 272, 274–277, 281.[10]

3. What is more, even if the colonies and original States had had boundaries in the sea, as they now

[10] But cf. the opinion of Kitto, J., 43 Aust. L. J. Rep. at 421, expressing some doubts as to the significance of *The Queen* v. *Keyn*.

claim,[11] it would not follow that they are entitled to the submerged lands and resources within those boundaries. As this Court noted in the first *Louisiana* case "[t]he matter of state boundaries has no bearing on the present problem." 339 U.S. at 705. That is because control of the bed of the territorial sea is so directly related to the external aspects of national sovereignty, including defense and foreign relations, that rights in it must be deemed to be attributes of national sovereignty and to belong to the federal government—unlike ownership of the beds of inland navigable waters, long held to be an attribute of the domestic sovereignty of the States. See *United States* v. *California*, *supra*, 332 U.S. at 29–30, 36. Thus, even if the concept of exclusive exploitative rights in the seabed had existed when the Union was formed or when the defendant States became members of it, the primary relationship of those rights to external rather than domestic sovereignty would have made the rights attributes of national rather than state sovereignty, just as it did when Great Britain transferred external sovereignty to Canada. *Re: Offshore Mineral Rights of British Columbia, supra,* [1967] Canada L. Rep. (S. Ct.) at 815–817, 65 D.L.R. (2d) at 374–376.

It is no answer to assert, as does Rhode Island (R.I. Ans., Third Defense), that it declared its independence from the Crown of England on May 4, 1776, before the formation of the Union. First, the

[11] Me. Ans., p. 3; N.H. Ans., p. 4; Mass. Ans., p. 3; R.I. Ans., Second Defense; N.Y. Ans., p. 3; N.J. Ans., p. 3; Del. Ans., p. 3; Md. Ans., p. 3; Va. Ans., p. 2; N.C. Ans., p. 3, par. VII; S.C. Ans., p. 4; Ga. Ans., p. 3, Fourth Defense.

several States never did achieve the status of independent external sovereignty; external sovereignty passed directly from the British Crown to the United States. *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 315–318. During the Revolution, it was lodged in the Congress, not in the individual States. *Penhallow* v. *Doane*, 3 Dall. 54, 80–82. But, at all events, even if Rhode Island (or any other State) had for some period possessed external sovereignty, and if that sovereignty had included as an attribute the right to control the exploration and exploitation of the natural resources of the adjacent seabed, still, when Rhode Island became a member of the Union, all the elements of its external sovereignty would have passed to the United States, including the right to control exploration and exploitation of the natural resources of the seabed, just as they did when the Republic of Texas became a State of the Union. *United States* v. *Texas*, 339 U.S. 707.

The consequence is, as this Court recently stated in deciding the claims of the Gulf States after passage of the Submerged Lands Act, that "except as granted by Congress, the States do not own the lands beneath the marginal seas." *United States* v. *Louisiana et al.*, *supra*, 363 U.S. at 77. We turn to the question what Congress has given the States of the Atlantic Coast.

D. CONGRESS HAS NOT GIVEN THE DEFENDANT STATES RIGHTS IN THE SUBMERGED LANDS OR RESOURCES UNDERLYING THE ATLANTIC OCEAN MORE THAN THREE MILES FROM THE COAST LINE

1. The remaining question, then, is what rights Congress has given the defendant States in the sub-

merged lands and resources seaward of their coast lines. Except as to Georgia (see *infra,* pp. 33–39), the only Act of Congress claimed to effect such a grant is the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. 1301–1315.[12] Here, as in *United States* v. *Louisiana et al., supra,* 363 U.S. at 7, "Since the Act concededly did not impair the validity of the *California, Louisiana,* and *Texas* cases, which are admittedly applicable to all coastal States, this case draws in question only the geographic extent to which the statute ceded to the States the federal rights established by those decisions."

Section 4 of the Submerged Lands Act, 67 Stat. 31, 43 U.S.C. 1312, confirmed the seaward boundary of each of the original States as a line three geographical miles from the coast line, and approved past or future claims by other States to boundaries three miles from the coast line, without thereby questioning or prejudicing more extended boundaries existing at or before statehood or already approved by Congress. Section 3(a) gave the States the "lands beneath navigable waters" within their boundaries, and the natural resources within such lands and waters, 67 Stat. 30, 43 U.S.C. 1311; while section 2(b) provided that "in no event shall the term 'boundaries' or the term 'lands beneath navigable waters' be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean * * *."

[12] "The Act was sustained in *Alabama* v. *Texas,* 347 U.S. 272, as a constitutional exercise of Congress' power to dispose of federal property." *United States* v. *Louisiana et al., supra,* 363 U.S. at 7.

67 Stat. 29, 43 U.S.C. 1301(b). Section 9 asserted federal jurisdiction and control over the natural resources of the subsoil and seabed that are seaward of the "lands beneath navigable waters" given to the States, 67 Stat. 32–33, 43 U.S.C. 1302. Federal jurisdiction in the latter area was reasserted and implemented by the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331–1343.

Both Maine and Florida have claimed boundaries in the Atlantic at least three geographical miles from the coast line,[13] and the other defendants are original States. Thus, all of the defendant States are entitled under the Submerged Lands Act to the submerged lands and resources within three geographical miles of the coast line. However, none of them is or could be entitled to more, since section 2(b) of the Act clearly provides that in no event shall the "lands beneath navigable waters" granted by the Act, nor the "boundaries" to which the grant is restricted, be construed as extending from the coast line more than three geographical miles into the Atlantic Ocean.[14]

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[13] Me. Rev. Stats. (1964), c. 1, sec. 2, asserts jurisdiction in the sea to whatever extent may be claimed by the United States. The United States claims a 3-mile territorial sea. *United States* v. *California*, *supra*, 332 U.S. at 33–34; see 4 Whiteman, *Digest of International Law* (1965) pp. 14–137. Fla. Const. (1968), Art. II, sec. 1, claims a boundary in the Atlantic Ocean three geographical miles from the coast line, or at the edge of the Gulf Stream, whichever is farther seaward.

[14] "Boundaries" and "lands beneath navigable waters," as defined in section 2(b) may extend up to three leagues from the coast in the Gulf of Mexico, if they were so at statehood or had been recognized by Congress. Other provisions of the Act refer to such boundaries without limiting them to the Gulf of Mexico. Sec. 2(a)(2), 43 U.S.C. 1301(a)(2); Sec. 4, 43

Since the defendants' only rights in the submerged lands and resources seaward of the coast line are those granted by the Submerged Lands Act, and the rights so granted extend only three geographical miles from the coast line, the defendant States can have no rights in the seabed more than three miles from the coast line.

2. We turn, finally, to the special claim advanced by Georgia that the rights of the United States, if any, in the submerged lands of the Atlantic Ocean adjacent to the coast of Georgia were transferred to Georgia by the boundary settlement agreement of 1802. Ga. Ans., p. 4. The terms and history of that agreement do not support such an interpretation.

The 1802 agreement was the arrangement whereby Georgia ceded to the United States "all the right, title, and claim, which the said State has to the jurisdiction and soil" of lands west of the Chattahoochee River, in exchange for certain undertakings by the

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U.S.C. 1312. This apparent inconsistency is explained by the fact that the limitations of section 2(b) were added by a floor amendment in the Senate, without at the same time removing from other sections the broader language that the amendment deprived of meaningful application outside the Gulf of Mexico. There can be no doubt that the amendment is controlling. Its purpose was to impose as a mater of law a limitation that had been generally assumed to exist as a matter of historic fact. See *United States* v. *California*, 381 U.S. 139, 154–156. As explained by Senator Holland, the author of both the bill and the amendment, the purpose of the amendment was "to have the language more clearly spelled out than it was in the original measure, to the effect that there is no intention whatsoever to grant boundaries beyond 3 geographical miles in either the Atlantic or the Pacific * * *." 99 Cong. Rec. 4116, quoted in 381 U.S. at 155.

United States, including payments to be made from proceeds of the ceded lands, extinguishment of Indian title to lands in Georgia, and the following (*American State Papers,* 1 Public Lands 114):

> Art. II. The United States accept the cession above mentioned, and on the conditions therein expressed; and they cede to the State of Georgia whatever claim, right, or title, they may have to the jurisdiction or soil of any lands lying within the United States, and out of the proper boundaries of any other State, and situated south of the southern boundaries of the States of Tennessee, North Carolina, and South Carolina, and east of the boundary line hereinabove described, as the eastern boundary of the territory ceded by Georgia to the United States.

Presumably Georgia relies on the foregoing language as effecting a cession of the rights of the United States in the submerged lands and natural resources underlying the Atlantic Ocean adjacent to the coast of Georgia; but the terms used fall far short of the specificity needed for a transfer of such rights, and the history of the agreement shows that transfer of any such rights was never within the intent of the parties.

The 1802 agreement was executed by federal and state commissioners, pursuant to the Act of April 7, 1798, 1 Stat. 549, the Act of May 10, 1800, 2 Stat. 69, and Georgia Act of February 15, 1799, Digest of the Laws of Georgia (1801) p. 726. The federal Act of 1798 empowered the federal commissioners to agree with state commissioners to adjust conflicting claims of the United States and Georgia to lands west of

the Chattahoochee River, and to receive proposals for the cession of other lands claimed by Georgia "out of the ordinary jurisdiction thereof." [15] The 1800 federal Act authorized the federal commissioners to make final settlement of the claims mentioned in the 1798 Act and, on behalf of the United States, to receive cession of the lands referred to in that Act, or of the jurisdiction thereof,[16] on "such terms as to them shall appear reasonable," except that payment could come only from proceeds of the ceded lands. Sec. 10, 2 Stat. 70. Section 2 of the Georgia Act of 1799 required that the United States extinguish Indian title to certain lands in Georgia and cede the lands to the State. Digest of the laws of Georgia (1801) p. 726, 727–728.

Thus, so far as the legislative history shows, Article II of the agreement, *supra,* meant to refer only to the Indian lands required by Georgia, Indian title to which the United States undertook to extinguish by the Fourth condition of Article I. It does not appear that cessation of any other federal lands had been sought by Georgia or considered by anyone.[17] There had been no discus-

[15] Sections 3–8 also provided for a territorial government in the disputed area, without prejudice to the rights of Georgia or any other person "to the jurisdiction or the soil of the said territory." Sec. 5, 1 Stat. 550. The area ceded included the present States of Alabama and Mississippi north of the 31st parallel.

[16] One of the questions debated in Congress had been whether the United States should seek title to the lands, or only governmental jurisdiction. 8 Annals of Congress 1279–1284 (1798).

[17] Neither the commissioners in submitting the agreement to the President, nor the President in submitting it to Congress, gave any hint that it was the purpose to cede to Georgia any federal rights in the seabed. *American State Papers*, 1 Public Lands 113–114.

sion of seabed lands or resources, and it is at least doubtful that the concept of ownership of rights in such lands and resources had come into existence in 1802, particularly as to the seabed seaward of the three-mile limit, which is all that is involved here. Cf. *United States* v. *California, supra,* 332 U.S. at 31–34. Certainly Georgia had made no such claim. The Georgia Act of February 15, 1799, *supra,* providing for the 1802 agreement, quoted from Article I, section 23 of the Georgia Constitution (of 1798) the description of the State's limits as extending "from the sea or mouth of the river Savannah, along the northern branch or stream thereof," by a counter-clockwise course—

> to the head of saint Mary's river, and thence along the middle of saint Mary's river to the Atlantic Ocean; and from thence to the mouth or inlet of Savannah river, the place of beginning: Including and comprehending all the lands and waters within the said limits, boundaries and jurisdictional rights, and also all islands within twenty leagues of the sea coast.

That description is notably similar to the description of the limits of Louisiana contained in the Louisiana Enabling Act, which the Court, in *United States* v. *Louisiana et al., supra,* 363 U.S. at 67–70, held included no territorial sea. In short, the area now in dispute was neither claimed nor sought by Georgia in 1802, and was not even recognized as being subject to exclusive rights of the sort now in issue.

Lands beneath navigable waters are attributes of sovereignty, and unless they are granted in specific terms, are deemed to remain attached to the sovereignty to which by their nature they appertain. Thus, when the Proprietors of New Jersey returned their governmental powers to the Crown, while retaining their title to the lands of New Jersey, ownership of the bed of Raritan Bay returned to the Crown, as an attribute of sovereignty, rather than remaining with the Proprietors as real estate. *Martin* v. *Waddell,* 16 Pet. 367. Similarly, when New York and Massachusetts settled conflicting claims to part of western New York by the Treaty of Hartford, whereby New York retained sovereignty while Massachusetts was given title to the land, lands under Lake Ontario belonged to New York, as an attribute of its sovereignty, rather than to Massachusetts as real estate. *Massachusetts* v. *New York,* 271 U.S. 65. But whereas lands under *inland* navigable waters are an attribute of the domestic sovereignty of States, rights in the *seabed* seaward of the coast line appertain by their nature to the external sovereignty of the national government. *United States* v. *California,* 332 U.S. 19. Thus, when the Republic of Texas relinquished its national sovereignty to the United States and became a State of the Union, its rights in the seabed automatically passed to the United States as an attribute of the national sovereignty so relinquished. *United States* v. *Texas,* 339 U.S. 707.

Examining the words of the 1802 agreement in the light of these principles, we find no express or implied cession of rights in the seabed. As in the cases discussed above, the transfer of rights to the "soil" would not include lands under navigable waters. The question, then, is whether the cession of "jurisdiction" impliedly included rights in the seabed. If the United States had been relinquishing its national sovereignty, making Georgia an independent nation, that would have included a transfer of whatever rights the United States had in the adjacent seabed (if it had any at that time). But obviously the United States was not relinquishing in 1802 its "jurisdiction" as national sovereign; we must ascribe some other significance to the term. The obvious and only alternative is the sort of domestic jurisdiction, comparable to state jurisdiction, that the United States exercises in territories and in areas of exclusive federal jurisdiction.[18] But, as we have seen, rights in the seabed are not inherently attributes of that domestic jurisdiction, and do not pass to States when they receive their domestic jurisdiction from the United States. *United States* v. *California,*

[18] This interpretation of the term is corroborated by its use in that sense in Article I of the 1802 agreement, by which Georgia ceded to the United States "all the right, title, and claim, which the said State has to the jurisdiction and soil" of the western lands. *American State Papers*, 1 Public Lands 114. The term was used in the same sense in section 5 of the Act of April 7, 1798, which provided that establishment of a government for the western lands should be without prejudice to the rights of Georgia or any other person "to the jurisdiction or the soil of the said territory." 1 Stat. 550.

332 U.S. 19; *United States* v. *Louisiana*, 339 U.S. 699. It follows that the 1802 agreement gave no rights in the seabed to Georgia.

CONCLUSION

After receiving procedural suggestions from the defendant States, we urge the Court to enter an order establishing a briefing and argument schedule on the present motion (see pages 19–20, *supra*), and, ultimately, to enter judgment as prayed for in the complaint.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF MAINE, ET AL., *Defendants*.

MOTION BY DELAWARE, MAINE, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE, RHODE ISLAND, SOUTH CAROLINA AND VIRGINIA FOR REFERENCE OF CASE TO A MASTER

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IN THE

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MOTION BY DELAWARE, MAINE, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE, RHODE ISLAND, SOUTH CAROLINA AND VIRGINIA FOR REFERENCE OF CASE TO A MASTER

In this original action the United States has sued the thirteen Atlantic Seaboard States to adjudicate rights in the seabed and subsurface lands lying more than three miles from the coastline. Following this Court's order granting the United States leave to file its complaint, 395 U.S. 955, answers were filed by each of the defendant States. The United States has filed a motion for judgment and a supporting brief which requests that as the next step this case be briefed and argued to the Court. The eight defendant States that

join in this motion submit that the preferable course would be to refer the case to a master.[1]

In summary, the movant States propose that the case should be referred to a master to take evidence, make findings of fact, conclusions of law and recommendations for decree, and that the master be specially instructed to consider and report upon the scope and validity of the historical claims of the States to the submerged lands in question. This course is believed appropriate for two reasons: First, the historical claims constitute a central issue in this case and, contrary to the suggestion of the United States, remain open for determination; and, second, reference to a master is the most efficient means of resolving the historical claims together with any other issues in the case and such a reference is supported by the precedents in this Court.

I. THE HISTORICAL CLAIMS OF THE STATES ARE A CENTRAL ISSUE IN THE CASE AND ARE OPEN FOR RESOLUTION BY THIS COURT.

The ultimate issue posed by the complaint of the United States and the answers of the States essentially is whether the United States or the States have the proprietary right to develop the seabed and subsurface lands more than three miles from the coast of these States.[2] The necessary first step in resolving this issue is to determine the scope and validity of the historical claims of the States to the submerged lands

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[1] The States that have joined in this motion are Delaware, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, South Carolina and Virginia.

[2] Compare U.S. complaint, ¶¶ II-IV, with, *e.g.*, answer of Maine, ¶¶ II-IV. This issue involves a determination of how far the rights of each defendant State extend seaward beyond the three-mile line.

in question. This analysis is clear from the position taken by the United States, as well as that taken by the States, and it is borne out by the approach this Court has taken in prior litigation.

The critical nature of the historical claims is evident from the United States' own brief in support of its motion to file its complaint. There, in stating the "facts" it believes pertinent to the case, the brief (p. 12) asserts that "the thirteen original colonies did not separately acquire ownership of the three-mile belt in the adjacent sea or of the soil under it."[3] Similarly, in explaining that the facts set forth entitle the United States to relief, the brief's very first contention (p. 13) is that this Court has held that the original thirteen States did not acquire ownership of the belt. The United States appears to assume that if the States lacked historical ownership of the first three miles, their historical claims asserted here to proprietary rights in lands lying seaward of the belt necessarily fail. On this premise that the States' historical claims are infirm, the brief (pp. 12-14) implies that rights in submerged coastal lands beyond the belt were ultimately acquired by the United States and it asserts the claims were confirmed by Congress in the Submerged Lands Act, 43 U.S.C. § 1301, *et seq.* (1964).

The States in their answers to the complaint have directly controverted this premise that their historical claims are infirm. For example, Maine in its answer (p. 3) explicitly alleges that "as successor in title to certain grantees of the Crown of England" it is en-

[3] The thirteen original States are not identical with the States in this case; two of the original States—Connecticut and Pennsylvania—have no Atlantic coast and two of the States in this case—Maine and Florida—were not among the original thirteen.

titled to develop the submerged lands in question. The answers of certain other States are quite specific concerning these historical claims (*e.g.*, answer of Maryland, pp. 3-4), and each of the movant States intends to support its historical claims in substantial detail in the course of this litigation. Thus, at the outset of this case, the pleadings raise a pivotal issue on which the two sides are in dispute.

The centrality of the historical claims is confirmed by this Court's analysis in *United States* v. *California*, 332 U.S. 19 (1947), the only prior occasion on which historical claims of Atlantic Seaboard States to submerged lands off the coast were examined by the Court. In *California*, that State claimed *inter alia* that it had ownership of its three-mile coastal belt under "equal footing" principles because the thirteen original States owned their adjacent lands in the three-mile belt. The Court's first step in its analysis was to consider the historical claims of the thirteen States and it concluded that it could not say that the thirteen original States possessed historical ownership rights to the three-mile belt. 332 U.S. at 31. While for reasons stated below we believe that the *California* case does not in any way foreclose assertion of the historical claims advanced here, the decision's approach in making the existence of those claims the threshold question establishes their essential importance in cases of this kind.

The historical claims are even more important to a determination of the ultimate issue here than they were in *California* because of subsequent legislative developments. In that case, after concluding that the historical claims had not been established, the Court indicated that foreign policy, defense and like con-

siderations required federal sovereignty of submerged coastal lands and the Court implicitly rejected a separation from this sovereignty of proprietary rights to develop the lands themselves.[4] In 1953, Congress enacted the Submerged Lands Act in which it conveyed to the adjacent coastal States such proprietary interests as the United States possessed to develop submerged lands in the three-mile belt or in some cases within three leagues of the coast. At the same time, as to these granted lands the Act reserved in the United States a variety of rights including sovereign authority for purposes of commerce, navigation, national defense and international affairs. See, *e.g.*, Section 6(a), 43 U.S.C. § 1314(a) (1964); *United States* v. *Louisiana*, 363 U.S. 1, 10 (1960). Consequently, the separation of sovereign and proprietary interests has been found to be feasible, so that an assault by the United States upon the historical claims of the States to proprietary rights in the submerged lands here involved becomes even more critical to its own case.

The United States appears to take the position that the historical claims of the Atlantic Seaboard States have been foreclosed by this Court's determination in

[4] These considerations were not asserted as an independent ground for the Court's rejection of California's position. If such policy considerations had been sufficient to prevail over historical claims of the original thirteen States, they would also have prevailed over the historical claims of Texas in United States v. Texas, 339 U.S. 707 (1950), and resort to equal footing principles to debar Texas' historical claims would have been wholly unnecessary. Any suggestion that the historical ownership of submerged lands by the States once established could be defeated in favor of the United States because of merely prudential considerations and without due compensation to the States would raise major constitutional questions. See United States v. Carmack, 329 U.S. 230, 241-42 (1946).

the *California* case. See United States brief in support of motion for judgment, pp. 18, 24. The historical claims, however, remain open for three independent reasons. First, the *California* decision did not conclusively resolve any historical claims. Second, the claims it discussed are not identical to those pressed here. Third, whatever was decided, the States in this litigation were not parties to *California* and cannot be bound by any determination there.

In *California* the Court in discussing the historical claims of the thirteen original States chose its language carefully to indicate that it was not making a conclusive historical determination but rather that California had failed to prove its case. Thus, the Court stated that based upon "the wealth of material supplied . . . we cannot say" that the thirteen original colonies acquired ownership of the submerged lands, 332 U.S. at 31, and the Court noted that neither charters, treaties, "nor any other document to which we have been referred" established a pattern of colonial or State ownership over the submerged lands there in question. 332 U.S. at 32.[5]

Also, as repeated references show, the Court's attention was focused upon the alleged existence of a uniform three-mile territorial-boundary claim by the original States, upon which California's equal footing theory rested. 332 U.S. at 31-33. The *California* decision never discussed the varying historical claims

[5] The United States in its brief in support of motion for judgment (pp. 22-23) also refers to United States v. Louisiana, 339 U.S. 699 (1950), and United States v. Texas, 339 U.S. 707 (1950). However these two later decisions may be interpreted on other issues, neither of them purported to reexamine any historical materials concerning the claims of the thirteen original States to submerged coastal lands.

here asserted by the thirteen defendant States, which are based upon their individual historical circumstances. Moreover, these claims do not necessarily rest upon territorial boundaries, but also assert rights to control and regulate development of submerged lands, whether within or outside State boundaries, analogous to the rights recognized in the Continental Shelf Convention (15 U.S.T. (pt. 1) 471). Thus, not only does the *California* opinion itself caution that at most it determines only that California did not prove its point, but that point is itself not identical with the claims made here.

Finally, even if the decision had squarely rejected each of the States' historical claims now advanced, none of the thirteen defendant States was a party to that litigation and consequently is not bound by its determinations. It is, of course, settled law, with exceptions not here relevant, that a stranger to litigation is not concluded by its resolution of either factual or legal issues. See *Durfee* v. *Duke*, 375 U.S. 106, 115-16 (1963); *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 690 (1961); *Restatement, Judgments* §§ 68, 70, 93-111 (1942). The rule that each person is entitled to his day in court upon an issue is of special pertinence where, as here, not only is the issue of extraordinary importance but proof bearing upon it is within the special competence of the party who was a stranger to the former litigation.[6]

[6] The United States observes that "some of the Atlantic Coast States participated, directly or indirectly, in the first *California* case as *amici curiae*" (brief in support of motion for judgment, p. 23). The report of the *California* decision lists the Attorney General of Massachusetts as participating in preparation of a brief *amicus curiae* filed on behalf of the National Association of Attorneys General; and the report shows that New York submitted its own brief *amicus curiae*. 332 U.S. at 21-22. Such roles do not

In sum, we see no basis for the statement of the United States that there is a "threshold question" whether this Court "is disposed to reconsider" conclusions previously reached (brief in support of motion for judgment, p. 18). The claims of the States rest upon specific historical propositions which the States assert and the United States disputes. Even if *California* and its successors were read as rejecting those historical propositions—a reading the movant States do not accept—it is the intention of these States to offer proof substantiating those propositions and showing that any past rejection of them was error. Since the movant States were not parties to the prior cases cited and thus cannot be foreclosed on res judicata grounds by the decisions therein, those propositions are necessarily put in issue by this litigation. On the basis of the evidence presented in this case, the Court may reject these propositions or may accept them in whole or in part; but the suggestion of the United States that the propositions may be *presumed* erroneous on the basis of evidence in some other case or cases cannot be justified.

II. THIS CASE AND ITS CENTRAL HISTORICAL ISSUES SHOULD APPROPRIATELY BE REFERRED TO A MASTER FOR INITIAL DETERMINATION.

The Court could itself determine the historical claims at issue in this case as well as other pertinent questions; the Court can, indeed, always perform itself

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under any discovered authority make the decision conclusive upon these two States, let alone bind the other eleven States in this case. In this connection it may be noted that Massachusetts sought leave to intervene in the *California* case and the United States, in successfully opposing that intervention, stated to the Court that "Massachusetts cannot be affected by any judgment which may be entered in the suit." Memorandum in opposition to motion of Massachusetts for leave to intervene, p. 1.

tasks assigned to a master and reference to a master is therefore necessarily a matter of judicial convenience and efficiency rather than absolute necessity. In this instance reference to a master is warranted for a variety of reasons including the great significance of the issues, the complexity of the data underlying their resolution, the liberal standard established by this Court for reference in original actions, numerous past precedents for such a reference, and the fact that no prejudicial delay will result from this suggested procedure.

It cannot reasonably be disputed that the present controversy is of vast importance. It involves a dispute between the United States and thirteen sovereign States. In terms of dollars the stakes may be inestimably large, see *United States* v. *Louisiana*, 363 U.S. 1, 11 & n.11 (1960), and matters of national policy are also involved, see *United States* v. *California*, 332 U.S. 19, 34-36 (1947). In this context, the most searching examination of the issues presented is required. As already shown, foremost among these underlying issues are the historical claims of the States.

The historical claims cannot be adequately resolved without examination of a vast array of historical materials. Among the pertinent documents are colonial charters, early colonial and State legislation, official correspondence during this period, and historical practice in the colonies and the newly formed States. Law and practice in England during pre- and post-revolutionary days are also critical because of the light they cast upon inherited English principles and because they bear upon the construction of colonial charters. In order to treat adequately the historical issues, it is

necessary to give attention to large numbers of documents of the kind just noted. In the *California* case, where an attempt was made to collect some of the materials bearing upon the thirteen States, a hundred or so colonial charters, early State laws and similar official materials were cited or quoted in part.[7] In *United States* v. *Texas,* 339 U.S. 707 (1950), the Court was presented with two cardboard boxes of documents limited to Texas' own brief history. 99 Cong. Rec. 2889 (1953) (Remarks of Sen. Daniel). In the present instance there are thirteen different States whose claims must be considered and a far greater period of time is involved. The movant States are currently making a thoroughgoing survey of State archives and other relevant sources in order to adduce the most complete record of material pertinent to their claims for presentation in this case. It is possible that in addition to documentary evidence the testimony of expert witnesses may be appropriate.

The importance of a particularized examination of historical evidence in resolving the present claims is supported by the pair of decisions, one from Canada and one from Australia, cited by the United States in its brief in support of motion for judgment (pp. 25-28). *Re Offshore Mineral Rights of British Columbia,* [1967] Canada L. Rep. (S. Ct.) 792, 65 D.L.R.2d

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[7] See appendix E to brief of California in opposition to motion for judgment. The attempt to excerpt documents necessarily led to omission of pertinent material. For example, one important Crown grant was set forth without including the provisions explicitly stating the broad construction to which it was entitled. Compare appendix E, p. 84, with Charter from Charles I to Lord Baltimore, June 20, 1632, art. XXII, reprinted in 3 Thorpe, American Charters, Constitutions and Organic Laws 1677, 1686 (1909).

353; *Bonser* v. *LaMacchia,* 43 Austl. L. J. Rep. 411 (High Court of Austl. 1969). Until the course of proceedings has been determined, there is no reason to consider in detail the support these decisions lend to the position of either side in this litigation, although the movant States dispute the assertion in the United States' brief (*id.* at 25) that the cases support any proposition so broad as that "the rights of the Crown stopped at the water's edge" at the time of or before the formation of the United States.[8] What is pertinent to the present question whether this case should be referred to a master is that both the Canadian and Australian courts found it necessary to engage in extensive examinations of history in order to resolve the exact claims before them. The historical documentation of the American colonial claims is far more extensive than anything considered in the Canadian and

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[8] The two decisions distinguished between various rights of the Crown and of individual colonies in Canada and Australia in connection with the sea. If in some respects or categories rights of the Crown halted at the low-water mark, it is incontestible that in other respects and categories they did not. Thus, for example, the opinion of Chief Justice Barwick of Australia stated in the same paragraph quoted in the United States' brief (p. 27): "However, accretion to the bed of the sea beneath territorial waters creating land above tidal limits has been held to be vested in the Crown. A basis for this conclusion is said to be the ownership by the Crown of the bed of the sea subjacent to such land: and expressions are used in the cases to which I later refer which treat the entire bed of the sea within three nautical miles as vested in the Crown." Moreover, the rights of the Crown were not necessarily the same in each period of history and, as is indicated in the opinion of Justice Windeyer, relied on by the United States (p. 28), these rights in some respects may have been greater before the 19th century English authority cited by the United States (p. 25). See 43 Austl. L. J. Rep. at 426-27.

Australian decisions.[9] In addition, the States propose to supplement this material by historical evidence bearing upon actual practice in the colonies.

After arguing that the historical claims of the States have been foreclosed but that they are in any event infirm on the merits, the United States in its brief in support of motion for judgment (pp. 29-30) invokes the pragmatic considerations concerning defense, foreign policy and other such matters mentioned in the *California* decision. Its contention appears to be that if the States' historical claims were valid they passed by implication to the United States on formation of the federal government. The assertion of what appears to be urged as an additional ground in support of the ultimate relief sought by the United States (compare n.4, *supra*) does not detract from the need for a master to resolve the historical issues relevant to the principal contention of the United States that the States lacked valid historical claims. On the contrary, the assertion of this additional ground argues in favor of the appointment of a master so that he may also consider evidence pertinent to this ground.

It seems reasonable to expect that there may be evidence, including oral testimony, available on the question whether the proprietary rights claimed by the movant States in submerged lands are incompatible with defense, foreign policy and other responsibilities of the national government. So far as such practical

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[9] The historical claims of the particular colonies in Canada and Australia are not, of course, identical to those advanced by the movant States here. Compare, *e.g.*, statutory grants to British Columbia, 65 D.L.R.2d at 357-58, with Grant of the Province of Maine of April 3, 1639, by Charles I, reprinted in 1 Poore, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 774 (1878).

considerations are relevant, the States may themselves submit evidence to establish that their own responsibilities—such as concern with environmental controls —support their ownership of the rights in question. If the United States does press practical considerations as an additional ground of decision, surely the most complete possible record should be developed on these issues. Also, American Constitutional Convention documents and other constitutional materials should be received and considered so far as they may bear upon any claim of an implied transfer of rights in submerged lands from the States to the national government. This multiplication of evidentiary material relevant to the litigation makes preliminary screening and appraisal by a master even more appropriate than if the existence of historical claims alone were in dispute.

Reference to a master in original actions in the Supreme Court is not, of course, limited to cases where a district court would appoint a master. Neither the facilities nor the limited time available in this Court lend themselves to the construction of an evidentiary record, and the use of a master to perform this function where the Court's original jurisdiction has been invoked is both sensible and established by precedent. In this instance a master could, through a limited number of hearings, receive the mass of historical material pertinent to State claims, select and organize the material, and provide a detailed analysis to this Court in his master's report. If oral testimony of scholars or other experts proves relevant to the historical claims, a master could easily receive it. Use of a master would not only lessen the burden upon the Court but would assure the most thorough and accurate evalu-

ation of conflicting claims as a foundation for this Court's eventual determination of the issues. In sum, the present case amply meets the standard previously set down by this Court in *United States* v. *Texas,* 339 U.S. 707, 715 (1950), for reference to a master:

> "The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts. *United States* v. *Texas,* 162 U.S. 1; *Kansas* v. *Colorado,* 185 U.S. 125, 144, 145, 147; *Oklahoma* v. *Texas,* 253 U.S. 465, 471. If there were a dispute as to the meaning of documents and the answer was to be found in diplomatic correspondence, contemporary construction, usage, international law and the like, introduction of evidence and a full hearing would be essential."

In a very large number of cases involving controversies between the United States and a State or among the several States, a master has been utilized as a matter of course. There are a score of instances of this kind among the limited number of original actions in these categories, see Comment, The Original Jurisdiction of the United States Supreme Court, 11 *Stan. L. Rev.* 665, 701-19 (1959). With few exceptions these cases parallel in type the present litigation. Thus such references have included actions to quiet title to riverbeds, *United States* v. *Utah,* 283 U.S. 64 (1931); actions to determine ownership of oil lands, *United States* v. *Wyoming,* 331 U.S. 440 (1947); boundary disputes between States, *New Jersey* v. *Delaware,* 291 U.S. 361 (1934); and suits to establish water rights between States, *Colorado* v. *Kansas,* 320 U.S. 383 (1943). There is thus ample precedent for the reference here requested.

Nothing in the Court's past practice in the several prior cases dealing with submerged coastal lands is inconsistent with a grant of this request. As this Court has itself noted, "In the *California* case, neither party suggested the necessity for the introduction of evidence." *United States* v. *Texas*, 339 U.S. 707, 715 (1950). It may well be that California's failure to seek a reference and present its evidence in detail influenced the outcome. Subsequently, in the first *Louisiana* and *Texas* cases, Louisiana did not seek a reference, *United States* v. *Louisiana*, 339 U.S. 699 (1950), and Texas' request for a reference was rejected because the Court found that equal footing principles debarred Texas' historical claims even if established by the evidence. *United States* v. *Texas*, 339 U.S. 707, 715 (1950). The Court's language in that instance strongly suggests that, absent the legal bar created by equal footing principles, a hearing would have been warranted on Texas' historical evidence. See p. 14, *supra*. Finally, in the litigation following the Submerged Lands Act the Court rejected the need for proceedings to develop evidence only because "the conclusions to be drawn from the historical documents relied on by Louisiana, Mississippi, and Alabama are so clear as to leave no issue presently involved open to dispute . . . ."[10]

Reference of the case to a master will not involve any delay prejudicial to the interests of either the

[10] United States v. Louisiana, 363 U.S. 1, 84-85 (1960). The historical standard established by the Submerged Lands Act was construed by the Court to require congressional acceptance of the States' disputed historical claims. Thus, an inquiry focused upon congressional history sufficed to disqualify Louisiana, Mississippi and Alabama from establishing their disputed claims under the Submerged Lands Act. See 363 U.S. at 30, 71.

United States or of the defendant States. A reference to a master could be made promptly and hearings could be fixed in order to allow this Court to receive the master's report at its next Term. To the extent proceedings before the Court were thereafter required, it is not impossible that they could also be concluded in that same Term. By contrast, even if the case were to be briefed and argued directly to this Court, it would not be practicable for it to be heard before the opening of the next Term.

Moreover, no harm would be worked by a brief delay should it occur in ultimate resolution of the case. None of the Atlantic Seaboard States is in the process of extracting minerals from the disputed seabed and, so far as is known, no such extraction is contemplated in the immediate future. Even if extraction did occur, the United States has sought an accounting in this very case. No demonstrated harm to the public interest has been incurred through failure to determine the precise rights of the United States and the States in the Atlantic seabed in the decade that has elapsed since the Submerged Lands Act. None will result from whatever brief delay may be necessary to provide a full consideration of the issues in this major litigation.

CONCLUSION

For the reasons stated, the movant States submit that the case be referred to a special master and that the master be directed in particular to consider and prepare detailed findings upon the historical claims of each of the thirteen defendant States. See, *e.g.*, *Texas* v. *New Mexico*, 344 U.S. 906 (1952). In making this request, the movant States reserve the right and

declare their intention to provide the historical material to the Court directly in the most efficient manner possible if the motion is denied and briefing and argument on the motion of the United States for judgment are ordered.

Should the Court follow the course suggested by the United States, the movant States concur in the time schedule for briefing and oral argument proposed by the United States in its brief in support of motion for judgment (pp. 19-20). That schedule contemplates that the brief in support of motion for judgment filed by the United States would constitute its opening brief on the merits, that the defendant States would file briefs and documents in response by June 1, 1970, that the United States would file any reply it wishes to make by September 1, 1970, and that oral argument would take place early in the next Term. In this connection, we urge that the proposed time schedule not be shortened by the Court to require the States to submit their briefs and supporting documents before June 1, 1970.

In the absence of a master's report, presentation of this original action directly to the Court entails preparing the evidentiary basis for State claims as well as the legal arguments. In view of the great importance of the issues and the substantial historical research required in the archives of the numerous States and in other sources, a time schedule shorter than that suggested would be burdensome to the movant States and prejudicial to their position. Since in the view of the movant States it would not be feasible to have oral argument in this case before the next Term, the suggested schedule would not result in any

additional delay in presentation of this case to the Court.

Respectfully submitted,

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January 30, 1970

FILE COPY

FILED
FEB 5 1970
JOHN F. DAVIS, CLERK

(23-A) No. 35, Original

IN THE

Supreme Court of the United States

October Term, 1969

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF MAINE, *et al.*,
Defendants.

MOTION BY STATE OF NEW YORK FOR REFERENCE OF CASE TO A MASTER

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

Supreme Court of the United States

October Term, 1969

No. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE, *et al.*,

Defendants.

MOTION BY STATE OF NEW YORK FOR REFERENCE OF CASE TO A MASTER

Sirs:

PLEASE TAKE NOTICE that the State of New York moves, on the annexed affidavit of Julius L. Sackman, an Assistant Attorney General and a member of the bar of this Court, that the case be referred to a Special Master and that the Master be directed in particular to consider and prepare detailed findings upon the claims of the State of New York and its codefendants herein. In so moving the State reserves the right and declares its intention to provide the historical and other factual material to the Court directly in the most efficient manner possible if this motion is denied, and briefing and argument before this

Court on the motion of the United States for judgment is ordered.

Dated: January 29, 1970.

Yours, etc.,

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Attorney for Defendant, State
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SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE, *et al.*,

Defendants.

State of New York }
County of Albany } ss.:

JULIUS L. SACKMAN, being duly sworn, deposes and says that he is a member of the bar of this Court and is an Assistant Attorney General in the office of Honorable Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the defendant, State of New York; that deponent is fully acquainted with all the facts and circumstances of the above-entitled actions.

The plaintiff has moved for judgment and has suggested a proposed schedule, subject to this Court's approval, for the filing of briefs and the argument of the case. The defendants, Delaware, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, South Carolina and Virginia, have cross-moved for reference of the case to a Master.

The State of New York hereby joins in the cross-motion and adopts the statements set forth by the said States in support of the cross-motion.

Should the Court follow the course suggested by the United States, the State of New York concurs in the time schedule for briefing and oral argument proposed by the United States in its brief in support of the motion for judgment (p. 20). That schedule contemplates that the brief in support of the motion for judgment filed by the United States would constitute its opening brief on the merits, that the defendant States would file briefs and documents in response by June 1, 1970, that the United States would file any reply it wishes to make by September 1, 1970, and that oral argument would take place at the start of the next Term. In this connection, we urge that the proposed time schedule not be shortened by the Court to require the States to submit their briefs and supporting documents before June 1, 1970.

In the absence of a Master's report, presentation of this original action directly to the Court entails our preparation of the evidentiary basis for the claim of the State of New York as well as the legal arguments. In view of the great importance of the issues and the substantial historical research required in the archives of the State of New York and in other sources, a time schedule allowing less time than that suggested would be burdensome to this movant and prejudicial to its position. This movant submits that it would not be feasible to have oral argument in this case before the start of next Term and that, therefore, the suggested schedule would not result in any delay in presentation of this case to the Court.

WHEREFORE, the State of New York respectfully prays that this Court issue an order referring the case to a

Master in accordance with and for the purposes set forth in the Notice of Motion to which this affidavit is annexed, and for such other, further and different relief as this Court may deem proper.

JULIUS L. SACKMAN

Sworn to before me this
~~29~~th day of January, 1970.
Richard L. McHale
Notary Public, Albany County
Comm. Exp. 3/30/70

LE COPY

FILED
FEB 9 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

October Term, 1969

No. 35, Original

United States of America, Plaintiff,

v.

States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida

---

MOTION FOR SEVERANCE OF THE STATE OF FLORIDA AND FOR THE APPOINTMENT OF A SPECIAL MASTER AND BRIEF IN SUPPORT OF MOTION

EARL FAIRCLOTH
Attorney General of Florida

T. T. TURNBULL
Chief Trial Counsel

The Capitol
Tallahassee, Florida

IN THE

Supreme Court of The United States

October Term, 1969

No. 35, Original

United States of America, Plaintiff

v.

States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida

---

MOTION FOR SEVERANCE OF THE STATE OF FLORIDA AND FOR THE APPOINTMENT OF A SPECIAL MASTER

The State of Florida moves the Court to sever Florida from the other twelve states listed above in this cause, No. 35, Original, and to appoint a Special Master pursuant to the case of U. S. v. Florida, 363 U. S. 121, 80 S Ct 1026, 4 L. Ed. 1096, decided May 23, 1960.

Dated this_____day of February, 1970.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General of Florida

T. T. TURNBULL
Chief Trial Counsel

The Capitol
Tallahassee, Florida

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 35, Original

United States of America, Plaintiff

v.

States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida

---

BRIEF OF THE STATE OF FLORIDA IN SUPPORT OF ITS MOTION FOR SEVERANCE AND FOR THE APPOINTMENT OF A SPECIAL MASTER

Again we refer to the case of U. S. v. **Florida**, No. 10, Original, decided May 23, 1960, 363 U.S. 121, 80 S. Ct. 1026, 4 L. Ed. 1096.

As a portion of the appendix, being noted as Exhibit 1, there is attached hereto that portion of the original complaint (Original No. 9) involving the State of Florida, being the "Fifth Cause of Action," and this complaint, with specificity, alleges that Florida claims in excess of three nautical miles, not only on its Gulf Coast, but also on its Atlantic Coast. Florida thereupon contends, and now asserts, that its claim seaward from its low water mark has been preserved by U. S. v. **Florida**, **supra**, and it is further contended that by the instant case, being No. 35, Original, the Thirteenth Cause of Action, specified in paragraph XX, preserves and protects this claim of the State of Florida when, by the last sentence of paragraph XX, it is stated "the term 'Atlantic Ocean' as used herein is to be understood as including the Straits of Florida." (See Appendix 2.)

We think that this Court will take judicial knowledge of the fact that at some point along Florida's Eastern seaboard, the Atlantic Ocean and the Gulf of Mexico come together or merge, if this is the correct word. We think, and we now contend, that this point of merger runs in a line generally southeastwardly from Palm Beach. We think, and we contend, that under the case of U. S. v. Florida, supra, we would be entitled to have this Court make the determination of exactly where this line exists. Under all circumstances and under U.S. v. Florida, supra, Florida is entitled to three marine leagues into the Gulf of Merico. Admittedly another factual situation arises and we state it as follows:

Between the southern tip of the Florida Keys, meaning the Marquesas Keys and the Dry Tortugas and the Keys and atolls constituting this body of dry land, there is a stretch of deep water. Under the case of U. S. v. California, 332 U. S. 19, 67 S. Ct. 1658, 91 L. Ed. 889, and the subsequent appearance of this case before this Court, the Dry Tortugas may be held to be an insular possession of the State of Florida. Notwithstanding this fact, the 1868 Constitution of Florida, about which we will write, post, describes the Dry Tortugas as being a part and portion of the State of Florida from whence the measurement or the bearing northwestwardly to three leagues off the mainland of the coast of the State of Florida must be collaborated.

We present the fact that this Court should take judicial knowledge that Cuba is less than 80 miles from Florida; we think this Court will likewise take judicial knowledge of the fact that the warm waters of the Gulf of Mexico are prolific breeders of shrimps and other crustacea, together with fish of many kinds and varieties; we think that this Court will take judicial knowledge of Cuban trawlers and trawlers from other areas and netters and fishermen, in general, come into and encroach upon the waters of Florida, even going into Florida Bay. This area has been designated by the State of Florida as a shrimp breeding area not subject to fishing, unless and until shrimp in the area

are of sufficient size.

We have pointed out these facts as being indicative of the necessity to sever Florida from the other States and to have the Court appoint a Special Master that may particularly and with specificity designate the boundaries of the State of Florida, so that we may from thence forth be able not only to protect spawning areas for the benefit of the State and the United States, but also to protect the fisheries and the fishing industry. At this time, and in this area, Florida has issued no oil or gas leases, or any other expiration contracts or licenses.

The area just above identified patently falls in the Gulf of Mexico, but just as patently, by virtue of Florida's 1868 Constitution, approved by Congress, the exact delineation needs, we think, judicial determination. This same fact is true as we go on the other side (the southern and southeasterly side of the Florida Keys). We feel that this Court will judicially note that there are many reefs, atolls, and rock clusters that are not awash at mean high tide. The existence and location of these land masses must be physically determmed by evidence that Florida would propose and that we feel sure that the Government would propose. Thereafter, a Special Master would make his determination and we think that it would be, frankly, somewhat of an imposition on this Court to have the evidence presented to it in any other fashion, save and except by report and recommendation of a Special Master.

In U. S. v. Florida, this Court recognized that the Congress, upon its readmission of the State of Florida, gave consideration to the boundary of the State of Florida then contained in the Constitution approved by the Congress for Florida upon its readmission. That boundary, as contained in 1868 Constitution, is included as Exhibit 3 of the Appendix attached hereto.

We quote from U. S. v. Florida (See pp. 1100, 1101, 4 L. Ed. 2d):

The voluminous references to the Reconstruction debates fail to show us precisely how closely the Southern States' Reconstruction Constitutions were examined. We cannot know, for sure, whether all or any of the Congressmen or Senators gave special attention to Florida's boundary description. We are sure, however, that this constitution was examined and approved as a whole, regardless of how thorough that examination may have been, and we think that the 1953 Submerged Lands Act requires no more than this. Moreover, the Hearings and the Reports on the Submerged Lands Act show, as the Government's brief concedes, that those who wrote into that measure a provision whereby a State was granted up to three leagues if such a boundary had been "heretofore approved by Congress," had their minds specifically focused on Florida's claim based on submission of its 1868 Constitution to Congress. When Florida's claims were mentioned in the hearings it was generally assumed that Congress had previously

*[363 US 128]

"approved" its three-league *boundaries. [15] The Senate Report on a prior bill, set forth as a part of the report on the 1953 Act, pointed out that "In 1868 Congress approved the Constitution of Florida, in which its boundaries were defined as extending 3 marine leagues seaward and a like distance into the Gulf of Mexico." S Rep No. 133, 83d Cong, 1st Sess 64-65. [16] The language of the Submerged Lands Act was at least in part designed to give Florida an opportunity to prove its right to adjacent submerged lands so as to remedy what the Congress evidently felt had been an injustice to Florida. Upon proof that Florida's claims met the statutory standard—"boundaries ... heretofore approved by the Congress"—the Act was intended to "confirm" and "restore" the

three-league ownership Florida had claimed as its own so long and which claim this Court had in effect rejected in United States v Texas, 339 US 707, 94 L ed 1221, 70 S Ct 918; United States v Louisiana, 339 US 699, 94 L ed 1216, 70 S Ct 914; and United States v California, 332 US 19, 91 L ed 1889, 67 S Ct 1658. As previously shown, Congress in 1868 did approve Florida's claim to a boundary three leagues from its shores. And, as we have held, the 1953 Act was within

*[363 US 129]

the power of *Congress to enact. Alabama v Texas, 347 US 272, 98 L ed 689, 74 S Ct 481. See also United States v California, 332 US 19, 27, 91 L ed 1889, 1893, 67 S Ct 1658.

The Submerged Lands Act, 43 USCA, Section 1312, contains this savings clause:

"Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any state's seaward boundary beyond three geographical miles if it was so provided by its Constitution or laws prior to all at the time such state became a member of the Union, or if it has been heretofore approved by Congress."

We thereupon submit the following:

1. U. S. v. Florida is this Court's authority for the fact that Florida's boundary contained in the 1868 Constitution was approved by Congress;

2. That Florida's boundary on both the Atlantic and Gulf Coast sides of the State is either three marine leagues or is, in the alternative, at the edge of the Gulf Stream; and

3. That this Court has reserved jurisdiction over the original case of U. S. v. Florida for the purpose of making a

factual determination as to the location of the boundary "on the ground."

We hasten at this point to call the Court's attention to Chapter 69-4, Florida Statutes of 1969, a copy of which is attached as a portion of the Appendix, marked Exhibit 4. This act is a cooperative type act between the State of Florida and the State of Georgia that as between these two states, and subject to the approval of the Congress, determines the boundaries between these two states so that, in turn, boundaries of all states north of Georgia may likewise follow the same procedure. This fact is not material to the legal issues now before the Court, but it is the feeling of the State of Florida that, factually, it may be important, and it goes without saying that counsel for the State of Florida could not do less than present this fact to the Court.

DATED this _____ day of February, 1970.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General of Florida

_____

T. T. TURNBULL
Chief Trial Counsel

The Capitol
Tallahassee, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Severance of the State of Florida and for the Appointment of a Special Master and a copy of the foregoing Brief of the State of Florida in Support of Its Motion for Severance and for the Appointment of a Special Master has been furnished to each Attorney General whose state is involved in this litigation, as well as 25 copies to the Solicitor General of the United States, on this _____day of February, 1970.

_____

ORIGINAL NO. 9

Fifth Cause of Action
(Against the State of Florida)

I

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2, of the Constitution of the United States, Title 28, United States Code, Section 1251 (b) (2), and this Court's order entered in this case on June 24, 1957.

II

On June 5, 1950, the United States was and, except as set forth in Paragraph III hereof, has ever since been and now is entitled to exclusive possession of and full dominion and power over the lands, minerals and other things underlying the Gulf of Mexico, Straits of Florida and Atlantic Ocean, extending seaward from the ordinary low-water mark and from the outer limit of inland waters on the coast of Florida to the edge of the continental shelf; and the State of Florida did not have on June 5, 1950, and, except as set forth in Paragraph III hereof, has never since had and does not now have any title thereto or property interest therein.

III

On May 22, 1953, by Public Law 31 of the 83rd Congress, known as the Submerged Lands Act, 67 Statutes at Large 29, the United States granted to the State of Florida the title to and ownership of the submerged lands and natural resources lying in the Gulf of Mexico, Straits of Florida and Atlantic Ocean within the boundaries of said State, but not extending seaward more than three geographic miles from the ordinary low-water mark or from the outer limit of inland waters unless the boundary of said State as it existed when the State became a member of the Union, or as approved by Congress, extended more than three geographic miles therefrom into the Gulf of Mexico, and not extending seaward more than three marine leagues therefrom into the Gulf of Mexico in any

event; and by said Act the United States released its claim for money or damages arising out of any operations by the State of Florida or under its authority in the area so granted.

IV

When the State of Florida became a member of the Union its boundary did not extend into the Gulf of Mexico, Straits of Florida or Atlantic Ocean more than three geographic miles from the ordinary low-water mark or from the outer limit of inland waters, and the Congress of the United States has never approved a boundary for said State extending into the Gulf of Mexico, Straits of Florida or Atlantic Ocean more than three geographic miles from the ordinary low-water mark or from the outer limit of inland waters.

V

By reason of the foregoing, the United States is now entitled to exclusive possession of and full dominion and power over the lands, minerals and other things underlying the Gulf of Mexico, Straits of Florida and Atlantic Ocean, lying more than three geographic miles seaward from the ordinary low-water mark and from the outer limit of inland waters on the coast of Florida, extending seaward to the edge of the continental shelf, and is entitled to an accounting for all sums of money derived therefrom by the State of Florida after June 5, 1950.

VI

The State of Florida claims some right, title or interest adverse to the United States in the lands, minerals and other things underlying the Gulf of Mexico, Straits of Florida and Atlantic Ocean, lying more than three geographic miles seaward from the ordinary low-water mark and from the outer limit of inland waters on the coast of Florida, and has not accounted to the United States for all or any sums of money derived therefrom after June 5, 1950.

VII

The original jurisdiction of this Court is invoked because the Court by its order of June 24, 1957, declared that the issues in the First Cause of Action are so related to the possible interests of Florida in the subject matter of the suit that the just, orderly and effective determination of such issues requires

that they be adjudicated in a proceeding in which all the interested parties are before the Court. The Court by said order allowed Florida 60 days within which to intervene and, if it failed to do so, allowed the United States 60 days thereafter within which to add Florida as a party. Florida has not intervened, and the 60 days allowed it for doing so have expired.

Wherefore, the United States prays that the defendants be required to answer this amended complaint within 30 days and that a decree be entered declaring the rights of the United States as against said States in the lands, minerals and other things underlying the Gulf of Mexico, Straits of Florida and Atlantic Ocean, lying more than three geographic and extending seaward to the edge of the continental shelf, enjoining said States and all persons claimin under them from interfering with the rights of the United States therein, and requiring said States to account for all sums of money derived therefrom after June 5, 1950.

J. Lee Rankin,
Solicitor General.

ORIGINAL NO. 35

THIRTEENTH CAUSE OF ACTION
(Against the State of Florida)
XX

The United States repeats and realleges the allegations contained in paragraphs I through IV and VI through VIII hereof, with the same force and effect as if herein set forth. The term "Atlantic Ocean" as used herein is to be understood as including the Straits of Florida.

WHEREFORE, the United States prays that the defendants be required to answer this complaint, and that a decree be entered declaring the rights of the United States as against the defendants in the subsoil, seabed, and natural resources underlying the Atlantic Ocean, including the Straits of Florida, lying more than three geographical miles seaward from the ordinary low-water mark and from the outer limit of inland waters to the edge of the continental shelf, and requiring said defendants to account for all sums of money derived therefrom, and for such other and further relief as may be proper in the premises.

John N. Mitchell,
Attorney General.
Erwin N. Griswold,
Solicitor General.

April 1969.

***

ARTICLE I
BOUNDARIES

The boundaries of the State of Florida shall be as follows: Commencing at the mouth of the river Perdido; from thence up the middle of said river to where it intersects the south boundary line of the State of Alabama, and the thirty-first degree of north latitude; then due east to the Chattahoochee river; then down the middle of said river to its confluence with the Flint river; from thence straight to the head of the St. Mary's river; then down the middle of said river to the Atlantic ocean; thence southeastwardly along the coast to the edge of the Gulf Stream; thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands; thence northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from the land, to a point west of the mouth of the Perdido river; thence to the place of beginning.

***

CHAPTER 69-4

Senate Bill No. 405

AN ACT relating to the boundary line between the states of Florida and Georgia; amending Section 6.09, Florida Statutes, so as to limit the boundary from the mouth of the Saint Marys River to the seaward limit of Florida as now or hereafter fixed by the Congress of the United States; to provide that such boundary is to be considered to extend beyond the seaward limit of the sovereign jurisdiction of this state should any need for further delimitation arise; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 6.09, Florida Statutes, is amended to read:

6.09 Boundary between Florida and Georgia.–

(1) The line run and marked by B. J. Whiter, Jr., on the part of Florida and G. J. Orr on the part of Georgia is the permanent boundary line between the states of Florida and Georgia.

(2) The boundary line between the states of Florida and Georgia as described in subsection (1) herein shall be extended from a point 37 links north of Ellicotts Mound on the Saint Marys River; thence down said river to the Atlantic ocean; hence along the middle of the presently existing Saint Marys entrance navigational channel to the point of intersection with a hypothetical line connecting the seaward most points of the jetties now protecting such channel; thence along said line to a control point of latitude 30° 42' 45.6" north, longitude 81° 24' 15.9" west, thence due east to the seaward limit of Florida as now or hereafter fixed by the Congress of the United States; such boundary to be extended on the same true 90° bearing so far as a need for further delimitation may arise.

Section 2. This Act shall not become effective until and unless by November 1, 1970, the Congress of the United States shall ratify, confirm, adopt or otherwise consent thereof.

Approved by the Governor April 25, 1969.

Filed in Office Secretary of State April 28, 1969.

FILE COPY

No. 35, Original

Office-Supreme Court, U.S.
FILED
FEB 11 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF MAINE, *et al.*,

Defendants.

MOTION BY NEW JERSEY FOR REFERENCE OF CASE TO A MASTER

STATE OF NEW JERSEY,
GEORGE F. KUGLER, JR.,
Attorney General.

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Assistant Attorney General,
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State House Annex,
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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE, *et al.*,

Defendants.

MOTION BY NEW JERSEY FOR REFERENCE OF CASE TO A MASTER

This office is in receipt of a motion for judgment by the United States, with supporting brief, and a motion by eight of the defendant States for reference to a Master, also with supporting brief.

New Jersey joins in the motion of the States of Delaware, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, South Carolina and Virginia and urges this Court to refer the case to a Master. New Jersey adopts the brief of the above named defendant States with the following additions and modifications.

This Case and its Central Historical Issues Should be Referred to a Master for Initial Determinations

In its motion for judgment, the United States seeks to focus the attention of the Court upon prior decisions

which it is alleged forecloses the States from now raising the issue of the State's proprietary rights to develop the seabed and subsurface lands beyond the three-mile limit. In considering the arguments of the United States, and the cases raised in support of those arguments, New Jersey perceives an unpliant view of the historical development of this issue. In relying upon the accretions of a series of judgments, and weighing these in terms of the relationship and distribution of power between the national government and the States, the United States asks this Court to confront the single question of whether the determined nationalism of the past shall be invoked to protect the economic evolution of the future. Should the reasons and purposes of other courts in other times be permitted to override the legitimate historic claims of the States to the rights which they have always possessed as concomitants of their original, separate sovereignty? By seeking the appointment of a Master, the States in concert ask this Court to review the claimed proprietary rights and to pass upon their present locus.

Mr. Justice Holmes has pointed to the development of judicially enhanced legal institutions as a response to

> ". . . [T]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men. . . ." Holmes, *The Common Law* 1 (Little Brown & Co. 1944).

Thus, for example, in examining early cases such as *Martin* v. *Waddell*, 16 Pet. 367 (1842), and its conclusion that as to lands under inland navigable waters the States exercised dominium, should not the ascribed attributes and privileges of sovereignty be read and interpreted in the light of the political purpose of the Court passing upon the issue.

Chief Justice Taney, speaking for the Court in *Martin* v. *Waddell, id.* notes that at the time of the Revolution

> ". . . when the people of New Jersey took possession of the reigns of government, and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the Parliament, became immediately and rightfully vested in the State." *Martin* v. *Waddell* at 416.

If the Court had not bottomed its actions on the above stated premise, it is conjectural whether in fact it would have returned to Queen Anne the dominium which had passed to the Proprietors as a privilege of sovereignty. And, if the lands had not been judicially declared encompassed by the act of surrender, they would remain vested in the Proprietors of New Jersey to this day. This vesting applies equally to such rights offshore as may have passed by royal grant.

New Jersey will not dwell on these questions at this time. The point is raised merely by way of illustration of the significance of the historical inquiry the States seek by the motion for reference. The dynamics of economic interplay read against a background of today's political mileau require a careful examination of the charter origins of states' rights beyond the three miles reserved by statute.

The compilation of historical data perforce is a time-consuming enterprise. New Jersey has enlisted the aid of the Department of History at Rutgers, the State University, for this effort. The academic year at Rutgers concludes on May 28, 1970. Until that date the time demands upon University personnel participating in research aspects of this case are constraining. For this

reason, if this Court determines to follow the course suggested by the United States, New Jersey would prefer that its answering brief be filed no earlier than Friday, July 31, 1970. This would permit the inclusion of that material otherwise prepared for submission to a Master. A shorter time schedule would be burdensome and prejudicial to New Jersey's position.

CONCLUSION

For the foregoing reasons, New Jersey submits that the case be referred to a Special Master and that the Master be directed in particular to consider and prepare detailed findings upon the historical claims of each of the thirteen defendant States. See, *e.g.*, *Texas* v. *New Mexico*, 344 U. S. 906 (1952). In making this request, New Jersey reserves the right and declares its intention to provide the historical material to the Court directly in the most efficient manner possible if the motion is denied and briefing and argument on the motion of the United States for judgment are ordered.

Should the Court follow the course suggested by the United States, New Jersey requests this Court to fix a schedule for briefing and oral argument by which the answering brief of the State of New Jersey will be due no earlier than July 31, 1970. In all other respects, New Jersey concurs with the conclusions of the States of Delaware, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, South Carolina and Virginia.

Respectfully submitted,

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey.

ELIAS ABELSON,
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State House Annex,
Trenton, New Jersey 08625

FILE COPY

FILED
FEB 25 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1969

NO. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

STATE OF MAINE, et al.,

Defendants.

MOTION OF THE STATE OF GEORGIA FOR REFERENCE OF CASE TO A MASTER

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IN THE

Supreme Court of the United States

OCTOBER TERM 1969

NO. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

STATE OF MAINE, et al.,

Defendants.

MOTION OF THE STATE OF GEORGIA FOR REFERENCE OF CASE TO A MASTER

COMES NOW the State of Georgia, a defendant in the above styled proceeding, and joins in the previously filed motions of the States of Delaware, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, South Carolina, Virginia and New York for reference of the case to a Special Master instructed by the Court to inquire into, consider and prepare detailed findings upon the claims of the various State defendants, including the State of Georgia, to the submerged lands in question. In support of said motion, the State of Georgia shows the Court as follows:

1. In its brief in support of its motion for judgment.

the United States concedes that this Court has not directly adjudicated the rights of the original States in the submerged lands in question [p. 23 of brief]. While the United States appears to contend that evidence is not needed on the point because of this Court's decision in *United States v. California,* 332 U.S. 19 (1947), we think the lack of merit in such contention is seen in the fact that that decision shows on its face that California's claim was rejected for insufficiency of proof. As stated by this Court:

> "From all the wealth of material supplied, however, we cannot say that the thirteen original colonies separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it." 332 U.S. *at* 31.

For this and the various other reasons which have already been set forth in detail in the motions of the above named co-defendant States, the State of Georgia respectfully submits that crucial threshold questions as to the scope and validity of State claims to the submerged lands can most appropriately be adjudicated by the taking of evidence by a Master. To reiterate all that which has already been said in the motion and supporting argument of Delaware, et al. would be superfluous and of no service to the Court. Suffice it to say that such argument of Delaware, et al. is adopted by reference by the State of Georgia.

2. The contention of the United States that the existence of exploitive rights in the marginal seas was unknown at the time the Union was formed [p. 11 of brief] is directly disputed by the State of Georgia, which is hopeful of being permitted to introduce evidence to

show that in fact such rights were recognized when the Union was formed, and that Georgia neither at that time nor at any time thereafter granted, sold or in any way conveyed "dominium" (as contradistinct from "imperium") rights in the marginal sea to the United States.

3. The State of Georgia further desires the opportunity of introducing evidence to show that whatever the situation may have been as to the existence of a concept of exploitive rights in marginal seas at the time the Union was formed, the United States of America had claimed international sovereignty by 1793 and in any event prior to 1802 when in return for lands received from the State of Georgia under the "Georgia Cession", it ceded to Georgia all of its claim, right and title to lands extending eastward from Georgia's new western boundary and south of the southern boundaries of the States of Tennessee, North Carolina and South Carolina—without reservation or limitation respecting the by then well-recognized rights in the marginal sea.

WHEREFORE, the State of Georgia prays that this its motion that the case be referred to a Master be inquired into and sustained by the Court and that such Special Master be directed to take evidence, inquire into, consider and prepare detailed findings upon the claims of the various States to the submerged lands in question. Should this motion be denied the alternative prayers of Delaware, et al. respecting the reservation of right to introduce evidence directly before the Court and the time

for filing of briefs and oral arguments are adopted by reference as alternative prayers of the State of Georgia.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, JR.
Exec. Asst. Attorney General

ALFRED L. EVANS, JR.
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ROBERT SEAVER, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

STATE OF FLORIDA,

Defendant.

AMENDED ANSWER OF THE STATE OF FLORIDA

ROBERT L. SHEVIN
Attorney General

STUART L. SIMON
Deputy Attorney General

W. ROBERT OLIVE, JR.
RONALD W. SABO
Assistant Attorneys General

The Capitol
Tallahassee, Florida 32304

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

-v-

STATE OF FLORIDA,

Defendant.

AMENDED ANSWER OF
THE STATE OF FLORIDA

COMES NOW the sovereign State of Florida (hereafter for brevity called "Florida"), defendant in this cause by and through its Attorney General, Robert L. Shevin, and in answer to the allegations contained in the numbered paragraph 20 of the plaintiff's Complaint under the heading Thirteenth Cause of Action admits, denies and alleges as follows:

I

In answer to Paragraph I of the plaintiff's Complaint, Florida alleges that such paragraph in its entirety alleges nothing requiring an Answer.

II

In answer to Paragraph II of the plaintiff's Complaint, Florida denies each and every allegation contained in said paragraph.

III

In answer to Paragraph III of the plaintiff's Complaint, Florida denies each and every allegation contained in said paragraph, except as to the existence of Public Law 31 of the 83d Congress, known as the Submerged Lands Act, 67 Statutes at Large 29.

IV

In answer to Paragraph IV of the plaintiff's Complaint, Florida admits that it claims some interest in the seabed, natural resources and subsoil of the continental shelf underlying the Atlantic Ocean and superadjacent waters more than three geographic miles seaward from ordinary low watermark and from the outer limit of inland waters, and insofar as the allegations in said paragraph may be construed to infer that the plaintiff is empowered, in the exercise of its alleged sovereign rights in the above-described submerged lands, to assert any claim with respect thereto which is adverse to Florida, Florida denies such claims by plaintiff entirely.

V

The allegations contained in Paragraph V of the plaintiff's Complaint are not asserted against Florida, and Florida otherwise is without knowledge of any of the allegations contained therein.

VI

In answer to Paragraph VI of the plaintiff's Complaint, Florida denies the allegations contained in said paragraph.

VII

In answer to Paragraph VII of the plaintiff's Complaint, Florida denies the allegations contained in said paragraph, except as to the existence of Public Law 212 of the 83d Congress, known as the Outer Continental Shelf Lands Act, 67 Statutes at Large 462, which speaks for itself.

VIII

In answer to Paragraph VIII of the plaintiff's Complaint, Florida admits that said paragraph, in its entirety is an argument in support of invocation of this Court's jurisdiction, but denies the fundamental question in issue relates to the foreign policy of the United States.

IX

In answer to Paragraph XX not heretofore answered by Paragraphs I through VIII of this Answer, Florida denies the "Atlantic Ocean" includes the straits of Florida.

AFFIRMATIVE DEFENSES

By way of affirmative defenses, Florida alleges as follows:

I

That the body of water referred to in plaintiff's Complaint as the "Straits of Florida" is an arm of the Gulf of Mexico or in the alternative the islands commonly referred to as the Florida Keys, which islands are transgressed by the U. S. Highway No. 1, but also including Elliott Key, Old Rhodes Key, Marquesas Key, Dry Tortugas Islands, and all named and unnamed areas of land above the mean low watermark in this insular chain, are located in the Gulf of Mexico. That because the aforementioned land area of Florida is within the Gulf of Mexico, Florida is entitled to a southern seaward boundary of three (3) marine leagues from its coastline wherever located in this area.

II

That by Act of June 25, 1868, 15 Statutes 73, Congress approved Florida's marine boundaries and that Congress in so approving such boundaries, pursuant to Article IV, Section 3, Clause 2 of the U. S. Constitution and other law existing at that time, did expressly or impliedly convey and grant to Florida whatever interest the United States possessed in the maritime territory within such boundaries without prejudice whatsoever to any constitutional claim to ownership, dominion and control that may have obtained to Florida from said conveyance and grant.

III

That Florida's marine boundaries exceed three (3) geographical miles in part in the Atlantic Ocean and that Public Law 31 of the 83d Congress, known as the Submerged Lands Act, 67 Statutes at Large 29, does not limit a state's interest under said act to three (3) geographical miles in the Atlantic, but instead provides that any state's seaward boundary beyond three (3) geographical miles is not prejudiced or questioned by said act where such seaward boundaries have been heretofore approved by Congress.

WHEREFORE, Florida prays that a decree be entered declaring its rights

as against the plaintiff in the seabed subsoil and superadjacent waters of the Atlantic Ocean adjacent to its coastline and to the limit of its congressionally approved boundary; and for its cost.

COUNTERCLAIM

The defendant, State of Florida, hereby files this claim against the plaintiff United States of America and as grounds therefore, alleges:

1. The Congress of the United States, by the aforementioned act of readmission of Florida to representation to Congress did thereby, subsequent to Florida's admission to the Union, grant to the State of Florida the submerged lands and superadjacent waters within the marine boundaries specifically set forth in the constitution approved by said act of readmission.

2. Title to said submerged lands, covering at least 509,224 square acres in the Atlantic Ocean, was thus vested in the State of Florida.

3. By now denying said title of the State of Florida, the United States of America is seeking to take said property without just compensation.

WHEREFORE, the State of Florida asks damages from the United States of America in excess of $51,000,000 (fifty-one million dollars) and hereby demands

trial by jury on said claim pursuant to 28 U.S.C. §1872. See Georgia v. Brailsford, 3 Dall. 1 (1794).

DATED this 28th day of January, 1971.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

STUART L. SIMON
Deputy Attorney General

W. ROBERT OLIVE, JR.
Assistant Attorney General

RONALD W. SABO
Assistant Attorney General

Attorneys for Defendant
Dept. of Legal Affairs
The Capitol
Tallahassee, Florida
32304

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of January, 1971, a copy of this Amended Answer, Affirmative Defenses and Counterclaim was mailed, postage prepaid, to Honorable John N. Mitchell, Attorney General of the United States, and Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530.

W. ROBERT OLIVE, JR.
Assistant Attorney General

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 35, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA

MOTION BY THE UNITED STATES TO DISMISS THE COUNTERCLAIM AND DENY THE DEMAND FOR JURY TRIAL FILED BY THE STATE OF FLORIDA

The United States of America moves to dismiss the counterclaim and to deny the jury demand filed by the State of Florida on January 28, 1971, on the following grounds:

1. The counterclaim constitutes a suit against the United States to which the United States has not consented.

2. The counterclaim does not state a claim on which relief can be granted.

3. The jury demand in the counterclaim should be denied because the State of Florida is not a "citizen"

428-077—71

nor is this an "action at law" within the terms of 28 U.S.C. 1872.

To permit consideration of this motion within the present Term of Court, the United States of America moves that the State of Florida be required to respond hereto within thirty days of the service on it of this motion.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1971.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 35, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA

MEMORANDUM IN SUPPORT OF MOTION

INTRODUCTION

This is a suit by the United States against the thirteen Atlantic coastal states for a determination of rights in the lands and natural resources of the bed of the Atlantic Ocean more than three geographical miles from the coastline. Florida filed a motion for severance, which the Court on November 16, 1970, referred to the Special Master previously appointed in this case. The motion asserted that Florida's defenses were not the same as those of the other defendants, and on October 27, 1970, during the hearings on the Florida motion, the Special Master granted the state permission to file an Amended Answer to clarify its

defenses. On January 28, 1971, Florida filed its amended answer, including as new matter a counterclaim against the United States. The counterclaim seeks $51 million damages on the ground that the United States is seeking herein to take Florida's submerged lands without just compensation; it includes a demand for a jury trial under 28 U.S.C. 1872. By the present motion the United States asks to have Florida's counterclaim dismissed and the jury demand denied.

Florida's motion for severance has been granted by the Special Master, and we understand that his report on that motion is being filed simultaneously with this motion. In connection with the severance, the United States and Florida are also filing joint motions to consolidate the proceedings against Florida in No. 35, Original, with supplemental proceedings to be initiated against Florida in No. 9, Original, and for reference to a Master. The United States assumes that Florida's counterclaim and jury demand in No. 35, Original, if not dismissed, will remain viable under the proposed consolidated proceedings and that resolution of the issues tendered by the present motion need not precede the proposed consolidation.

Resolution of the issues tendered here, or at least of the jury trial demand, should precede the proposed reference to a Master, however. The mode of proceeding will obviously be quite different if a jury is required, either as to the counterclaim alone or on the action as a whole, than if the case is to be tried, as we contend, to

the Master alone. While a decision on the merits may obviate the issue of dismissing the counterclaim, see n. 3 *infra*, it cannot resolve this procedural issue. Nor should the jury issue be referred to the Master, as it raises strictly legal issues of a most unique character; indeed, it is not clear whether any jury trial could be held other than directly before this Court. The matter is one which can readily be resolved without oral argument in this Court; to permit its resolution during the present Term of Court, we suggest that Florida may be directed to file its response within thirty days of the service on it of this motion. That will permit Florida sufficient time for response, *cf.* Fed. R. Civ. P. 6(d), and will give this Court ample time to consider the papers and reach a decision before it rises for the summer.

I

THE COUNTERCLAIM FOR DAMAGES SHOULD BE DISMISSED

A. THE CLAIM FOR DAMAGES IS AN UNCONSENTED SUIT AGAINST THE UNITED STATES

The relief sought by the United States in its complaint is basically equitable in nature, a declaration of its rights in the subsoil, seabed, and natural resources of the continental shelf underlying the Atlantic Ocean beyond the three-mile limit, and an accounting for any money derived by the state from those lands. Implicit in the request for this relief is the possibility that Florida will be found to have the subject rights, and to be entitled to an accounting for any sums the United States has received. *Cf. United States* v.

Louisiana, 363 U.S. 1; *Id.,* 382 U.S. 288.[1] By its counterclaim, however, Florida seeks a good deal more. It asserts that the submerged lands and resources are being taken from it, and demands $51 million in "just compensation" for such taking. This claim is not fairly comprised in the matters put in issue by the United States complaint, and constitutes, in effect, a suit initiated by the state against the United States.

Florida's counterclaim thus must be dismissed as an unconsented suit against the United States. Under the Constitution, a state may not sue the United States unless Congress has consented thereto. *Kansas* v. *United States,* 204 U.S. 331; *Arizona* v. *California,* 298 U.S. 558, 568; *Minnesota* v. *United States,* 305 U.S. 382, 387. The government's immunity from suit applies not only to suits initiated by the adverse party, but also to counterclaims filed by the defendants in suits brought by the United States. *United States* v. *Shaw,* 309 U.S. 495, 500–505; *Illinois Central R.R. Co.* v. *Public Utilities Comm.,* 245 U.S. 493, 504–505. There is no reason why this rule, like the prohibition on initiating suits, should not apply equally to suits by states as to suits by individuals. *Cf. Minnesota* v. *United States,* 305 U.S. 382, 387. Neither the Court, nor the Attorney General, nor both together, can give

[1] Thus, there is no objection in this case to the fact that the State of North Carolina captioned its second defense in its Answer as "Answer, Defense, and Counterclaim". In substance, the second defense merely states the grounds on which North Carolina believes itself entitled to judgment on the issues raised in the complaint.

such consent where it has not been given by Congress.[2] The United States has at no time consented to be sued by the State of Florida on the alleged counterclaim.[3]

B. UNDER NO CIRCUMSTANCES COULD THE FACTS ALLEGED IN THE COUNTERCLAIM ENTITLE FLORIDA TO RELIEF

Quite apart from the fact that it asserts a claim on which the United States has not consented to be sued either in this court or in this way, the counterclaim should be dismissed for failure to state a claim on which relief can be granted. After asserting the basis for Florida's claim to the submerged lands and resources seaward of the three-mile limit, the counterclaim alleges that:

> 3. By now denying said title of the State of Florida, the United States of America is seeking to take said property without just compensation.

On that ground, it alleges that the state is entitled to damages in excess of $51 million. That is manifestly an untenable analysis of the litigation.

---

[2] The Court of Claims has been given jurisdiction of claims for compensation for the taking of property. 28 U.S.C. 1491; *Young Men's Christian Association* v. *United States*, 395 U.S. 85, 86 n. 1.

[3] In *United States* v. *Louisiana, et al.*, No. 11, Original, October Term, 1957, the State of Alabama included in its answer a "cross-bill" seeking a boundary determination, which was not within the issues raised by the complaint. The United States moved to dismiss the cross-bill as an unconsented suit against the United States; but the decision on the complaint having shown the cross-bill to be without merit, the Court ordered it dismissed without considering its status as an unconsented suit against the United States. *United States* v. *Louisiana, et al.*, 363 U.S. 1, 83–84 n. 141.

This is a suit by the United States, in the nature of a suit to quiet title, by which the United States seeks to establish that, as against the State of Florida, the United States now has exclusive rights to the natural resources of the continental shelf more than three miles from the coastline in the Atlantic Ocean. *Cf. United States* v. *Louisiana, et al.*, 363 U.S. 1; *United States* v. *Florida,* 363 U.S. 121. Florida, on the other hand, claims to have rights in the natural resources beyond the three-mile limit in the Atlantic, either by virtue of the Act of 1868 approving the Florida Constitution, 15 Stat. 73, or under the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301–1315, or perhaps on some other basis.

For present purposes, it is unnecessary either to analyze or to evaluate the grounds on which either party claims to be entitled to these natural resources. What is important is that the suit is not one to transfer rights, but rather is one to determine which party is entitled to them under the present state of affairs. If Florida prevails, it will keep the rights found to belong to it, and there will be no taking. If the United States prevails, it will be because Florida has and had no rights. Florida will have lost nothing in that event, because it had nothing to lose. No outcome of the case can take anything from Florida. The counterclaim, seeking compensation for rights allegedly being taken from Florida by this proceeding, does not state a claim on which relief can be granted.

II

THE DEMAND FOR A JURY TRIAL SHOULD BE DENIED

The State of Florida relies on 28 U.S.C. 1872, citing the case of *Georgia* v. *Brailsford*, 3 Dall. 1, as authorizing a demand for a jury trial on its alleged counterclaim. Amended Answer of the State of Florida, p. 7. That section reads: "In all original *actions at law* in the Supreme Court against *citizens* of the United States, issues of fact shall be tried by a jury." (Emphasis added.)

The State of Florida cannot be construed to be a "citizen" under the terms of Section 1872. The cases construing the term "citizen" as used in other sections of 28 U.S.C. clearly distinguish a state from a "citizen." *City Bank Co.* v. *Schnader*, 291 U.S. 24, 29 (diversity); *State Highway Comm.* v. *Utah Co.*, 278 U.S. 194, 200 (diversity); *Arkansas* v. *Kansas & Texas Coal Co.*, 183 U.S. 185, 188 (diversity); *Postal Telegraph Cable Co.* v. *Alabama*, 155 U.S. 482, 487 (diversity); *Central Stikstof Verkoopantoor, N.V.* v. *Alabama State Docks Dept.*, 415 F.2d 452, 457 (C.A. 5) (diversity); *Riley* v. *Worcester County Trust Co.*, 89 F. 2d 59, 64 (C.A. 1) (interpleader); Jud. Act of 1789 § 13, 1 Stat. 73, 80–81. We see no reason why the construction given to the term "citizen" in those cases is not equally applicable to Section 1872.

Moreover, the demand for a jury trial under Section 1872 is subject to the additional infirmity that this case is not an "action at law." This proceeding is in the nature of a quiet title action and as such is a suit in equity. Section 1872 is by its terms appli-

cable only to actions at law. *United States* v. *Louisiana et al.*, 339 U.S. 699 (1950). The Court in *United States* v. *Louisiana, et al.*, considered demands by the States of Louisiana and Alabama for jury trials. By its complaint in that case the United States raised the same issues and sought the same relief that it is seeking in the present case. The demands of both of those states for a jury trial in that case were denied, the Court declaring with respect to Louisiana's motion for a jury trial (339 U.S. at 706):

> We need not examine it [Louisiana's motion] beyond noting that this is an equity action for an injunction and accounting. The Seventh Amendment and the statute,[4] assuming they extend to cases under our original jurisdiction, are applicable only to actions at law. * * *

The case which Florida cites in support of its jury demand, *Georgia* v. *Brailsford*, 3 Dall. 1, is not applicable to the case at hand since that case did not involve a suit between the United States and a state; that case was an action at law against citizens of the United States.

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[4] 28 U.S.C. 1872.

CONCLUSION

For the foregoing reasons, the State of Florida should be directed to respond to this motion within thirty days of service, the counterclaim which the State of Florida asserts in its amended answer to the complaint should be dismissed, and the demand for a jury trial should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 35, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA

JOINT MOTION OF THE UNITED STATES AND THE STATE OF FLORIDA TO CONSOLIDATE PROCEEDINGS HEREIN AGAINST THE STATE OF FLORIDA WITH UNITED STATES v. STATE OF LOUISIANA, ET AL., NO. 9, ORIGINAL

The United States of America, by its Solicitor General, and the State of Florida, by its Attorney General, jointly move the Court to consolidate for all purposes these proceedings against the State of Florida with *United States* v. *State of Louisiana, et al.*, No. 9, Original, and that such further proceedings be had with respect to the State of Florida as may be ordered in said cause, pursuant to the jurisdiction retained by the Court therein under its decree of December 12, 1960, 364 U.S. 502, upon the condition that in No. 9, Original, the State of Florida will not present any evidence or make any argument with re-

spect to the rights of the British colonies under colonial grants or charters, or with respect to any claim that the States of the Union have purely constitutional rights of a proprietary character in the submerged lands or the natural resources of the bed of the sea adjacent to their coasts; but the State of Florida shall be entitled in No. 9, Original, to the benefit of any determination that the Court may make in No. 35, Original, with respect to those questions to the extent that such a determination may be relevant under the equal footing doctrine or otherwise applicable to the factual situation of the State of Florida. However, the State of Florida is not prohibited from approving of or submitting *amicus curiae* briefs in No. 35, Original.

This motion is made on the following grounds:

1. This case raises the question of the extent of Florida's submerged lands in the Atlantic Ocean.

2. The same question has been raised in the Amended Complaint in *United States* v. *Louisiana, et al.*, No. 9, Original, but in the view of the United States it was not considered by the Court in its opinion of May 31, 1960.

3. Simultaneously herewith there is being submitted to this Court, in *United States* v. *Louisiana, et al.*, No. 9, Original, a joint motion of the United States and the State of Florida to initiate supplemental proceedings; to consolidate therewith the proceedings in this case between the United States and Florida; to appoint a Special Master to hold hearings and make recommendations for a decree; and for entry of a decree defining the boundary between that area

of the seabed in which the State of Florida has rights to the natural resources and the area of the seabed in which the United States has such rights along the entire coast of Florida, in both the Gulf of Mexico and the Atlantic Ocean, not determined by this Court in its opinion in *United States* v. *Florida*, 363 U.S. 121 (1960), or its decree in *United States* v. *Louisiana, et al.*, No. 9, Original, 364 U.S. 502.

4. The cases raise common questions of law and fact.

5. The Special Master appointed in this case after hearing on the Motion for Severance of the State of Florida referred to him by this Court on November 16, 1970, has advised the parties that he is submitting a report recommending that the proceedings against Florida be severed from this case and be consolidated with proceedings against Florida in No. 9, Original.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General of the
United States.

ROBERT L. SHEVIN,
Attorney General of the
State of Florida.

Dated this day of MARCH 1971.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 35, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA

MEMORANDUM IN SUPPORT OF MOTION

For completeness, the Amended Complaint in *United States* v. *Louisiana et al.*, No. 9, Original, put in issue the extent of Florida's submerged lands in the Atlantic Ocean as well as in the Gulf of Mexico; but the United States understanding has been that in its opinion of May 31, 1960, 363 U.S. 121, and decree of December 12, 1960, 364 U.S. 502, the Court dealt with Florida's limits only in the Gulf of Mexico. Recognizing that the issue of the extent of Florida's rights in the submerged lands off of its Atlantic coast was thus still before the Court pursuant to its retained jurisdiction in No. 9, Original, the United States nevertheless included Florida as a defendant in the present case, as to its claims in the Atlantic.

This was done in the belief that the issues affecting the rights of Florida on its Atlantic coast are so similar to the issues affecting the rights of the other Atlantic States as to make it desirable that all be considered together.

Florida then filed a motion for a severance in this case, which the Court submitted to the Special Master by order of November 16, 1970. At the hearing on that motion it appeared that Florida's claims in the Atlantic are not the same as those of the other defendant States, and that Florida does not intend to present any evidence or make any argument with respect to the rights of British colonies under colonial grants or charters, or with respect to any claim that States of the Union have purely constitutional rights of a proprietary character in the submerged lands or natural resources of the seabed adjacent to their coasts. The Special Master has advised the parties that he is submitting his recommendation that the proceedings against Florida in this cause be severed from those against the other Atlantic States, provided, however, that Florida shall nevertheless be entitled to the benefits of any determination that the Court may make as to other States in this cause with respect to those questions to the extent that such determination may be relevant under the equal footing doctrine or otherwise applicable to the factual situation of the State of Florida.

At the same time, circumstances have arisen making it necessary for the parties to move in No. 9, Original, to institute supplemental proceedings to define the limit of Florida's submerged lands in the Gulf of Mex-

ico with greater particularity than was done in the 1960 decision. A joint motion for that purpose is being filed simultaneously herewith. It thus appears that proceedings to define the limits of Florida's rights in the submerged lands of the Gulf and Atlantic will be proceeding simultaneously. As there are common questions of law and fact presented, both parties believe and, as the parties are advised, the Special Master is recommending that it will be more orderly and convenient to have the State of Florida's claims to the submerged lands in the Gulf and in the Atlantic determined in a single proceeding. This motion to consolidate the severed proceedings in the present case with the proceedings about to be initiated in No. 9, Original, is designed to accomplish that purpose.

The issues affecting Florida here include some that are similar in character to those affecting the other Atlantic States and those affecting Louisiana in the supplemental proceedings now pending before a Special Master in No. 9, Original. We assume that the Court will consider reference to a Special Master appropriate here for the same reasons that led it to make reference in those cases. We therefore have moved in No. 9, Original, that the consolidated proceedings as to Florida be referred either to the Honorable Albert B. Maris, whose position as Special Master in this cause has already introduced him to the subject, or to such other Special Master as the Court may designate. This reference should be made subject to the condition that Florida will not present evidence or argument with respect to the issues raised by other Atlantic States,

referred to above, namely, the rights of British colonies under colonial grants or charters, or the claim that States of the Union have purely constitutional rights of a proprietary character in the submerged lands or natural resources of the seabed adjacent to their coasts. It is understood that Florida shall nevertheless be entitled to the benefit of any determination that the Court may make in No. 35, Original, with respect to those questions, to the extent that such determination may be relevant under the equal footing doctrine or otherwise applicable to the factual situation of the State of Florida. Moreover, it is understood that Florida is not prohibited from approving or submitting *amicus curiae* briefs in No. 35, Original.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General of
the United States.

ROBERT L. SHEVIN,
Attorney General of
the State of Florida.

March 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971

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IN THE

Supreme Court of the United States

October Term, 1970 — No. 35, Original

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v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA and FLORIDA

REPORT OF THE SPECIAL MASTER UPON MOTION OF THE STATE OF FLORIDA FOR SEVERANCE

March 29, 1971

ALBERT B. MARIS
Special Master

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

IN THE

Supreme Court of the United States

October Term, 1970 No. 35, Original

UNITED STATES OF AMERICA

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA and FLORIDA

REPORT OF THE SPECIAL MASTER UPON MOTION OF THE STATE OF FLORIDA FOR SEVERANCE

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to the order of the Court entered November 16, 1970, 400 U.S. 914, your special master submits the following report with respect to the motion filed by the State of Florida on February 9, 1970 for a severance, which motion was referred to me by that order.

The complaint filed by the United States in this case alleges in effect that the United States is entitled, to the exclusion of the defendant states, to exercise sovereign rights over the seabed and subsoil underlying the Atlantic Ocean seaward from the three mile limit (within which

limit the United States had transferred its rights to the states by the Submerged Lands Act, 67 Stat. 29) to the limits of the continental shelf, for the purpose of exploring the area and exploiting its resources. The complaint asserts that the defendant states claim rights in the seabed and subsoil in question and that one of them, the State of Maine, has purported to grant exclusive oil and gas exploration and exploitation rights in a portion thereof. A separate cause of action is asserted against each defendant state and a declaratory decree and order for accounting are sought.

Each defendant state has filed an answer to the cause of action asserted against it. In the case of the 12 defendant states other than Florida, each answer sets up an affirmative defense to the effect that the state received from England, while it was a British colony (and, in the case of New York, also from Holland while it was a Dutch colony), certain rights in the portion of the seabed and subsoil in question adjacent to its Atlantic coast and that it did not lose these rights upon declaring its independence or give them up upon joining the federal Union, but continues to have them.

The affirmative defense set up by the State of Florida is entirely different from those of the other defendant states. That state asserts that by the Act of June 25, 1868, 15 Stat. 73, Congress approved the marine boundaries of the state, as set out in Article I of its Constitution of 1868, which boundaries, it asserts, run more than three miles seaward from its coast in part in the Atlantic Ocean, and that Congress thereby granted to Florida whatever interest the United States possessed in that maritime territory within those boundaries.

Following the order of reference of November 16, 1970, I held a hearing on the motion of the State of Florida for a severance. At the hearing counsel for that state asserted that its defense was based on its claim that the Act of 1868 had approved the marine boundaries claimed in its 1868 Constitution and that this approval constituted a

grant to the state of rights in the seabed and subsoil of the adjacent waters of the Atlantic Ocean within those boundaries or upon a construction of the Submerged Lands Act, 67 Stat. 29. Florida disclaimed any intention to claim any rights derived from England under colonial grants or charters or any purely constitutional rights of a proprietary character in its capacity as a state of the Union, except that if any such rights should hereafter be determined in this case to exist with respect to any of the other 12 defendant states, Florida would want to be entitled to the benefit of that determination to the extent relevant and applicable to its factual situation.

On the basis of the position of Florida as thus stated, it appeared to me that while there are undoubtedly questions of law and probably also of fact common to the causes of action of the United States against the 12 defendant states other than Florida which have been joined in this action, there are no questions of law or fact, except possibly with respect to the construction of the Submerged Lands Act, common to those 12 causes of action and the cause of action asserted against the State of Florida. I accordingly concluded that the cause of action against Florida was misjoined with the other 12 causes of action in this case and should be severed and proceeded with separately, as provided by Rule 21, F.R.C.P. Counsel for the United States agreed with this view. Accordingly, on January 14, 1971, I made an order as special master severing the cause of action against the State of Florida for hearing and determination. I was in doubt, however, as to my authority to order the cause to be proceeded with wholly separately, as Rule 21 contemplates. I, therefore, recommend that the Court itself order the cause of action against the State of Florida to be severed and proceeded with separately.

In the case of United States of America v. States of Louisiana, Texas, Mississippi, Alabama and Florida, No. 9, Original, the Court has determined that the State of Florida is entitled, as against the United States, to all the lands, minerals and other natural resources underlying

the Gulf of Mexico, within the historic boundaries described in its 1868 Constitution, extending seaward from its coast line for a distance not over three leagues, with the exceptions provided by section 5 of the Submerged Lands Act. 363 U.S. 121. In the decree entered with respect to the cause of action against Florida in that case on December 12, 1960, 364 U.S. 502, the Court reserved jurisdiction to entertain such further proceedings as may from time to time be deemed necessary or advisable to give proper force and effect to the decree. It appears that in the amended complaint filed by the United States against the State of Florida in that case an adjudication was also sought of the respective rights of the United States and the State of Florida in the seabed and subsoil underlying the ocean off the Atlantic coast of Florida, a question substantially the same as that raised in the cause of action of the United States against Florida in No. 35, Original, but it seems clear that this portion of the amended complaint was not adjudicated by the decree entered December 12, 1960.

Since the entry of the decree of December 12, 1960 in No. 9, Original, questions have arisen as to the location of the coast line of Florida, within the meaning of the decree, and especially as to where at various places on the Florida Gulf coast the line of demarcation should be drawn between the inland waters of that state and the high seas, which line of demarcation is to be regarded as the coast line for the purpose of demarcating the outer limits of the submerged lands in the Gulf of Mexico in which the State of Florida has rights under the decree of December 12, 1960. It appears, therefore, that supplementary proceedings in No. 9, Original, under the jurisdiction reserved in that decree will be required to adjudicate these questions.

It thus appears that the cause of action against Florida, in No. 35, Original, when severed should, in the interest of expedition and to avoid duplication of effort, be consolidated with the unadjudicated portion of the complaint against Florida in No. 9, Original, involving its

Atlantic coast, and any supplementary proceedings in that case with respect to the location of the shore line of the Gulf coast of Florida. For, as has been pointed out, the unadjudicated portion of the complaint in No. 9, Original, is substantially the same as the cause of action against Florida in No. 35, Original, while questions with respect to Florida's coast line and the outer limits of its inland waters on its Atlantic coast are likely to be raised in No. 35, Original, which will be similar in character and involve similar questions of law to those which will be raised in the supplementary proceedings in No. 9, Original.

Your special master is informed that counsel for both the United States and Florida have filed, or are about to file, with the Court joint motions in No. 35, Original, to consolidate for all purposes the cause of action against the State of Florida in that case with the further proceedings against Florida in No. 9, Original, and in No. 9, Original, to effect the same consolidation and to order supplemental proceedings with respect to Florida under the jurisdiction reserved by the Court in its decree of December 12, 1960. It appears to your special master that such consolidation and supplemental proceedings are appropriate and timely.

Your special master accordingly recommends that in case No. 35, Original, heretofore referred to him, an order be entered

(a) severing the cause of action asserted by the United States against the State of Florida for all purposes;

(b) consolidating that cause of action with the remaining proceedings with respect to Florida in the case of United States v. Louisiana, Texas, Mississippi, Alabama and Florida, No. 9, Original;

(c) and that such further proceedings be had in the consolidated cause with respect to the State of Florida as justice may require.

The order should be upon the condition that the State of Florida will not present any evidence or make any argument in the consolidated cause with respect to the rights

of the British colonies under colonial grants or charters, or with respect to any claim that the States of the Union have purely constitutional rights of a proprietary character in the submerged lands or the bed of the sea adjacent to their coasts; but the State of Florida should be entitled in the consolidated cause to the benefit of any determination that the Court may make in No. 35, Original, with respect to those questions to the extent that such a determination may be relevant and applicable to the factual situation of the State of Florida.

Respectfully submitted,

ALBERT B. MARIS
Special Master

March 29, 1971

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ABBREVIATIONS AND USAGE IN THIS BRIEF

California case	*United States v. California*, 332 U.S. 19 (1947).
ICJ Opinion	*North Sea Continental Shelf Cases*, 1969 I.C.J. 3 (1969).
OCSLA	Outer Continental Shelf Lands Act, 67 Stat. 462; 43 U.S.C. §§ 1331-1343 (1953).
Shelf	Continental Shelf; 43 U.S.C. § 1331(a); 15 U.S.T. (Pt. 1) 471, Art. 1.
Shelf Convention	1958 Geneva Convention on the Continental Shelf, 15 U.S.T. (Pt. 1) 471.
State	State of the United States.
SLA	Submerged Lands Act, 67 Stat. 29; 43 U.S.C. §§ 1301-1315 (1953).
Truman Proclamation	Presidential Proclamation No. 2667, Sep. 28, 1945, 59 Stat. 884 (1945).
U. S. Brief	Brief for the United States in Support of Motion for Judgment in this case.
Whiteman Digest	Whiteman, *Digest of International Law*, Vol. 4 (Department of State Publication No. 7825, 1965).

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in the Supreme Court of the United States

OCTOBER TERM, 1971

No. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, AND GEORGIA

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The undersigned as counsel for The Florida Council of 100, Inc., a non-profit corporation of the State of Florida, move for leave to file the attached brief as *amicus curiae* in the present controversy in order to present to

this Court: a) a new line of argument which has never been presented to or considered by this Court in the present or in prior submerged lands cases; and b) argument and a recommended conclusion different from the positions asserted by the Plaintiff and Defendants in the present controversy, specifically an argument of concurrent Federal and State jurisdiction which is unlikely to be advocated by any of the parties in this case. The interests of justice will be served if the parties in this case respond to the arguments in the attached brief.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

NO. 35, ORIGINAL

THE UNITED STATES OF AMERICA

vs.

THE STATE OF MAINE, *et al.*

BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Florida Council of 100, Inc., a non-profit corporation of the State of Florida founded in 1964, is dedicated to the purposes of improvement and development of the economic climate of the State and the nation. Issues of the optimum development and conservation of the submerged lands of the Atlantic Continental Shelf and the continental shelf of the United States are within these interests. The Executive Committee of the Florida Council of 100 has authorized the submission of this brief.

Counsel individually also have a professional interest in the resolution of the present controversy through the rational development and determination of the law relating to the issues of this case. Dennis M. O'Connor is Professor of Law and Marine Sciences, and Director of the Ocean Law Program, at the University of Miami. Willard D. Dover has served as Chairman of the Boundaries Committee, and as a Commissioner, of the Florida Commission on Marine Sciences and Technology.

Appreciation is expressed to the Florida Commission on Marine Sciences and Technology for a research grant to the University of Miami which permitted completion of certain research upon which this brief is in part based.

STATEMENT

This suit was brought to establish as against the defendant States exclusive rights over the seabed and subsoil of the continental shelf lying off their shores under the Atlantic Ocean. The State of Maine issued a prospecting permit for oil and gas exploration on the continental shelf lying off its shores. The other defendant States had made various claims to assert some rights in and jurisdiction over the portions of the continental shelf off their shores. When the Executive Branch found after communication with these States that they would not relinquish entirely all claims to some rights in and jurisdiction over the continental shelf, the Federal Government brought this suit "for a declaration of the exclusive rights of the United States, as against the defendant States, in the subsoil, seabed, and natural resources underlying the Atlantic Ocean, including the Straits of Florida, more than three geographical miles from the ordinary low-water line and from the outer limit of inland waters . . . " (Complaint, p. 10.)

QUESTION PRESENTED

Whether rights in and jurisdiction over exploration and exploitation of the resources of the continental shelf underlying the Atlantic Ocean beyond three miles from the coastline belong to the United States or to the defendant States exclusively or concurrently.

SUMMARY OF ARGUMENT

The formation of our nation and adoption of our Constitution did not confer or allocate, prior to this Century, exclusive legal rights in the Atlantic Continental Shelf as between the States of the Union and the Federal Government of the United States for at least two reasons: first, our constitutional history did not assign any territorial or sovereign rights to the Federal Government without the consent of the States; and secondly, legal rights (as compared to inherent sovereign rights) in the Shelf came into existence only in the Twentieth Century. Neither ancient grants nor successions from foreign Crowns limit the contemporary assertion of either Federal or State rights in the Shelf, as Shelf rights, unlike an unknown resource content of a known territory or property which was validly conveyed, are of a new type based upon the inherent power of a sovereign to assert a jurisdiction beyond its territory and boundaries on the bases of both the contiguity of seabed resources and the expected impact of their exploration and exploitation upon its territory.

The policy basis underlying the submerged lands cases which held that coastal States did not have rights in seabed resources beyond their coastline has been reversed by Con-

gress when it transferred all the submerged lands then in controversy (from the coastline three miles seaward, and within "boundaries" as defined in legislation) to exclusive State jurisdiction for purposes of exploration and exploitation of seabed resources. This Congressional action left such cases without controlling or even persuasive force in deciding the present controversy.

The Constitutional Powers of foreign relations, defense, interstate commerce and conservation which have been delegated to the Federal Government cannot be shown to require exclusive federal jurisdiction over the Shelf for other purposes. No "aspect of external sovereignty" is presented by domestic allocation within the framework of our Constitution and national laws of Federal and State jurisdiction over the resources of the Shelf, as our nation possesses these resources exclusively relative to the other nations of the world. Because of their contiguity, and the expected impact of their development, Shelf resources may be the subject of rights and jurisdiction both of coastal nations and coastal States. The principles of jurisdiction applied in our national law operate alike for both States and the Federal Government; and the capacity of the States to exercise jurisdiction is limited only by the constitutional delegation of powers to the Federal Government and by the Federal exercise of competence within the proper sphere of Federal authority. As neither Congress nor the Executive has taken all legal rights in the Shelf since these arose in the Twentieth Century, nor has claimed nor by preemption exercised exclusive jurisdiction over Shelf resources, the coastal States may exercise a concurrent jurisdiction over the Shelf with the Federal Government.

Resolution of the political questions subsequent to finding of concurrent Federal-State jurisdiction over the Shelf is best left to Congress, the Executive and the Coastal States rather than continue protracted litigation of the unfolding issues in a multiplicity of cases.

I.

THE FORMATION OF OUR NATION AND ADOPTION OF OUR CONSTITUTION DID NOT CONFER OR ALLOCATE EXCLUSIVE LEGAL RIGHTS IN THE OUTER CONTINENTAL SHELF (HEREINAFTER "SHELF") AS BETWEEN THE STATES OF THE UNION (HEREINAFTER "STATES") AND THE FEDERAL GOVERNMENT OF THE UNITED STATES.

A. Our Constitution and Constitutional History did not confer or allocate exclusive legal rights in the Shelf as between the States and the Federal Government.

(1) In describing the creation and flow of legal territorial rights because of and during the Revolution against England, this Court held, regarding acts which took place in 1777:

> ". . . There was no territory within the United States that was claimed in any other right than that of some one of the confederated States; therefore, there could be no acquisition of territory made by the United States, distinct from or independent of, some one of the States . . ." *Harcourt v. Gaillard*, 12 Wheat. 523, 526 (1827).

(2) The Articles of Confederation specifically negatived any claim by the national government to territorial rights at the expense of the States, stating in Article IX:

> . . . no State shall be deprived of territory for the benefit of the United States."

(3) The Constitution was also carefully drawn to forfend the very type of unwarranted assertions of sovereign power and property rights by the central government which are involved in this case. As to territorial and property rights, the Constitution is clear, concluding, as it does, with the statement in Article IV, Section 3, Clause 2:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States, and *nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.*" (Emphasis added).

(4) As to governmental powers (sovereign rights) which may be applied to events occurring beyond or within the territory of the States, the Bill of Rights in Amendment X made it perfectly plain that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

(5) There is no expressed rule or principle of the Constitution purporting to grant, dispose of, or apportion exclusive sovereign or property rights in subsequently-acquired contiguous territory or areas as between the adjacent State and the Federal Government. The law and practice in instances of acquisition of contiguous areas is further discussed below in Part V, B (2) of this brief.

(6) The basic claim of the Federal Government, that the only rights which the States may have in the Shelf are those which may have been granted to them by the Federal Government, is unfounded and unsound. Underlying its entire position, and containing the real gist of its theory of the case, is the claim stated in the Brief for the United States in Support of Motion for Judgment (hereinafter "U.S. Brief") at page 20:

> "C. EXCEPT AS GRANTED BY CONGRESS SINCE STATEHOOD, THE COASTAL STATES HAVE NO RIGHTS IN THE SUBMERGED LANDS OR NATURAL RESOURCES SEAWARD OF THE COASTLINE."

This is a spurious claim, without foundation in constitutional law or policy. As seen above, our Constitution does not grant, dispose of, or apportion exclusively sovereign or property rights as between the States and the Federal Government without the consent of the States. Therefore, any exclusive rights the Federal Government has in the Shelf, under national law, must derive either from: (a) the States of the Union (though not at the time the Union was formed); or (b) the inherent rights of states generally.

(7) The groundless assumption that the whole bundle of rights in the Shelf must belong to one party to the exclusion of the other (U.S. Brief, 7, "Question Presented," and Answers of Various of the States Defendants filed in 1969) also flies in the face of our federal system. The simple and beautiful truth about our form of government is that it is based upon a duality of rights and powers. To say that all Shelf rights must necessarily remain as a whole in the States or pass exclusively to the central government upon the formation of the Union is to deny the very soul and structure of that Union, as many rights are neither exclusively Federal nor State.

(8) Based upon the foregoing, we submit that the Constitution of the United States and the formation of the Union did not confer, allocate, grant or dispose of exclusive rights in the Shelf as between the States and the Federal Government. The effects of the delegated powers of the United States and the reserved sovereignty of the States relative to present day allocation of Shelf rights are discussed more fully in Parts IV and V of this Brief.

B. Legal Rights in the Shelf came into existence in the Twentieth Century.

(1) Some of the confusion in the U.S. Brief stems from its allegation that no Shelf rights existed at the time of the Revolution and its inconsistent conclusion that such rights passed to the United States upon the formation of the Union. (U.S. Brief, 11-12.) We submit that the stated conclusion is rendered false by the truth of the allegation.

(2) The Government makes the point that "exploitive rights" in the Shelf did not exist at the time that our Union was formed. (U.S. Brief, at 11.) In the sense that the term "exploitive rights" is used as meaning "legal rights to exploit," we agree.

(3) Whether viewed as property rights or sovereign rights, all rights in the Shelf (termed variously "rights," "sovereign rights" and "exploitive rights" in the U.S. Brief) came into existence as legal rights only after two things happened: (a) such rights were perceived with attendant claims being made to them; and (b) the means for assertion and exercise of such rights became available by reason of the advance of civilization and technology. As used in jurisprudence the term "right" connotes a well-founded legal claim, or the capacity to assert a legally enforceable claim. *Bouvier's Law Dictionary*, Vol. 2 *Right*, pp. 927-929 (1897). 77 C.J.S. *Right*, 392 (1952).

(4) In our national law, the coastal States began to perceive and assert legal rights in the Shelf about 1921 with the California leasing statute. Other States subsequently made similar claims, asserting and bringing into exercise claims sometimes said to have been derived from their Constitutions or our constitutional history. No Federal assertion of any claims to legal rights in the Shelf was made until 1937, when the Secretary of the Interior, Harold Ickes, began to have "doubts" as to whether the Federal or State governments owned the submerged lands. Legislative History — Submerged Lands Act, Prior Committee Reports, Appendix I, H. R. Rep. No. 1778 (83d Cong., 1st Sess.; 1953 *U.S. Code Cong. and Admin. News*, 1415, 1417-1418, 1426-1427 (1953) (excerpt, pp. 1417-1422, is reproduced in Appendix to this Brief). The tem-

poral relationship of these Federal and State claims is not, however, dispositive of the sovereign or property rights which may exist in the Shelf. Under national law, as discussed herein and below, it is our Constitution and laws which are controlling both (a) as to the distribution of sovereign powers within our nation, and (b) as to the allocation of, and power of disposition over, property rights as between the States and the Federal Government.

(5) The phrase "continental shelf" was invented and used in a geological and geographical sense in 1887, but its emergence in a juridical context was precipitated by the Truman Proclamation of 1945 (Presidential Proclamation No. 2667, September 28, 1945, 59 Stat. 884 (hereinafter "Truman Proclamation")). Gutteridge, The 1958 Geneva Convention on the Continental Shelf, XXXV *Brit. Yb. Int'l.* L. 102 (1959)

(6) The submerged portions of the continent existed prior to the advent of civilization and law, although the characteristics of these portions were not recognized until recent decades. They became the subject of legal rights only in the Twentieth Century. In the most recent authoritative judicial pronouncement on the subject, the International Court of Justice put it this way:

> "97. . . . The natural resources of the subsoil of the sea in those parts which consist of continental shelf are the very object of the legal regime established subsequent to the Truman Proclamation . . ." *North Sea Continental Shelf Cases*, (1969) I.C.J. 3, at 51. (Hereinafter "ICJ Opinion.")

(7) Juridical development of legal rights in and to the Shelf began in 1945, and those legal rights came into being prospectively only, not retroactively. See *Matson Navigation Company v. United States* (The Montebello), 141 F.Supp. 929 (Ct. Cl., 1956).

(8) Legal rights in the Shelf, therefore, could not have been acquired by, or granted to, any entity until the Twentieth Century. The inherent rights in the Shelf associated with the sovereignty and sovereign powers of coastal States and nations are discussed more fully below in Parts IV and V of this Brief.

II.

NEITHER ANCIENT GRANTS NOR TERRITORIAL BOUNDARIES LIMIT EITHER STATE OR FEDERAL LEGAL RIGHTS IN THE SHELF.

A. Ancient grants from, and successions to, the Crowns of England, Holland or Spain are not essential to the resolution of this case and reference to them serves only to obfuscate the real issues.

(1) It is axiomatic that a general conveyance of real property or a cession of territory also transfers rights to the minerals and other resources located therein. But legal rights in the Shelf or jurisdiction over its resources (which lie beyond the territory of States) are a new type of property or sovereign rights not subject to the principles of implied conveyance or limited by express limitation of conveyance. The asserted ancient grants and executory

conveyances of rights in the offshore submerged lands may be affirmatively controlling if a State is recognized as the beneficiary of an effective grant, but their absence does not limit either State or Federal legal rights in the Shelf.

(2) The Federal Government proceeds at some length to demonstrate that there were no legal or exploitive rights in the English Crown and makes what it seems to think is a telling point: that the Crown did not pass these nonexistent rights on to Canada or Australia (or, by inference, to the American Colonies) (U.S. Brief, 24-30). The Government also undertakes to prove that no Shelf rights existed in England and Canada until after 1876 or 1878 (U.S. Brief, 25). We agree, but point out that it was only long after those dates that any such rights came into existence. (See Part I, B of this Brief.)

(3) How rights which did not exist and were completely unknown could have been passed on to anyone is left unexplained. But the really exquisite nature of this series of *non-sequiturs* becomes apparent only when they are distilled and put together to form the Federal Government's thesis: Since exploitive rights were unknown and did not exist in the Crown of England, and since the Crown did not pass on to the Colonies those unknown and nonexistent rights, the Colonies passed such rights to the Federal Government of the United States at the time of formation of the Union. The magical process by which an unknown nothing was transformed into an unknown something, underwent a mythical passage to a central government, and then remained unknown for more than 150 years, is still secret.

(4) Rejecting these sophistries, we suggest that law and plain common sense require the conclusion that neither the States nor the Federal Government enjoyed any legal or exploitive rights in the Shelf before, upon, or immediately after the formation of the Union for one simple reason: those rights came into existence more than a century later.

B. Modern boundaries and the delimitation of territory do not limit either State or Federal jurisdiction in this case, for the legal rights in and jurisdiction over the Shelf lie beyond the boundaries of all parties.

(1) The Truman Proclamation made no mention of boundaries, but clearly was intended to apply beyond the territorial sea of the United States, the limits of which are commonly recognized as our nation's most seaward territorial boundary. The White House Press Release which accompanied the Truman Proclamation spoke of a depth of contour line of about 100 fathoms, which line lies in most areas beyond the limits of the territorial sea. Whiteman, Digest of International Law, Vol. 4, pp. 757-758 (Department of State Publication 7825, 1965) (hereinafter "Whiteman Digest"). The concurrent Executive Order (No. 9633; 10 F. R. 12305; 3 C.F.R. 437 (Supp., 1957)) preserved the rights of the States and the Federal Government in the Shelf outside as well as within the three-mile limit with the following language:

> " . . . Neither this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states,

relating to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three-mile limit." 1945 U.S. Code Cong. Service, p. 1315 (1945). Whiteman Digest, 758-759.

Revocation of this Executive Order and establishment of a naval petroleum reserve (solely for oil and gas exploration and exploitation) by Executive Order No. 10426 (18 F.R. 405; 3 C.F.R. 924-925 (Supp., 1958)) did not affect the legal situation of whatever rights the States may have had in the Shelf. It clearly did not attempt to exclude all rights of the States in the Shelf, as it established a reserve "for oil and gas only," and it was declared "[s]ubject to valid existing rights." *Id.* § 1 (a) and (b).

(2) The geographic marine surface boundaries for purposes of jurisdiction over navigation and other uses of the water column, such as fishing, do not limit jurisdiction over the submerged portion of the continent. In point of time, such boundaries were claimed and set long before there was any knowledge of, much less claims to, the use and development of the Shelf. Whiteman Digest, Ch. IX, §1 (pp. 1-14) and §2 (pp. 14-137), Ch. XI, §1 (pp. 740-764). "By 1900, the three-mile or one-league limit had been positively adopted or acknowledged as law by twenty of the twenty-one states which claimed or acknowledged a territorial sea at that time. The twenty states were . . . and the United States." Heinzen, *The Three Mile Limit: Preserving the Freedom of the Seas*, 11 Stan. L. Rev. 597, 632-634 (1959).

(3) In the first *California*, *Louisiana* and *Texas* cases, the States argued that boundaries should control.

"The basis of California's asserted ownership is that a belt extending three English miles from low water mark lies within the original boundaries of the state . . . " *U. S. v. California*, 332 U.S. 19, at 23 (1947) (hereinafter "*California* case"). See also, *U. S. v. Louisiana*, 339 U.S. 699, 705 (1950), and *U. S. v. Texas*, 339 U.S. 707, 711 (1950). The holdings were that boundaries did not control. *California* case at 31; *U. S. v. Louisiana*, 339 U.S. 699, 705; *U. S. v. Texas*, 339 U.S. 707, 720; (U. S. Brief, 22-23).

(4) In submerged lands legislation the term "boundaries" has been relevant only in the Submerged Lands Act of 1953 (67 Stat. 29, 43 U.S.C. §§ 1301-1315) (hereinafter "SLA"). Even there, however, the term "boundaries" was used only to define the express quitclaim by the Federal Government to any proprietary interest within the accepted State "boundaries." "Boundaries" as used therein did not purport to determine any matters relating to the seabed beyond such areas. To the contrary, except for the quitclaim of submerged lands under the U. S. territorial sea, the SLA expressly preserved whatever rights the United States may have had in the Shelf (43 U.S.C. §1302) (just as did the Truman Proclamation, with its attendant Executive Order, some eight years prior to the SLA).

(5) Approval by this Court of a 3-league, or 9-mile, boundary for Texas and Florida in the Gulf of Mexico subsequent to the SLA had the effect of according these coastal States exclusive legal rights in the natural resources of the Shelf beyond the boundaries of the United States. *U. S. v. Louisiana*, 363 U.S. 1, 84 (1960); *U. S. v. Florida*, 363 U.S. 121, 129 (1960). The language of the SLA confirming United States Shelf jurisdiction beyond boundaries was held further in *U. S. v. Louisiana et al.* 363 U.S.

1, 83-85 to give exclusive jurisdiction to the United States, a matter which this brief discusses below in Part VI.

(6) The Outer Continental Shelf Lands Act (67 Stat. 462, 43 U.S.C. §§1331-1343) (hereinafter "OCSLA") dealt with lands or rights entirely beyond the boundaries of the States and the nation, that is, the area in question in this case. But nothing in that Act purports to divest States of the Union of any rights, although the States' power to apply taxation laws to the Shelf was limited. Congress merely exercised its undoubted authority to set up its own rules for Federal leasing on the Shelf. The legislative history of the OCSLA is clear. The Committee Report states:

> "Purpose of the Bill
>
> "The purpose of H.R. 5134 is to amend the Submerged Lands Act in order that the area in the outer Continental Shelf beyond the boundaries of the States may be leased and developed by the Federal Government. At the present time the Submerged Lands Act merely established that the seabed and subsoil in the Outer Continental Shelf beyond State boundaries appertained in [sic] the United States and was subject to its jurisdiction and control.
>
> "There are no provisions for the leasing and development of the area by the Federal Government nor are provisions made for the exchange of State leases for Federal leases in the same area.

"This bill contains provisions to accomplish those very objectives." H.R. Rep. No. 413, 83rd Cong., 1st Sess. (1953); *1953 U.S. Code Cong. and Admin. News*, Vol. 2, pp. 2177-2178 (1953).

Indeed, the claim language in the OCSLA is unmistakably, and, we believe, significantly, similar to the Truman Proclamation (adding only the phrase "power of disposition" to cover and authorize the leasing program being established in the Act). 43 U.S.C. §1332. Setting up a leasing program in an area where the Federal Government unquestionably has rights (though non-exclusive) is an entirely different thing from an attempt to divest the States of all Shelf rights. As the Court well knows, Congress considered this whole matter for many years, and suffered some vetoes, before the 1953 legislation was finally drafted, passed and approved by the President. The voluminous Committee Reports (*See, e.g.* excerpt in Appendix to this Brief), as well as the *California* (332 U.S. 19), *Louisiana* (339 U.S. 699) and *Texas* (339 U.S. 707) cases, are replete with discussions of boundaries. Had Congress later wanted to base an attempted divestitude of the Shelf rights of States on boundaries, it most certainly would have said so. The feeble and contrived allegation of the Federal Government on this point serves to emphasize the validity of our position. The Government states (U. S. Brief, 23-24):

" . . . So, also, *although Congress did not purport to foreclose greater claims*, the underlying premise of the Submerged Lands Act — which in 1953 granted a three mile belt to the State bordering on the Atlantic Ocean — is that the present defendants theretofore held no rights in the bed

of the territorial sea and thereafter would hold none farther seaward, where federal administration was provided for under the Outer Continental Shelf Lands Act enacted in the same year . . . " (Emphasis added.)

This allegation says that, although Congress did not purport to foreclose the States' claims on the Shelf, such claims were automatically foreclosed by an underlying premise of the SLA. We suggest that such a conclusion is patently unwarranted, and that boundaries simply have no bearing on the matter of Shelf rights for this clear reason: Shelf rights are generally beyond territorial boundaries and Congress did not change this legal situation.

III.

THE POLICY BASIS UNDERLYING THE FIRST CALIFORNIA SUBMERGED LANDS CASE HAS BEEN REVERSED BY CONGRESS, LEAVING IT WITHOUT CONTROLLING OR EVEN PERSUASIVE FORCE IN DECIDING THE PRESENT CONTROVERSY.

(1) In the case of *United States v. California* there were only two real issues on the merits, and they were decided under the heading *"third"* in the Opinion (332 U.S. 19, at 29-39). The Court held:

(a) that California had not produced enough references and evidence to prove:

> "... that the thirteen original colonies separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it." (332 U.S. 19, at 31); and

(b) the commerce, defense and foreign relations powers of the national government required:

> "... that the Federal Government rather than the state has paramount rights in and power over that belt [the three-mile territorial sea], an incident to which is full dominion over the resources of the soil under that water area, including oil."
>
> (332 U.S. 19, at 38-39; parenthetical matter added).

(2) Holding (a) is not controlling in this case because, firstly, it dealt with a matter of evidence and proof. Review of the Whiteman Digest, Ch. IX, indicates that most authorities on the territorial sea were subsequent to the formation of our nation. Additionally, the fact that California failed to prove that the 13 original States exercised *dominium* over the territorial sea cannot be held against the parties in this case, 10 of whom are original States. Secondly, legal rights in the Shelf were not acquired by either the States or the Federal Government until much later than the revolution against England.

(3) Holding (b) is clearly based on policy considerations determined by the Court to exist at that time in 1947. Such a policy was also a clear basis for the 1950 *Louisiana* decision (339 U.S. 699, at 705) and the 1950

Texas decision (339 U.S. 707, 712). *But the policies relied on by the Court in 1947 and 1950* to allocate the seabed from the coastline out to three miles from shore to the Federal Government *were reversed by action of the Congress and the President in 1953* by enactment of the SLA. See Appendix to this Brief. We are mindful of the provision of the SLA that it shall not be "deemed to affect in any wise the rights of the United States . . . " (43 U.S.C. §1302) on the Shelf (outside of the State and the United States boundaries). It is clear that this language in the SLA does not give anyone any rights in the Shelf and its resources. What it does accomplish is a reversal of the policy basis for the holdings in the *California* case and the *Louisiana* (339 U.S. 699) and *Texas* cases (339 U.S. 707). Without that policy basis, the reasoning in those cases cannot be sustained unless there is some other compelling reason why the long-recognized claims of States must be forfeit. But the Federal Government does not even allege any other or new policy, basing its present claims squarely on the previous cases (U.S. Brief, 22-24). Indeed, the Government (U.S. Brief, 22) itemizes the same policy bases for its present claims as: " . . . defense, international relations, and external sovereignty . . . " "External sovereignty" presumably refers to foreign commerce, unless it is merely redundant to "international relations."

(4) Stripped of its policy rationale by Congress, the *California* case today offers no impediment to a review of the factors involved in determining the allocation of Shelf rights. That case was decided in the aftermath of World War II, only six years after an attack on Pearl Harbor, and only five years after blackouts and hysteria on the Pacific coast resulting from the fear of a Japanese amphibious assault. Memories of the plans of enemy con-

quest and control of natural resources in Asia, and of a Nazi proximity to the oil reserves of the Middle East (El Alamein) were fresh and potent. The "Cold War" was just beginning and the United Nations was in a precarious struggle for life. Criticism is not here intended. To the contrary, we are urging that time and the historical perspective of nearly a quarter century reveal far-reaching changes both within and outside our nation.

(5) Currently, the security fear is not of loss of essential natural resources. Nowhere does the Government allege any fear of an invasion from the Shelf or a threat of loss of Shelf resources to foreign nations. To the contrary, the official U. S. position as presented internationally is to demand a "narrow" Shelf (stopping at the 200 meter isobath) with a dedication of the remainder of the ocean floor to the benefit of international community in a "trusteeship zone" and an international regime. Presidential Statement, 116 Cong. Rec. X S7747-7748 (May 25, 1970); and Draft United Nations Convention on the International Sea-Bed Area (Working Paper Submitted by the United States to the United Nations Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction), Arts. 1, 2, 3, 26 and 27, 25 U.N. GAOR, Supp. No. 21 (A/8021), pp. 130, 132-133, 138-139 (1970).

(6) The security, foreign relations and commerce issues are examined more fully below in Part IV of this Brief. The point being made here is that new policies consistent with those laid down by Congress and the Executive and attuned to the present realities are not foreclosed by the prior decisions of the Court, all of which were based on the *California* case.

IV.

THE CONSTITUTIONAL POWERS DELEGATED TO THE FEDERAL GOVERNMENT BY THE STATES CANNOT BE SHOWN TO REQUIRE EXCLUSIVE FEDERAL JURISDICTION OVER THE SHELF.

The exercise of exclusive Federal Powers by the United States carries with it paramount rights limited to those reasonably necessary to effectuate their specific purposes. It does not establish exclusive rights generally nor establish all rights for all purposes. The need must be evident or shown in each case to the Court.

A. The Foreign Relations Power does not require exclusive Federal rights in and jurisdiction over the Shelf for purposes other than Foreign Relations.

(1) The fact that the Shelf lies in general beyond the limits of the territorial sea does not raise foreign policy problems which prohibit the exercise of some State jurisdiction over the Shelf. The 1958 Geneva Convention on the Continental Shelf (15 U.S.T. (Pt. 1) 471) (hereinafter "Shelf Convention") recognizes the water column above the Shelf as international waters (Art. 3) (Whiteman Digest, 920). And the OCSLA specifically recognizes the water column above the Shelf as international waters (43 U.S.C. §1332 (b)). Both these international and national prescriptions, and the ocean law associated with them, are binding upon the States in their exercise of any jurisdiction which they may have over the Shelf. The Department of State did not object to language in the Execu-

tive Order which accompanied the Truman Proclamation and provided that the Order and the Proclamation did not affect the determination of issues between the Federal Government and the States. Whiteman Digest, 755-756.

(2) The United States has not based its territorial sea or international boundary claims on Shelf considerations. Quite to the contrary, it has consistently opposed and protested the claims of other nations (particularly in Latin America) to extensive territorial seas based on an interpretation by those nations that such claims follow the Truman Proclamation. Whiteman Digest, 793-814 and 874-882.

(3) No foreign affairs problems have been caused by the recognition by the Court on the basis of the SLA of a nine-mile boundary in the Gulf of Mexico for submerged lands of Florida and Texas — six miles into or beneath international waters. It was held by the Court in those cases that the question of State and Federal jurisdiction over these areas of the Shelf was a matter of domestic concern. *U. S. v. Louisiana et al.*, 363 U.S. 1, 64, 84; *U. S. v. Florida*, 363 U.S. 121, 129.

(4) International Law, codified in the Shelf Convention and confirmed in the ICJ Opinion, recognizes that the Shelf rights of the coastal nation are exclusive as regards any other nation, regardless whether the coastal state asserts any claim. Shelf Convention, Art. 2. No other nation has any interest. Thus, the allocation of such rights internally within a nation cannot be the concern of any other nation.

(5) The States presently exercise a jurisdiction to prescribe laws in some cases for foreign ships in the territorial sea, and in ports and other internal waters. Even for admiralty questions, which are generally within federal jurisdiction, the States prescribe law for such matters as leins, local regulations and torts. 2 Am.Jur. 2d *Admiralty* §7, pp. 723-724 (1962). See also the discussion of authority over internal waters, the territorial sea and adjacent ocean areas in McDougal and Burke, *The Public Order of the Oceans*, Chs. 2, 3 and 6 (1962). There is considerable commerce by foreign ships in these waters, and this State jurisdiction does not harmfully impinge on foreign relations or adversely affect foreign affairs or security interests to the detriment of our nation. *A fortiori*, when the jurisdiction of the United States is exclusive relative to the interests of the other nations of the world, as it is on the Shelf, there can be no question of any undesirable effects on foreign affairs by State exercise of jurisdiction.

(6) There is no question of the authority of the Executive to conclude international agreements regarding the Shelf for any foreign relations purpose, which agreements may determine the extent of jurisdiction (Federal and State) over the Shelf and the manner in which such jurisdiction may be exercised. In the case of *Missouri v. Holland*, 252 U.S. 416 (1920) this Court upheld as against the jurisdiction and police power of a State, a treaty and pursuant legislation of Congress providing for reciprocal protection of migratory birds which make seasonal flights between Canada and the United States. If the United States chooses to enter into an international agreement or treaty defining or limiting Shelf rights there is simply no question of the legal efficacy of this exercise of the foreign

relations power, both as to Federal and State jurisdiction over and rights in the Shelf. The mere possibility of an international agreement which might require a consequential limitation of the rights or powers of the States does not, however, operate to limit or divest such rights or powers.

(7) Finally, were a coastal State to undertake activities on the Shelf, or to exercise any jurisdiction over the Shelf, in a manner adversely affecting the conduct of foreign relations this Court has the power to declare such activities or jurisdiction unconstitutional even absent any specific prohibitory legislation by Congress or prescriptions of the Executive. *Zschernig v. Miller* 389 U.S. 429 (1968).

(8) In sum, the foreign relations power delegated to the Federal Government by the States in our Constitution is adequate for its purpose on the Shelf and at sea as well as on land. It does not require exclusive Federal jurisdiction over the Shelf any more than exclusive Federal jurisdiction over aliens and foreign enterprises or State property on land. To the contrary, as United States legal rights on the Shelf are exclusive relative to other nations the question of Federal and State jurisdiction is purely one of domestic concern and is regulated solely by our national law. While it may be desirable in the future conduct of United States foreign relations to make international agreements limiting or regulating United States jurisdiction over the Shelf, our existing Constitutional Law is entirely adequate to make any such agreements binding upon the States as well as the Federal Government. Moreover, if the States exercise any jurisdiction over the Shelf which adversely affects the foreign relations of the United States, the Legislative, Executive or Judicial Branches of

our Federal Government can curtail such an exercise of jurisdiction. As the foreign relations power is adequate and exclusively federal it cannot afford a basis for allocating legal rights on the Shelf to the Federal Government for purposes other than foreign relations.

B. The Defense and Commerce Powers do not require exclusive Federal rights in and jurisdiction over the Shelf.

(1) No instance can be found where the Defense Power, assigned exclusively to the Federal Government in our Constitution, is inadequate in the territory or property of any State. The Defense Power of the Executive is general and does not require exclusive ownership of the Shelf or any other category of property to protect the security interests of the United States. Nor does the Defense Power operate to divest the States of other sovereign powers.

(2) The States regularly cooperate with the Federal Executive on defense matters relative to territorial and territorial sea areas under their jurisdiction, and there is no reason to suppose that State cooperation in such matters would be any less for any jurisdiction which they may have over the Shelf. The only instance related to jurisdiction over the resources of submerged lands of the Shelf and territorial sea in which the States might have stood in opposition to the Federal Defense Power was precisely one in which all interested Federal agencies, including the Department of Defense, were met in cooperation by State officials in the establishment of safety fairways in the Gulf of Mexico. See Griffin, Accommodation of Conflicting Uses of Ocean Space with Special Reference to Navigation

Safety Lanes, in *Proceedings of the Second Annual Conference of the Law of the Sea Institute*, at pp. 73, 79-81 (1968).

(3) In sum, the Defense Power assigned by our Constitution exclusively to the Federal Government is adequate for its purpose, and does not require exclusive Federal jurisdiction for purposes other than defense for its efficacy or implementation.

(4) The Commerce Power delegated to the Federal Government in our Constitution, and conservation interests, do not require ownership either of territory or of a class of property by the Federal Government for their effectuation. To the contrary, the Power and associated interests and powers are required solely to regulate the use of property by others and to limit the exercise of State and local jurisdiction within our Constitutional framework.

(5) That questions of interstate and foreign commerce may arise as a result of State jurisdiction over the Shelf cannot be questioned. The Legislative, Executive and Judicial Branches of the Federal Government may deal with such questions, however, both by applying our Constitutional and general laws and by prescribing new law within their respective competences.

(6) Conservation of the resources of the Shelf similarly does not present any novel or insoluble problem in our Constitutional framework. The Federal Government can always control or prevent the production of oil and gas (or other resources) on the Shelf in the same way it does on dry land. Conservation is not impaired in any way. Declaration of specific powers for conservation and re-

stricted exploitation of oil and gas resources of the Shelf by Executive Order (No. 10,426; 18 F.R. 405; 3 C.F.R. 924-925 (Supp., 1958)) was expanded by Congress in the OCSLA (43 U.S.C. §1341). There is simply no question of needed reserves being dissipated, and the national interest jeopardized, by irresponsible exploitation.

V.

THE COASTAL STATES HAVE SOME LEGAL RIGHTS IN AND MAY EXERCISE JURISDICTION OVER THE SHELF UNLESS THESE RIGHTS AND POWERS HAVE BEEN CONSTITUTIONALLY TAKEN BY THE FEDERAL GOVERNMENT.

A. The Coastal States Have Some Rights in the Shelf.

(1) The coastal sovereign entity always had inherent rights in the Shelf, but as seen above and reinforced herein these inherent rights did not ripen into legal rights until the Twentieth Century.

(2) The ICJ Opinion and the contemporary opinions of scientists are alike in associating the Shelf with the adjacent land. The ICJ opinion speaks of the origin and nature of both inherent and legal Shelf rights:

> "95. The institution of the continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would never have

existed, remains an important element for the application of its legal regime. The continental shelf is, by definition, an area physically extending the territory of most coastal States into a species of platform which has attracted the attention first of geographers and hydrographers and then of jurists. The importance of the geological aspect is emphasized by the care which, at the beginning of its investigation, the International Law Commission took to acquire exact information as to its characteristics, as can be seen in particular from the definitions to be found on page 131 of Volume 1 of the *Yearbook of the International Law Commission* for 1956. The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf . . .

"96. The doctrine of the continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no one. The contiguous zone and the continental shelf are in this respect concepts of the same kind. In both instances the principle is applied that the land dominates the sea . . .

"97. . . . the natural resources of the subsoil of the sea in those parts which consist of continental shelf are the very object of the legal regime established subsequent to the Truman Proclamation . . ." ICJ Opinion, at 51.

Scientists now know that the continents and the deep ocean floor are different in kind. The continents are primarily composed of granitic rock, rich in silica and

the alkalis (sometimes nicknamed "white rock"), while the deep ocean floor is mainly basaltic rock, rich in heavy minerals (hence, "black rock"). The most fundamental and remarkable physiographic feature of our planet is the tremendous scarp at the interface of the continents with the deep ocean floor. Simply put, the solid earth is covered, on a world-wide basis, with a relatively thin layer or crust of basaltic rock. The continents float on this basaltic rock. The continents float on this basaltic layer in a manner which has been likened to an iceberg in the sea. In a study prepared at the request of the National Council on Marine Resources and Engineering Development and officially presented by the United States to a United Nations Committee (Department of the Interior Press Release, Aug. 14, 1969), Federal Government scientists summed up the point this way:

> "GEOLOGIC AND PHYSIOGRAPHIC PROVINCES AND THEIR BEARING ON POTENTIAL SEABED MINERAL RESOURCES
>
> "The solid earth's surface consists of two great physiographic divisions, the ocean basins, and the continents that rise to mean heights of 4,300 to 5,800 meters above the ocean floor. The ocean basins, of course, are filled with sea water — more than filled, in fact, for the ocean extends over the margins of the continental masses for distances ranging from a few to more than 1,300 km. The boundary between the continental masses and the ocean basins thus lies beneath the sea, generally at depths ranging from 2,000 to 4,000 meters.

"The physiographic contrast between the continents and the ocean basins reflects fundamental geologic differences between them. The continental crust is richer in silica and the alkalis and poorer in iron and magnesia than the oceanic crust. Although the continental crust averages about 35 km. in thickness compared with about 5 km. for the oceanic crust, its density is less (fig. 4). The continental and oceanic masses are in flotational equilibrium with the underlying mantle, and the lighter continents rise above the ocean basins, much as does an iceberg in the sea.

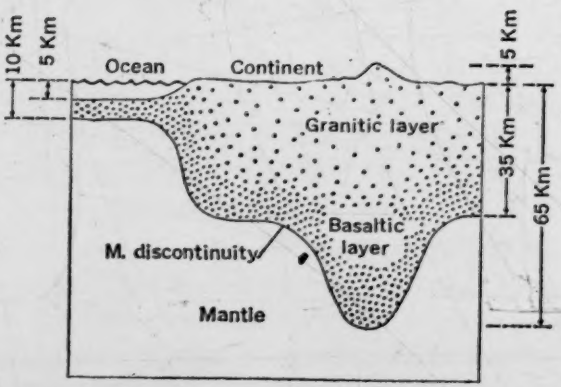


Figure 4. Idealized cross section showing the flotational equilibrium between oceanic and continental crust. (Takeuchi and others, 1967).

"The igneous rocks of the continental crust consist mainly of granite and related rocks relatively rich in silica and the alkalis, although some basalt and other rocks rich in iron and magnesia are also present. In many areas these

granitic rocks intrude, or are overlain by, thick accumulations of sediments deposited in ancient seas that spread over the continents, and in marginal oceanic basins — sediments derived in large part from the weathering and erosion of adjacent land. Oil, gas, sulfur, saline minerals, coal and other deposits occur in these sedimentary basins. Oceanic crust, in contrast, is largely composed of basalt and related rock; and, except near the continental margin where erosional debris from the land may be present, it is generally overlain by no more than a few hundred meters of sediments.

* * *

". . . Petroleum, coal, sulfur, salt, potash, phosphate rock, limestone, and many other minerals have been concentrated by biologic and sedimentary processes in sedimentary rocks . . .

* * *

"In spite of their smaller size compared to the floor of the large ocean basins, the submerged parts of the continents, the continental rises, and the small ocean basins contain the greater part of the potential subsea mineral resources, both in terms of the variety of minerals that exist and the value of those that are likely to be recovered within the next few decades. Most important among these minerals is petroleum, the bulk of which likely occurs in the continental terraces and rises and the small ocean basins . . ." (McKelvey, V.E., and Wang, Frank F. H., *World Subsea Mineral Resources*, pp. 5-7 (Department of the Interior, U.S. Geological Survey, 1969).

(3) The essential harmony between the ICJ Opinion and the present knowledge of the scientific community is apparent: The Shelf is a part of the land mass which is submerged temporarily in terms of geologic time. Legal rights connected with it have only recently been claimed or acknowledged. Whatever rights coastal entities had to the Shelf in times past were inherent rights only, and not legal rights, until acknowledged and clothed with the protection of law. And the legal rights established in the attendant and appurtenant Shelf belong to the coastal sovereign.

(4) The emptiness of the claim that all rights in the Shelf must emanate from the central government in Washington, D. C., is emphasized by the fact that the resources in question (mainly petroleum and related minerals) occur in the sedimentary rock of the Shelf. These same sediments were eroded from the dry land of the continent before being deposited on the Shelf. Thus, the components of the mineral deposits themselves actually "derived in large part from the weathering and erosion of adjacent land." (McKelvey and Wang, *supra*, p. 5). The "adjacent land" in this case is necessarily the coastal States.

(5) In sum, the inherent rights in the Shelf were inherent both as being at one time potential rights and also as inhering in the coastal sovereign entity. Why, we ask, must the legal rights maturing from the inherent rights of coastal States be deemed to be Federal when the rock itself came from areas which are now the States?

(6) The ICJ Opinion sums up the matter of inherent Shelf rights clearly and, we believe, persuasively (at p. 22):

"19. More important is . . . what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, — namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. *In short, there is an inherent right.* In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised . . . " (Emphasis added.)

And (at P. 31):

"43. More fundamental than the notion of proximity appears to be the principle — constantly relied upon by all the Parties — of the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State. There are various ways of formulating this principle, but the underlying idea, namely of an extension of something

already possessed, is the same, and it is this idea of extension which is, in the Court's opinion, determinant . . . "

(7) Recognition that the ICJ Opinion was dealing with nation-states on the international level does not impair the applicability of these principles to coastal states generally, including the States. As seen above, it is abundantly clear that the Shelf is an extension from the land domain of the coastal States as well as that of the United States. The very rock which contains the sought-after minerals originated by erosion from the areas of the coastal States. Thus, the "natural prolongation" could hardly be more natural as regards the coastal States.

(8) From the ICJ Opinion, as well as from compelling logic, it is clear that the coastal sovereign entity, by whatever name or designation, always had inherent rights to the submerged portion of the continent. But these rights were not perceived or claimed until the Twentieth Century, and did not begin to ripen into legal rights until the specific claim of the 1945 Truman Proclamation (with its attendant disclaimer of any disposition of rights of the States *vis-a-vis* the Federal Government).

(9) In this connection, it is most revealing to look at the declaration of the Executive Branch regarding the formulation of law for the Shelf, which is contained in the official State Department Whiteman Digest under the heading "History of the Truman Proclamation":

" . . . .This Nation's claim to the natural resources was strengthened by the *earlier* action of some of the States in leasing, and consequently

bringing about the actual use and occupancy of the Continental Shelf . . . " Report from the Committee on the Judiciary, Mar. 27, 1953, to accompany H.R. 4198, Submerged Lands Act, H.R. Rep. No. 215, 83d Cong., 1st Sess., p. 7. (Emphasis added.) Whiteman Digest, 759.

(10) The emergence of the Shelf in international law cannot be construed, even remotely, to deprive the States of their inherent or legal rights in the Shelf. The argument of the U. S. Brief may be misleading when it asserts that the Truman Proclamation operated "[d]omestically" (U.S. Brief, p. 13). That Proclamation operated to claim rights for the United States internationally, while the accompanying Executive Order (No. 9633; 10 F.R. 12305; 3 C.F.R. 437 (Supp., 1957)) and White House Press Release (Whiteman Digest, 757-758 and U. S. Brief, 13) make it clear that domestically no effect on the States was intended.

(11) The conclusion, therefore, is that unless all sovereign and property rights in the Shelf have been positively taken from the States since 1945, the coastal States, consistently with the developing international and national law of the Shelf, may claim, assert and exercise some jurisdiction on the Shelf.

B. The coastal States may exercise jurisdiction over Shelf resources.

(1) It is axiomatic that a State may exercise a jurisdiction to protect a right.

(2) The law and practice in instances of acquisition of contiguous areas indicates that, rather than a band of new federal jurisdiction being created surrounding our States, the territory of the States of the United States is established or expanded. In the instance of the Chamizal, for example, in which an area was added to the United States by the migration of the Rio Grande River between the United States and Mexico, it was accepted that the area belonged to Texas and was subject to its jurisdiction. See Remarks of the President, 50 *Dept. of State Bull.*, pp. 49-50 (Jan. 13, 1964). The Shelf resources similarly are the subject of rights and jurisdiction arising subsequent to the formation of the States and the United States. It cannot be shown that our Constitution and laws require different types of subsequently acquired property to be the subject of different relative Federal and State rights.

(3) As regards sovereign powers, the reserved sovereignty and associated general police powers of the States may extend to the Shelf even though it lies beyond the boundaries of the States and of the United States, unless and until their application is excluded by Congress. This Court has upheld the applicability of State police powers to federally licensed activities on the navigable waters of the United States, in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440. And application of State forced pooling orders to federally granted oil and gas leases on lands in the federal public domain is a proper exercise of State jurisdiction if not excluded by Congress. *Texas Oil and Gas Corp. v. Phillips Petroleum Co.*, 277 F.Supp. 366 (1967), aff'd. 406 F.2d 1303 (1969). Congress has not excluded the exercise of State jurisdiction over the Shelf (see Part VI of this brief below). And the legislatures of the coastal States have not ceded or relin-

quished all claims to jurisdiction. Consequently, the coastal States may exercise police powers over the Shelf for a number of purposes. Such purposes may include enforcement of pooling policies, conservation laws, safety, and other laws associated with police powers.

(4) The jurisdiction exercised by coastal States over the Shelf is also consistent with the principles of competence to prescribe with respect to events having an effect within territory. See *Restatement II, Foreign Relations Law of the United States*, §§ 18-21 (1965). It is also consistent with the principles of the exercise of jurisdiction over the Continental Shelf. *Id.*, § 23. And with the jurisdictional conflict of laws rules. See *Restatement II, Conflict of Laws*, Proposed Official Draft, Part I, §§ 10, 24, 56 (1967).

(5) The principles of concurrent Federal and State rights in and jurisdiction over the Shelf were not squarely presented to or considered by the Court in prior cases, and the present defendant States are not bound by causes or decrees to which they were not parties.

(6) The Federal Government has, however, claimed fee simple ownership in the Shelf in earlier cases. Now for reasons indicated herein it is claiming today "something less than fee simple." Neither Congress nor the Court has ever supported the fee simple claim of the Federal Government. The decisions in the *California* case (at p. 36) and the *Louisiana* (339 U.S. 699, 704) and *Texas* (339 U.S. 707, 719) cases spoke of "paramount rights in" and "power over" the Shelf, when defining the interest of the Federal Government. The OCSLA was notably silent about this fee simple claim, reverting to the language of the Tru-

man Proclamation, i.e., "appertained", "jurisiction", and "control". 43 U.S.C. § 1332. The phrase "power of disposition" in the OCSLA referred only to the leasing program therein established.

(7) In the face of this restraint by the other two Branches of government, the Executive began retreating from its early, exaggerated, claim to fee simple ownership and in later cases is claiming progressively less. For example, in the 1960 *Louisiana* case, the complaint alleged that the government was "entitled to exclusive possession of, and full dominion and power over" the Shelf. (363 U.S. 1, 5.) In *U. S. v. Ray*, in 1970 — ten years later, the Fifth Circuit stated, at the specific instance of the Executive, that the rights of the United States in the Shelf were "something less than fee simple." (423 F.2d. 16, 18-19 (1970)) (The language of the paragraph crossing pages 19-20 was amended to include the last three sentences by slip opinion dated Apr. 10, 1970.) In the instant case, the Complaint, p. 11, claims for the United States only "sovereign rights .... (on the Shelf) .... for the purposes of exploring the area and exploiting its natural resources..."

(8) The concurrent jurisdiction of the Federal Government and the States is nothing startling or revolutionary. It already exists and is recognized for numerous situations, including events on the Shelf, even though State jurisdiction is not necessarily co-equal or co-extensive with Federal jurisdiction in such cases. State law has been adopted as surrogate Federal law for the Shelf. *Rodrique v. Aetna Casualty Co.*, 395 U.S. 352, 357. Examples of concurrent jurisdiction include crimes on federal property or against federal officers; the jurisdiction of state and federal agencies (including the Coast Guard)

within territorial and inland navigable waters; injury on, or damage to, offshore drilling rigs beyond the three or nine mile limits; and oil pollution beyond the three or nine mile territorial limits(with respect to collection of damages by third parties). This Court has upheld application of State law (a tax on the severance of timber) on federal reserve lands where private companies had contracts with the Federal Government, because Congress had not assumed exclusive legislative jurisdiction over the lands. *Wilson v. Cook*, 327 U.S. 474, 487 (1945). Conformed to in *Cook v. Wilson*, 193 S.W. 2d. 818 (1946).

(9) In sum, state laws and police powers extend over the Shelf and over the extraction of its resources, even though the Shelf is beyond state boundaries, unless and until Congress determines to exclude their application.

VI.

NEITHER CONGRESS NOR THE EXECUTIVE HAS EXCLUDED ALL COASTAL STATE RIGHTS IN AND JURISDICTION OVER THE SHELF AND ITS RESOURCES.

(1) Assuming that the Federal Government has a species of plenary power which enables it to take all Shelf rights away from the States and to exclude any exercise of State jurisdiction over the Shelf, there has been no attempt to do so. It is no answer to assert, as does the U. S. Brief, that the failure of Congress to make the attempt somehow resulted in its accomplishment (U. S. Brief 23-24).

(2) Acceptance of a theory of a secret and a silent taking of Shelf rights by Congress after its fourteen years of deliberation on submerged land matters, would be to impute to Congress base motives and an intent to violate our Constitution. Any interpretation of the OCSLA as such a taking would render it unconstitutional as a deprivation of property without just compensation — a direct violation of our Constitution, Amendment V. Public entities, including the states, are entitled to compensation for property taken from them by the Federal Government. *State of Washington v. United States*, 214 F.2d 33 (1954), Cert. Den., 348 US 862; *Sarpey County, Nebraska v. United States*, 386 F.2d 453, 181 Ct. Cl. 666 (1967). Further, it is a basic rule of statutory construction that the Court will not opt for an interpretation which would render a statute unconstitutional if there is any fair reading of it which would keep it within the framework of our Constitution. *United States v. Cohn Grocery Co.*, 225 U.S. 81 (1920); Sutherland, *Statutory Construction*, Vol. 2, §§ 2401, 4509, pp. 174-175, 326-327 (3rd ed., 1943).

(3) Congress was well aware of the legal and constitutional problems involved in the submerged lands controversy. Further, it was sympathetic to the position of the States and was dismayed and troubled by the implications of the decision in the *California* submerged lands case. *There is no indication of any intent to deprive the states of all their rights in the Shelf.* In fact, the legislative history of both the SLA and the OCSLA discloses that Congress was very careful to refrain from making any federal claims which would deprive the constitutional or legal rights of anyone, including the States. The portion of the legislative history of the SLA printed as an Appendix of this Brief is indicative of this intent of Congress. See Appendix to this Brief.

(4) The OCSLA leasing program is a constitutional exercise of power by Congress, but it does not exclude all exercise of rights and jurisdiction by the States over the Shelf. The establishment of a leasing program, and of a single leasing entity for the Shelf resources was within the powers of Congress. The necessity for certainty of rights so that large capital investments could be made and the need to fix a federal severance charge or royalty for the extraction of Shelf resources were properly within the powers exercised by Congress. Unless the intent of Congress was to exclude the exercise of all State rights and jurisdiction over the Shelf, the federal leasing program would not of itself preclude exercise by the States of a jurisdiction over the Shelf and its resources for purposes of conservation, safety, the accommodation of conflicting uses where there may be economic impairment, the enforcement of pooling orders, and the exaction of taxes or other payments for the severance or production of resources from the Shelf. The federal leasing program established in OCSLA was simply a confirmation and legislative authorization of the federal leasing which had been going on under the 1945 Executive Order for eight years.

(5) The legislative intent of Congress is revealed clearly in the history of the OCSLA. The intent to confirm and give validity to the Truman Proclamation, and to vest the power to take or dispose of the natural resources of the Shelf beyond States' boundaries in the Secretary of the Interior, are noted. The language of the first substantive section in OCSLA, 43 U.S.C. § 1332, declaring the policy of the United States "that the subsoil and the seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this sub-

chapter," was stated in the committee report on H.R. 4198 (in which Sept. 8(a) contained substantially the same language) to assert "as against the other nations of the world the claim of the United States to the natural resources in the Continental Shelf." *1953 US Code Congressional and Administrative News*, Vol. 2, pp. 1390, 1391 (1953).

(6) Further indication of the intent of Congress may be seen from the language of the entire Sect. 8(a) in H.R. 4198 as it passed the House of Representatives in 1953:

"TITLE III

"OUTER CONTINENTAL SHELF OUTSIDE STATE BOUNDARIES

"Sec. 8. JURISDICTION OVER OUTER CONTINENTAL SHELF. — (a) It is hereby declared to be the policy of the United States that the natural resources of the subsoil and seabed of the outer continental shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act. Federal laws now in effect or hereafter adopted shall apply to the entire area of the outer continental shelf. The Secretary is hereby empowered and authorized to administer the provisions of this title, and to adopt rules and regulations not inconsistent with Federal laws to apply to the area.

"*Except to the extent that they are inconsistent with applicable Federal laws now in effect or*

hereafter enacted, or such regulations as the Secretary may adopt, the laws and police powers of each coastal State which so provides shall be applicable to that portion of the adjacent outer continental shelf which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer continental shelf, and the Secretary shall determine and publish lines defining each such area of State jurisdiction: *Provided*, That State taxation laws within such area shall be limited to severance or production taxes and may be levied only by those States which apply and administer their conservation laws and other State governmental functions in said area: *Provided further*, That the rate of such severance or production tax shall not be in excess of the rate of said tax within State boundaries.

"This Act shall be construed in such manner that the character as high seas of the waters above the outer continental shelf and the right to their free and unimpeded navigation and navigational servitude shall not be affected.

"(b) Oil and gas deposits in the outer continental shelf shall be subject to control and disposal only in accordance with the provisions of this Act and no rights in or claims to such deposits, whether based upon applications filed or other action taken heretofore or hereafter, shall be recognized except in accordance with the provisions of this Act." (Emphasis added.)

The emphasized portion of the second paragraph of Sec. 8(a) comprises 43 U.S.C. Sec. §1333(a)(2) with modifications, and the enacted version of OCSLA went on in the same Section to exclude the application of State taxation laws on the Shelf. This further provided that applicable State laws will be administered and enforced by the officers and courts of the United States. Thus, except for provision for a single, federal leasing entity, and the exclusion of the application of State taxation laws on the Shelf, Congress did not exclude the application of other State laws to the exploration and exploitation of the resources of the Shelf.

(7) Viewed in proper perspective, then, and giving Congress the benefit of constitutional awareness and motives, the OCSLA was merely a confirmation of what Congress believed was the previously existing situation on the Shelf, with the establishment of a single, federal leasing program, and the exclusion of the application of State taxation laws on the Shelf. But, as shown above, the previously existing situation on the Shelf included the sovereign and property rights of the States, subject, of course: 1) to the supremacy of federal powers within their proper sphere, and, 2) to the capacity to exercise jurisdiction over the Shelf as over other United States public lands for a variety of purposes other than taxation.

(8) The only relevant official actions of the Executive were contained in the Executive Order of the President which accompanied the Truman Proclamation. Exec. Order No. 9633, 3 C.F.R. 437 (Supp., 1957) (which specifically preserved the rights and jurisdiction of the States in the Shelf) and the Executive Order establishing a naval petroleum reserve, which was declared expressly subject to

existing rights and for oil and gas only. Exec. Order No. 10,426, 3 C.F.R. 924 (Supp., 1958).

(9) The conclusions thus far are clear: since Shelf rights crystalized into legal rights and the capacity to exercise jurisdiction around 1945, and these rights and powers have not been foreclosed by necessary construction of the powers delegated to the Federal Government by our Constitution, and have not positively taken away from the States by Congress or the Executive since that time, they still subsist.

VII.

THE COURT SHOULD DECLARE THE CONCURRENT FEDERAL-STATE RIGHTS IN AND JURISDICTION OVER THE RESOURCES OF THE SHELF AND LEAVE THE CONTINUING POLITICAL QUESTIONS TO BE RESOLVED BY THE EXECUTIVE AND LEGISLATIVE BRANCHES AND THE COASTAL STATES.

A. The courts are not the appropriate arena for decisions on the political aspects of submerged lands matters.

(1) The burden of this Court from submerged lands litigation during the quarter century since the *California* case has been enormous. Yet there has been no real resolution of the basic controversies. Only portions of the California, Louisiana and Texas coasts have been delimited by judicial decree. A vast amount of work remains to be done

by the Court, and by Masters it appoints, on baseline questions alone if the previously established patterns of decision are continued. Myriad other controversies will probably be presented if present trends continue. And the issue of Federal and State jurisdiction over the Shelf (beyond the three-mile territorial sea) is only now for the first time being squarely presented to the Court.

(2) Claims of coastal States for an involvement in the decisions concerning the Shelf and its resources can be expected to increase. Demands to apply State laws for purposes of conservation, environmental protection and safety have been heard where the States are specially interested in ocean activities which affect nearby Shelf resources or the integrity of the marine environment, or which damage their shores or injure their citizens. In recognition of these demands Congress in the Water Quality Improvement Act of 1970, Sec. 11(o) (2), assigned certain additional authority to the States concerning oil pollution from ships, onshore and offshore facilities:

> "Nothing in this section shall be construed as *preempting any State* or political subdivision thereof *from imposing any requirement* or liability with respect to the discharge of oil into any waters within such State." (Emphasis added.) Pub. L. No. 91-224, Title I (Apr. 3, 1970); 84 Stat. 91; 33 U.S.C.A. 1161 (o) (2) (1970).

Congress had earlier stated:

> "... [I]t is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in pre-

venting and controlling water pollution, to support and aid technical research relating to the prevention and control of water pollution, and to provide Federal technical services and financial aid to State and interstate agencies and to municipalities in connection with the prevention and control of water pollution." Fed. Water Pollution Control Act, Sec. 1.(b); 33 U.S.C.A. 1151 (1970).

(3) Congressional establishment of a federal leasing program and exclusion of State taxing power over Shelf resources do not amount to an exhaustion of the field of legal problems which may arise relative to rights in and jurisdiction over the resources of the Shelf and associated activities. The public interest at the time Congress enacted the OCSLA demanded some certainty in Shelf exploration and exploitation. Congress responded with an interim solution which, as can be seen from the claims of all the parties to this case, is incomplete. Many other decisions will be necessary to establish in detail and with finality the equitable division of both benefits and burdens associated with rights in and jurisdiction over Shelf resources. One question as yet unanswered is whether the States may obtain any revenues from the Shelf resources other than by "taxation" which is precluded by the OCSLA. 43 U.S.C. § 1332(a)(2). May a State-imposed severance charge be considered not inconsistent with, but supplemental to, the federal law and thus required under the terms of the OCSLA to be implemented by federal officers?

(4) The demand of the Federal Government in this case for a declaration of "exclusive rights" in the resources

of the Atlantic Continental Shelf as against the defendant States (Complaint, p. 10) is essentially a political demand which leaves obscure many justiciable issues such as these: May a coastal State (such a Maine) require and issue a prospecting permit for Shelf exploration pursuant to its conservation, safety and mineral exploitation powers? (See *Wilson v. Cook*, 327 U.S. 474, and *Texas Oil and Gas Corp. v. Phillips Petroleum;* 277 F.Supp. 366 (1967) which authorized the application of State taxation laws and pooling orders relative to the extraction of resources from federal lands, and Part V. B. of this Brief, above). May a coastal State exercise some jurisdiction over Shelf resources, and the exploration and exploitation activities associated with them under its general police powers?

(5) The enormous gaps in present law concerning the Shelf are best filled by suitable legislation of the Federal Government and the States, and by Federal-State Compacts. Rather than seek a general declaration of exclusivity by this Court, with resultant prolongation and continued refinement of litigation on a myriad of issues, many of them political, the Executive Branch could seek action by Congress within the sphere of Federal Powers and concurrent action with the coastal States on matters where this is appropriate. Surely, obsolete and bankrupt technical arguments about King George and his Realm cannot be allowed to control the destiny of our States and the United States on matters so involved with present national interest as the development and conservation of Shelf resources. (Compare the "first hurdle" argument advanced in the U.S. Brief, 24-30.) Although we have inherited English common law for the protection of private rights and interests, the powers of the English Crown and

the extent of its "Realm" should not be allowed to determine today relative Federal-State rights and interests in the Shelf established under our federal system.

(6) Rejecting anachronistic fetters such as a presumed disposition of Shelf rights and jurisdiction by the conception of territory two centuries ago, or by our Constitution (which does not dispose of territorial rights of the States without their consent, and which delegates less than all sovereign powers to the Federal Government), or by the assumption in the California case that the seabed area there in issue (within the three-mile territorial sea) was beyond boundaries and therefore should be beyond State jurisdiction, the path is opened to a recognition of concurrent jurisdiction whereby both the States and the Federal Government may operate within their proper Constitutional spheres of jurisdiction on contemporary Shelf legal problems.

(7) As the development and conservation of Shelf resources and the protection of the marine environment continue to present ever more immense and intricate issues, the good will and cooperation of the States, rather than their exclusion from participation, best serves the resolution of these issues. Instead of denying the considerable contribution which can be made by the States, their cooperation within the framework of our constitutional system is established by a finding of concurrency. The political issues and many of the details of Federal and State rights in and jurisdiction over the Shelf can be resolved by the other Branches of government and the coastal States, with the Judicial Branch considering only the more defined issues of a justiciable character.

B. Declaration of the concurrent Federal-State jurisdiction over the Shelf best serves the public interest.

(1) The public interest of the United States includes the interests of all citizens and is best served by the concerted action of all levels of government including those closest to, and most affected by, the problems with which government deals. Advances in science and technology make the shared interest and concurrent jurisdiction of the States and the Federal Government more vital and important, as the opportunities and vulnerability of each level of government increase both with expanding exploration and exploitation of Shelf resources and as a result of actions taken by other government levels.

(2) The Executive recognizes the importance of the roles of coastal States in ocean and coastal problems. In the Annual Report of the President to the Congress on Marine Resources and Engineering Development, dated April, 1970, the President of the United States concluded his "President's Transmittal Message to Congress" with the paragraph:

> "The Federal government will continue to provide leadership in the nation's marine science program. But it is also important that private industry, State and local governments, academic, scientific and other institutions, increase their own involvement in this important field. The public and private sectors of our society must work closely together if we are to meet the great challenges which are presented to us by the oceans of our planet.
>
> "/s/ Richard Nixon
> The White House, April 1970."

This same Annual Report of the President is replete with calls for greater State involvement. For example, referring to the February 10, 1970, Environmental Message of the President to the Congress it states (p. 27):

> ". . . . Important sections of the message were devoted to water pollution. The Government has proposed legislation to encourage States to assume a greater responsibility for planning, regulating and managing their coastal areas . . . ."

And (at page 28):

> "Our impact on the marine environment must be regulated so that the coastal areas and the deep ocean can be preserved, developed and used for our continuing benefit. This can be accomplished through comprehensive management, beneficial use, protection and development of the coastal areas employing Federal, State and local governments and public and private interests . . . ."

In his annual report on marine affairs to Congress this year the President concluded his Letter of Transmittal as follows:

> "We have embarked on a strong marine science program for the 1970's. In the year ahead the Federal Government will build upon these accomplishments. And we will look to all sectors of the Nation's marine science community — State and local governments, industry and the universities — to contribute to the fullest to the United

States' efforts to make better use of the oceans and to provide world leadership on the major ocean issues before the community of nations.

"/s/ Richard Nixon
The White House, April 7, 1971"

(3) Further dramatic evidence of recognition of the interests of States in Shelf exploration and exploitation came when the Chief Executive recently requested Congress to cancel certain federally granted oil leases specifically because they lay seaward of a State sanctuary. In the words of the President to Congress:

"In 1955 the State of California took steps to protect a particularly beautiful area of its coastline by creating a State Sanctuary extending sixteen miles along the Santa Barbara Channel and closing it to all petroleum exploration. About a decade later, however, the federal government issued leases for petroleum exploration immediately seaward from the State Sanctuary. Oil platforms were soon constructed and petroleum drilling began. In January, 1969, a blowout in the Channel resulted in widespread oil pollution of the Sanctuary.

"The twenty federal leases seaward from the Sanctuary which were granted by the previous Administration should be cancelled. Legislation being submitted today would terminate these leases and create a Marine Sanctuary . . . .

* * *

"This proposal for Santa Barbara illustrates our strong commitment to use offshore lands in

a balanced and responsible manner. *It recognizes the earlier decision made by the people of California to set aside a part of their coastline as a sanctuary*, and it extends the protected area across the Channel to Santa Cruz Island . . . ." (Emphasis added.) 6 *Pres. Docs.* 752-753 (Jun. 15, 1970); 116 *Cong. Rec.*, No. 96, p. S8823 (Jun. 11, 1970).

Congress did not approve the President's request, and the Department of the Interior is considering resumption of oil drilling in the Santa Barbara Channel under more stringent regulations. *New York Times*, Sep. 3, 1971, at 54, col. 1. One may conjecture that had the more severe requirements of California been in effect for drilling on the Shelf off its shores in 1969 the Santa Barbara spill might have been avoided. *See e.g.* Nanda and Stiles, Offshore Oil Spills: An Evaluation of Recent United States Responses, 7 *San Diego L. Rev.* 519, 528 (1970). Or that had both the California decision to establish a sanctuary, and the State drilling regulations prescribed specifically for its geologic situation, been considered the spill might have been avoided. It is certain, however, that the long term public interest of our nation is best served not by political interaction of the President and the Congress but by regular participation of the States in making law for the Shelf, both as to regulation of development activities, the conservation of resources, and the preservation of the marine environment.

(4) It needs little reflection to realize that the land bases and shore installations associated with offshore resource development are a primary concern of the coastal States. These exploration and exploitation activities involve

an integrated and continuous flow of persons and things both outward from land into the ocean and inward from the sea to the shore, from dry land to Shelf and from Shelf to dry land. The process does not stop at any artificial "boundary" line, to begin again beyond or inside such an artificial line. Men, materials, supplies, ships, barges, tenders, pipelines, electrical power and communications cables, and drilling rigs themselves are all a part of this continuous process of circular flow between the shore and the Shelf.

(5) Not only is the impact of Shelf activities and development greatest on the adjacent coastal State, that State invariably has strong grounds for jurisdiction on the basis of its territorial competence over men and materials, on the basis of citizenship (as it is in the main its residents who do the work on the Shelf), and often on the basis of jurisdiction over the ships and other vehicles and equipment using its ports and frequently possessing its State character through registration. And the resources extracted from the Shelf frequently are processed in, sold in, and used in the adjacent coastal State. Denying that State a role in decision-making for activities on the Shelf which affect it may limit only its bases for jurisdiction, not its interest and concern for the entire process of resource extraction and utilization.

(6) Further, the rapid progress in development of fixed offshore platforms and underwater habitates affixed to the Shelf, where human beings can live for extended periods of time, is reported in numerous stories in the public press as well as in scholarly journals and raises a whole new set of factors which calls for State involvement. Will the inhabitants on our Shelf be residents, hence citizens, of the adjacent coastal State? Do they qualify as

electors? Must they pay State *ad valorem* taxes, State income taxes and other State taxes? Do their children qualify to attend State public schools? Are these children and their parents "residents" so as to take advantage of the tuition differential in State universities? Can such persons stand for election to State office?

(7) In sum, there is ample scope for the action and cooperation of all branches of government at both the Federal and State levels relative to the exploration and exploitation of Shelf resources. Appropriate governmental action and cooperation are fostered best by candid declaration in this case that there exists concurrent Federal and State jurisdiction over the Shelf and that the best course of action is concerted cooperative action on the many specific issues which are evoked.

(8) Declaration of concurrent Federal-State rights in and jurisdiction over the Shelf by this Court will not displace or impair the paramount interest and powers of the Federal Government within the areas of its delegated sovereign powers; will not destroy the federal leasing program established by Congress in the OCSLA; and will not hinder the possibilities of Federal-State accommodation of interests on the myriad problems and controversies which will arise over the activities on and development of resources of the Shelf. Rather, declaration of concurrent rights and jurisdiction can be expected to promote Federal-State cooperation and lead to resolution of those problems in the Executive and Legislative arenas. Such arenas are most suitable for the elaboration of decisions on baselines and the accommodation of conflicting claims on conservation, safety and other matters which are within the interests of the sovereigns concerned.

(9) As Justice Frankfurter stated in his concurring opinion in the Florida case (363 U.S. 121, at 132 (1960)):

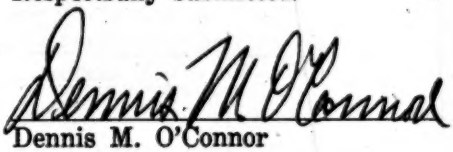
> "But in these matters we are dealing with great acts of State, not with fine writing in an insurance policy. . ."

Further "great acts of State," blended with enlightened and sympathetic statesmanship, will be the real source of resolution of the interests of all parties. Bickering over legalistic and technical points of language to resolve major issues with polictical overtones does not fulfill this requirement.

CONCLUSION

For the reasons stated, we urge the Court to declare that rights in and jurisdiction over exploration and exploitation of the resources of the Shelf underlying the Atlantic Ocean beyond three miles from the coastline do not belong exclusively either to the Plaintiff or to the defendant States, and that concurrent Federal and State rights and jurisdiction exist for the Shelf. The Court can of course retain jurisdiction to rehear the case if the political issues are not set to rest.

Respectfully submitted.



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APPENDIX

LEGISLATIVE HISTORY—SUBMERGED LANDS ACT PRIOR COMMITTEE REPORTS, Appendix I,

House Report No. 1778,

1953 U. S. Code Cong. and Admin. News, p. 1415, 1417-1422
(Footnotes omitted.)

III. HISTORY OF LEGISLATION

One hundred and sixty years of unchallenged ownership by the States

Throughout our Nation's history the States have been in possession of and exercising all the rights and attributes of ownership in the lands and resources beneath the navigable waters within their boundaries. During a period of more than 150 years of American jurisprudence the Supreme Court, in the words of Mr. Justice Black, had—

"used language strong enough to indicate that the Court then believed that the States also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not."

That same belief was expressed in scores of Supreme Court opinions and in hundreds of lower Federal courts' and State courts' opinions. Similar beliefs were expressed in rulings by Attorneys General of the United States, the Department of the Interior, the War Department, and

the Navy Department. Lawyers, legal publicists, and those holding under State authority accepted this principle as the well-settled law of the land.

As late as 1933, the then Secretary of the Interior, Harold L. Ickes, in refusing to grant a Federal oil lease on lands under the Pacific Ocean within the boundaries of California, recognized:—

"Title to the soil under the ocean within the 3-mile limit is in the State of California, and the land may not be appropriate except by authority of the State."

Claims of States first challenged by Federal officials in 1937

It was not until a few applicants for Federal oil leases and their attorneys continued to insist that the United States owned the soil under navigable waters, that, in the words of Mr. Ickes, "doubt" arose in his mind as to which Government owned the submerged lands. The "doubt" was first publicly expressed in the Nye resolution introduced in the Seventy-fifth Congress in 1938, and was subsequently expressed in the Hobbs and O'Connor resolutions and the Nye and Walsh resolutions introduced in the Seventy-sixth Congress in 1939, all of which failed of enactment. Had the Congress followed the recommendations of the Departments of Interior, Justice, and Navy, by enacting any one of the resolutions, it would have attempted to appropriate for the United States, without compensation to the States, the 3-mile marginal belt as a naval petroleum reserve, and the Attorney General would have been authorized to establish through judicial proceedings the Government's title.

The theory advanced in 1938 and 1939 by the same Federal departments which now oppose H. R. 5992 was to the effect that the United States had no right to appropriate the natural resources within the submerged coastal lands unless the Congress, as the policy-making branch of the Government, asserted what was contended to be a dormant right. They spoke of the right as being "novel" and one never before asserted by the United States under the Constitution, and as being a right which the States had been asserting and enjoying, and would continue to assert and enjoy unless and until the Congress changed the policy of the Federal Government. Congress, however, did not change the long-existing and recognized policy.

Congress in 1946 recognized States' claims

As a result of continuing threats of Secretary of the Interior Ickes to grant Federal leases on portions of the submerged coastal lands, resolutions were introduced in 1945 in the Seventy-ninth Congress, quieting title to these lands in the States. After extensive hearings, these resolutions were passed in 1946 as House Joint Resolution 225. However, the reaffirmation of the well-established policy was voided through a veto by President Truman. The House failed to override the veto.

While the Congress was considering House Joint Resolution 225, the Federal officials, being dissatisfied with the continued refusal of Congress to appropriate property long claimed by the States, instituted on May 29, 1945, a suit against the Pacific Western Oil Corp., a lessee of the State of California to recover part of the submerged lands claimed by California and its lessee.

After House Joint Resolution 225 passed the House by a large vote, and while it was pending in the Senate, the suit against Pacific Western Oil Co. was voluntarily dismissed by Attorney General Clark, and an original action was brought by him in the Supreme Court against the State of California, wherein he alleged that the United States "is the owner in fee simple of, or possessed of paramount rights in and power over" the submerged lands within 3 miles of the California coast. These two suits were instituted and the latter one against California was prosecuted after the Congress had refused in 1938 and again in 1939 requests of the Attorney General and other Federal officials for permission to institute a suit for that purpose.

The House, in failing to override the veto of House Joint Resolution 225 was no doubt influenced, as the President had been, by the pending litigation.

Decision of Supreme Court denying California ownership

On June 23, 1947, the Supreme Court rendered its opinion in the case of United States v. California, 332 U.S. 19, 67 S.Ct. 1658, and on October 27, 1947, a decree was entered which reads, in part, as follows:

"1. The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals, and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles and bounded on the

north and south, respectively, by the northern and southern boundaries of the State of California. The State of California has no title thereto or property interest therein."

In the Court's majority opinion, Mr. Justice Black said:

"The crucial question on the merits is not merely who owns the bare legal title to the lands under the marginal sea. The United States here asserts rights in two capacities transcending those of a mere property owner."

He then proceeded to define those two capacities as that of national defense and of conducting foreign relations.

Mr. Justice Black, in the majority opinion, stated further:

"As previously stated this Court has followed and reasserted the basic doctrine of the Pollard case many times. And in doing so it has used language strong enough to indicate that the Court then believed that States not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not."

Thus the Court by its decision not only established the law differently from what eminent jurists, lawyers, and public officials for more than a century had believed it to be, but also differently from what the Supreme Court apparently had believed it to be.

This committee, having heard the testimony of many able and distinguished State attorneys general, of representatives of the American Bar Association and State bar associations, and of other able and distinguished jurists and lawyers, is of the opinion that no decision of the Supreme Court in many years has caused such dissatisfaction, confusion, and protest as has the California case. We have heard it described in such terms as "novel," "strange," "extraordinary and unusual," "creating an estate never before heard of," "a reversal of what all competent people believed the law to be," "creating a new property interest," "a threat to our constitutional system of dual sovereignty," "a step toward the nationalization of our natural resources," "causing pandemonium," etc.

Power of Congress to reestablish long-accepted policy of State ownership

The committee recognizes that it is within the province of the Supreme Court to define the law as the Court believes it to be at the time of its opinion. However, the Supreme Court does not pass upon the wisdom of the law. That is exclusively within the congressional area of national power. Congress has the power to change the law, just as the Supreme Court has the power to change its interpretation of the law by overruling pronouncements in its former opinions which have been accepted as the law of the land. Therefore, in full acceptance of what the Supreme Court has now found the law to be, Congress may nevertheless enact such legislation as in its wisdom it deems advisable to solve the problems arising out of the decision.

Indeed, the power of the Congress to establish the law for the future as it was formerly believed to be, was, in effect, recognized by the Court in the California case for it held in connection with the lands in question that the power of Congress under article IV, section 3, clause 2 of the Constitution to dispose of territory or other property of the United States was without limitation; and that it would not be assumed that—

"Congress, which had constitutional control over Government property, would execute its powers in such way as to bring about injustices to States, their subdivisions, or persons acting pursuant to their permission."

Many witnesses testified that they construed the opinion as an invitation or recommendation to the Congress to consider the legislative question as to whether in the public interest the States should continue in possession of, and exercise State control of, the submerged lands within their boundaries, or the Federal Government should take from the States these lands and hereafter exercise all control over them.

IV. SUPREME COURT DECISION MAKES LEGISLATION NECESSARY

When House Joint Resolution 225 was passed by the Congress, there existed only a threat to the long-established and settled policy of State ownership of these lands. Now, as a result of the reversal of this policy by the Supreme Court's opinion in the California case, there exists, in the words of Attorney General Clark, " a variety of unusually complex problems which must be resolved."

The Committee deems it imperative that Congress take action at the earliest possible date to clarify the endless confusion and multitude of problems resulting from the California decision, and thereby bring to a speedy termination this whole controversy. Otherwise inequities, injustices, vexatious and interminable litigation, and the retardment of the much-needed development of the resources in these lands will inevitably result.

Issue of title is confused

While the Supreme Court decreed that California was not the owner of the 3-mile marginal belt, it failed expressly to decree that the United States was the owner. Furthermore, although requested by the Attorney General, and others appearing amici curiae, the Court refused to hold that the United States was the "owner in fee simple" or had "paramount rights of proprietorship" in such 3-mile belt.

"Fee simple" and "proprietorship" are words commonly used in law to denote ownership, while the words "paramount rights in and full dominion over" employed by the Court are foreign to the law of real property.

Attorney General Clark expressing the view that paramount rights and full dominion signified a title even higher than a fee simple testified:

"They said to us in effect, go ahead and get the oil. That is what the effect of the opinion is. What more could the Supreme Court have held? If it held that we had fee simple title, something might come up some day on this

particular land. This is a novel decision. This land is under water. It is in the 3-mile belt * * * So they did not want to be bound by any fee simple proposition.

"So they could have said fee simple title, they could have said any of the descriptive terms that we use with reference to titles, but they might have found themselves in difficulty later on when someone else might have claimed that all you have said here is that the United States had fee simple title."

Mr. Justice Frankfurter, in his dissenting opinion, had difficulty in determining the meaning and legal significance of the words used by Mr. Justice Black in the majority opinion, stating that:

"The Court, however, grants the prayer but does not do so by finding that the United States has proprietary interests in the area. To be sure it denies such proprietary rights in California.

"Of course the United States has "paramunt rights" in the sea belt of California—the rights that are implied by the power to regulate interstate and foreign commerce, the power of condemnation, the treaty-making power, the war power. We have not now before us the validity of the exercise of any of these paramount rights. Rights of ownership are here asserted—and rights of ownership are something else. Ownership implies acquisition in the various ways in which land is acquired—by conquest, by discovery and claim, by cession, by prescription, by purchase, by condemnation. When and how did the United States acquire this land?

"The fact that these oil deposits in the open sea may be vital to the national security, and important elements in the conduct of our foreign affairs, is no more relevant than is the existence of uranium deposits, wherever they may be, in determining questions of trespass to the land of which they form a part."

Mr. Justice Reed said in his dissent:

"This ownership in California would not interfere in any way with the needs or rights of the United States in war or peace. The power of the United States is plenary over these undersea lands precisely as it is over every river, farm, mine, and factory of the Nation."

Many witnesses were of the opinion that the construction of paramount rights as including fee ownership would, if carried to its logical conclusion, destroy the basic legal distinction between governmental powers under the Constitution on the one hand, and State or private ownership of real property on the other, because the "paramount powers" of the United States do not depend upon whether the point at which they may need to be exercised is above or below low-water mark or on one side or the other of a line dividing a bay from the coastal waters.

Many witnesses expressed the opinion that the title was left suspended in mid-air, leaving the property ownerless, contrary to the basic concept of our common law that legal title to every piece of property must exist in someone; others expressed the view that the Supreme Court held, in effect, that Congress, as the policy-making branch of the Federal Government, had the power, in the first instance, to determine who shall be the owner of the lands.

The theory that title to the 3-mile belt was in "the family of nations," expressed by Congressman Hobbs, of Alabama, was also adhered to by representatives of the Navy Department in 1938 and 1939. With respect to inland waters, Congressman Hobbs agreed that the paramount rights of the Federal Government, as defined by the Supreme Court in U. S. v. California, 332 U.S. 19, 67 S.Ct. 1658, might likewise be exercised for the purposes of national defense and international negotiations.

Mr. Justice Black, in speaking for the majority of the Court in the California case, said:

"The very oil about which the State and Nation here contend might well become the subject of international dispute and settlement."

If the Court in making the statement had reference to the military power of a foreign nation to dispute the rights of the States to take oil under submerged lands within their boundaries, then the same statement could correctly be made about oil under uplands, providing, of course, the foreign nation possessed a military force strong enough to compel a settlement by the United States. However, if the statement was made because the Congress had never legislatively asserted on behalf of the United States or the States title to the submerged lands within their boundaries, then we think that is all the more reason why the Congress should now remove all doubt about the title by ratifying and confirming the titles long asserted by the various States, subject always, of course, to the paramount powers of the Federal Government under the Constitution, which titles have never been disputed by any foreign nation.

The committee is unable to determine whether or not the Supreme Court held that the United States has actual title in and to the submerged coastal lands adjacent to California, but it is obvious that Congress has the power to legislate in any event, for, as the Court said, the Federal Government has—

"the paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited."

On the other hand, if the Federal Government does have a fee simple title to these lands and even something greater and paramount to title as contended by the Attorney General of the United States, then the Congress, under the authority of article IV, section 3, clause 2, of the Constitution, has unlimited control over such lands and may dispose of them in such manner as it deems in the public interest. The committee is, therefore, of the opinion that S. 1988, if enacted, will establish, confirm, and vest in the littoral States, which have since the formation of our Union claimed title to the marginal belt, such title and rights as the Federal Government has, subject to the reservations contained therein.

CERTIFICATE OF SERVICE

We certify that in compliance with Supreme Court Rule 33 we have this day served a copy of the foregoing Motion and Brief upon the Plaintiff and Defendants in this case by mailing a copy certified air mail, with postage prepaid, to each of the following:

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888 Sixteenth Street, N.W.
Washington, D.C. 20006

Dated: September 17, 1971.

By Dennis N. O'Connor

By

FILE COPY

Supreme Court, U. S.
FILED
JUN 5 1972
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1968

No. 35,
ORIGINAL

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA.

MOTION BY THE DEFENDANT, COMMONWEALTH OF MASSACHUSETTS FOR PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT THEREOF

ROBERT H. QUINN
Attorney General
HENRY HERRMANN
Special Assistant Attorney General
THOMAS J. CROWLEY
Assistant Attorney General

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 35,
ORIGINAL

UNITED STATES OF AMERICA,
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v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA.

MOTION FOR PRELIMINARY INJUNCTION FOR THE COMMONWEALTH OF MASSACHUSETTS

Defendant, Commonwealth of Massachusetts, moves the Court for a preliminary injunction against the Plaintiff, United States of America, its elected and appointed officials and officers, and its agents, servants, employees, attorneys and all persons in active concert and participation with it, pending final hearing and determination of the action:

1. Enjoining them from conducting any explorations, by whatever method, for the location or probable location of oil, gas and other mineral resources within that area of the Atlantic Continental Shelf which is claimed by Mas-

sachusetts and which is in issue in the case at bar, to wit, an ~~area: landed Starting it to at a point of the three miles~~ area: ~~landed~~. Starting at a point three miles from the New Hampshire/Massachusetts boundary with a coordinate of latitude 42°58′30″N., and longitude 70°47′00″W., and continuing along a line on a bearing of N86.07°30′E to a point of intersection with the limit of the North American Atlantic Continental Shelf, thence in a general southwesterly direction following the limit of the Continental Shelf to a point having the coordinate latitude 40°02′00″N., and longitude 70°34′00″E., thence continuing landward in a general northwesterly direction on a bearing of N35°W., thence to a point in the vicinity of Block Island having the coordinate latitude 41°03′N. and longitude 71°31′E., thence northeasterly on a bearing N34°E., to a point 3 miles from the Massachusetts/Rhode Island coastal boundary having a coordinate of latitude 71°09′N., and longitude 41°27′30″, thence returning to the point of origin near the New Hampshire/Massachusetts boundary along a line 3 miles off the coastline of Massachusetts.

2. Enjoining them from licensing, permitting, or otherwise authorizing any non-federal governmental entity, and any legal and natural person from performing the acts delineated in prayer one above;

provided, however, that nothing contained in the prayers one and two above shall be construed to interfere with the Armed Forces of the United States in the performance of their national defense role;

3. Enjoining and ordering them to forthwith suspend, or amend to conform to the provisions of prayer one above, the exploration permit granted to Digicon, Inc., dated May 4, 1972, and designated OCS Permit E2-72, pursuant to the right to suspend or amend specified therein; and to also suspend any further such exploration permits which encompass the activities delineated in prayer one above, which may pos-

sibly exist, and of which the Defendant, Commonwealth of Massachusetts has no knowledge.

4. Enjoining and ordering them to maintain and keep in strict confidentiality any data previously acquired by the Plaintiff by virtue of the activities delineated in prayers one and two above;

on the grounds that

1. Unless enjoined by this Court the Plaintiff, United States of America will comit the acts referred to in prayers numbered one and two above and will refuse to perform the acts referred to in prayers numbered three and four above.

2. Such action and non-feasance by the Plaintiff will result in serious and irreparable harm to the Defendant as more particularly appears in the Affidavits attached hereto;

3. The issuance of a Preliminary Injunction herein will not cause undue inconvenience or loss to the Plaintiff, but will prevent serious and irreparable harm to the Defendant, Commonwealth of Massahusetts.

And the Defendant, Commonwealth of Massachusetts further moves that in view of the seriousness and urgency of the subject matter of this Motion, the Plaintiff, United States of America, be required to respond hereto within such period of time as the Court may deem meet and proper to enable the Court to consider and rule on this Motion within the present Term of Court.

ROBERT H. QUINN
Attorney General
Commonwealth of Massachusetts

June, 1972

In the Supreme Court of the United States

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UNITED STATES OF AMERICA,
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STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA.

DRAFT

Preliminary Injunction

This cause came on to be heard on defendant Commonwealth of Massachusetts' motion for a preliminary injunction and the Court having considered the motion, the affidavits in support of the motion and the affidavits in opposition thereto, and having considered the pleadings filed by the Plaintiff United States of America in opposition, the Court makes the following

Findings of Fact

1. The plaintiff United States of America, during the pendency of this action and before same can be heard on its merits

a. Proposes to conduct explorations, through the Geological Survey, for the location or probable location of oil and gas deposists in that portion of the North American Atlantic continental shelf with respect to which both the plaintiff and the defendant, Commonwealth of Massachusetts, claim the exclusive right of exploration and exploitation of the mineral resources of the subsoil; and

b. Has authorized a private exploration company, to wit, Digicon, Inc. of Houston, Texas, to conduct the same type of explorations in the same geographical area referred to in 1(a) above, and said explorations are presently continuing; and

c. Proposes to issue further permits in the future of the general type referred to in 1(b) above.

2. Defendant Commonwealth of Massachusetts contends that the plaintiff's conduct of such explorations as referred to in 1(a) above, and the plaintiff's issuance of permits to private persons as referred to in 1(b) and 1(c) above would be unlawful and contrary to the rights of exclusive exploration asserted by Defendant Commonwealth of Massachusetts in its answer, and further, that the alleged statutory authority which the plaintiff asserts as justification for the acts complained of by the Defendant Commonwealth of Massachusetts in its Motion for a Preliminary Injunction is directly in issue in this action.

3. The defendant Commonwealth of Massachusetts further contends that the plaintiff's acts referred to in (1) above would cause it to sustain irreparable injury, both in serious damages, and in an amount difficult or impossible to determine, to its exclusive right of exploration, and in usurping the prerogative of the Massachusetts Legislature to proscribe all further explorations in the relevant area, and the Defendant Commonwealth of Massachusetts further contends that sale, publication, or other disposition of

the exploration data already accumulated by the plaintiff by means of the acts referred to in 1(a) and 1(b) above will significantly increase the injury caused to Massachusetts, and the defendant, Commonwealth of Massachusetts, further contends that it is without any adequate remedy at law.

4. Defendant Commonwealth of Massachusetts further contends that the issuance of a Preliminary Injunction herein will not cause undue inconvenience or loss to the plaintiff.

5. The defendant Commonwealth of Massachusetts further contends that if the Court rules affirmatively on its motion, it should be exempted from the requirement of providing a bond.

6. The granting of a Preliminary Injunction is necessary to preserve the status quo until the merits of the case can be decided.

Conclusions of Law

1. Defendant Commonwealth of Massachusetts is entitled to a Preliminary Injunction on the terms of, and with the effect of, the ORDER set forth below.

And it is therefore

ORDERED that the plaintiff, United States of America, its elected and appointed officials and officers, and its agents, servants, employees, attorneys and all persons in active concert and participation with it, pending final hearing and determination of the action be

1. Enjoined from conducting any explorations, by whatever method for the location or probable location of oil, gas and other mineral resources within that area of the Atlantic continental shelf which is claimed by Massachusetts and which is in issue in the case at bar, to wit, an area: Starting at a point three miles from the New Hampshire/Massachusetts boundary with a coordinate of latitude 42° 58′30″N., and longitude 70°47′00″W., and continuing along

a line on a bearing of N 86.07°30′ E. to a point of intersection with the limit of the North American Atlantic continental shelf, thence in a general southwesterly direction following the limit of the continental shelf to a point having the coordinate latitude 40°02′00″ N., and longitude 70°34′ 00″ E., thence continuing landward in a general northwesterly direction on a bearing of N 35° W., thence to a point in the vicinity of Block Island having the coordinate latitude 41°03′ N., and longitude 71°31′ E., thence northeasterly on a bearing N 34° E., to a point 3 miles from the Massachusetts/Rhode Island coastal boundary having a coordinate of latitude 71°09′ N., and longitude 41°27′30″, thence returning to the point of origin near the New Hampshire/Massachusetts boundary along a line 3 miles off the coast line of Massachusetts.

2. Enjoined from licensing, permitting, or otherwise authorizing any non-federal government entity, and any legal and natural person from performing the acts delineated in paragraph one above;

> Provided, however, that nothing contained in the paragraphs one and two above shall be construed to interfere with the Armed Forces of the United States in the performance of their national defense role;

3. Enjoined and ordered to forthwith suspend, or amend to conform to the provisions of ~~prayer~~ paragraph one above, the exploration permit granted to Digicon, Inc., dated May 4, 1972, and designated OCS Permit E2-72, pursuant to the right to suspend or amend specified therein; and to also suspend any further such exploration permits which encompass the activities delineated in paragraph one above, which may possibly exist, and of which the Defendant, Commonwealth of Massachusetts has no knowledge.

4. Enjoined and ordered to maintain and keep in strict confidentiality any data previously acquired by the plaintiff by virtue of the activities delineated in paragraphs one and two above.

AFFIDAVIT

My name is Henry Herrmann.

I am a Special Assistant Attorney General of Massachusetts with an office at the Department of the Attorney General, 131 Tremont Street, Boston, Massachusetts. I am a member of the Massachusetts and the Federal Bar.

I am submitting this Affidavit in support of the Motion being submitted to the Supreme Court of the United States, by the Attorney General of Massachusetts, which seeks to enjoin any exploration for oil or other mineral deposits in the disputed area of the Continental Shelf off the coast of Massachusetts, by any federal agency or private party, until such time as a decision is rendered in the case of *United States* v. *The State of Maine, et al.*

On November 3, 1971, the Attorney General of the Commonwealth of Massachusetts became aware of press reports that the United States Department of the Interior intended to issue off-shore exploration permits for that area off Massachusetts which is in dispute in this lawsuit. On that day, at the request of the Attorney General, I had telephone conversations with both the Honorable Erwin N. Griswold, Solicitor General of the United States, and the Honorable William T. Pecora, Undersecretary of the Interior. I communicated the concern of the Attorney General that the Federal Government would disrupt the status quo during the pendency of this lawsuit and stressed that Massachusetts could not passively acquiesce in any such action, but, rather, would be forced to move this Court for a preliminary injunction. After considerable discussion, I was assured that the press reports were completely erroneous and that the reported federal action would not take place before a final decision in this lawsuit. I was given specific assurances by Dr. Pecora that the *only* action contemplated during the pendency of this lawsuit was an environmental impact study, pursuant to the provisions of the National Environmental Policy Act of 1969, with re-

gard to future continental shelf oil exploration and exploitation. I was told that Dr. Pecora's department was initially contemplating only a compilation and evaluation of scientific and other data presently in its possession; his estimate was that this would take a few months and that a preliminary report would be made public upon its completion. Dr. Pecora told me that, at that time, the Department of the Interior might decide to hold public hearings or elicit public testimony on the contents of the preliminary report. I would like to stress that no mention whatsoever was made by Dr. Pecora of any intent of his department to conduct explorations for oil, or to license private persons to do so, in the area under dispute. I informed Dr. Pecora that Massachusetts would consider even public hearings as an improper assertion of federal jurisdiction during the pendency of this lawsuit.

In my letter to Dr. Pecora dated November 8, 1971, I confirmed the substance of our telephone conversation. I received an answer dated November 23, 1971 from David E. Lindgren, Esq., Associate Solicitor, Department of the Interior. Mr. Lindgren informed me that the day after the aforementioned telephone conversation, the Secretary of the Interior issued a press release which clarified what Mr. Lindgren considered the erroneous impressions resulting from news media reports. In the pertinent part of his letter, Mr. Lindgren stated:

> In that press release, the Secretary noted that the issue of sea bed jurisdiction, presently in litigation in *United States* v. *Maine*, No. 35 Original, is a paramount consideration and, consequently, "no leasing procedures — no action toward such procedures, in fact — can be undertaken until the Supreme Court decides that boundary issue or the States and the Federal Government make interim arrangements for leasing pending the Supreme Court decision". It appears that this

statement serves to meet the concerns you expressed in your November 8 letter.

Please be assured that the Department of the Interior will continue to conduct its activities and responsibilities in these offshore areas in full recognition of the rights, interests and claims of the Commonwealth of Massachusetts, and all the other East Coast States, in the pending Supreme Court action.

Dr. Pecora's verbal assurances and the content of Mr. Lindgren's letter dispelled the urgency of the situation as far as the Attorney General of Massachusetts was concerned.

At a meeting on December 14, 1971 in Philadelphia, attended by representatives of the United States and most of the defendant States, including Massachusetts, the matter of federal action *pendente lite* was discussed. In correspondence to confirm the gist of these discussions, the Acting Solicitor of the Department of the Interior sent the following "clarifications" to the Attorney General of Massachusetts:

You have stated that we have agreed not to take any action towards "leasing procedures" nor "hold any hearings with respect to proposed leasehold areas" unless agreements or arrangements were entered into with the adjacent State. The definition of "leasing procedures" is crucial. We believe that it was made clear at the meeting that the "leasing procedures" referred to were "formal pre-leasing procedures", that is, those involving the published call for nominations and subsequent procedures leading to the issuance of Outer Continental Shelf (OCS) leases as provided for in the applicable regulations. Thus, the United States reserves the right to continue information-gathering activities and hold informal hearings for the purposes of obtaining information relevant to possible mineral development of the OCS off the East Coast.

It was my understanding that taken in its context in the above quoted paragraph, "information-gathering activities" could not conceivably refer to physical exploration.

I can therefore not overstate my surprise and concern engendered by an article entitled "East Coast Drilling Speeded" which appeared in the Boston Evening Globe on February 8, 1972. The substance of that article, which I believe to be accurate after having confirmed it with Mr. John Fuerbinger, the reporter for the Boston Evening Globe who had attended a Department of the Interior press conference in Washington, was that stratigraphic drilling for oil in the Georges Bank area would be undertaken by the Interior Department this summer. The purpose of the drilling was said to be "to pinpoint the richest areas for petroleum production if the government should decide to lease them". Mr. Henry L. Berryll, Chief of Marine Research, Geological Survey, was quoted as saying "We're moving as fast as we can".

The Attorney General of Massachusetts again considered seeking a preliminary injunction in this Court. However, subsequent reports reaching this Department indicated that the aforementioned drilling plans had been suspended for the time being for "scientific reasons" and lack of funds. Subsequently, by means of an article entitled "U. S. and Industry Go Fishing for Oil" by Mr. Tom Incantalupo appearing in *Newsday* on May 19, 1972, the Department of the Attorney General became aware of yet another drastic change in the situation. I have confirmed the substance of that article with Mr. Incantalupo, and believe it to be true. It stated that the vessel *Gulf Seal* sailed out of New Bedford, Massachusetts, on May 18, 1972 in order to conduct seismic explorations for oil in the Georges Bank area (which is claimed by Massachusetts in this lawsuit). The *Gulf Seal* is operated by Digicon, Inc., a research firm in Houston, Texas. Digicon was retained for a fee of $750,-

000.00 by a consortium of thirty oil companies headed by Getty Oil. In addition, the article stated that the United States Geological Survey intended to conduct seismic surveys for mineral deposits in an adjacent area, which is also claimed by Massachusetts.

Acting on information received from Mr. Incantalupo, I confirmed that Digicon was operating under a permit issued by the United States Geological Survey.

Unfortunately, the Department of the Massachusetts Attorney General has had to rely almost entirely on press reports as to the continually changing plans of the Federal Government in this area. Notwithstanding our repeated requests that this Department be kept informed of the Interior Department's plans in this disputed area, specifically as to activities which would relate to the issues in this lawsuit, our requests for timely official information have been consistently ignored.

After first having obtained clearance from the Associate Solicitor of the Interior Department, I called the responsible officials of the Geological Survey on May 25 and 26, 1972, and urgently requested a copy of the Digicon permit. I received one a week later.

On the basis of the information contained in the Digicon permit (the text of which I have annexed hereto as Exhibit 1) and on the basis of my information and belief as to the proposed explorations by the Geological Survey this summer in an area of the continental shelf claimed by Massachusetts, the Attorney General has made a determination that he is obliged to move for a preliminary injunction in this Court in order to protect the interests of Massachusetts *pendente lite*.

For the reasons stated in the affidavits submitted by the Honorable David M. Bartley, Speaker of the Massachusetts House of Representatives, and Mr. Charles J. Strumski, President of the Massachusetts Wildlife Federation, I be-

lieve that serious and irreparable harm will be caused to Massachusetts if the above delineated actions by the United States are not enjoined during the pendency of this lawsuit. I believe, on the legal grounds set forth in Massachusetts' brief in support of this Motion, that serious financial damages, in an amount extremely difficult to ascertain, would be caused by plaintiff's interference with Massachusetts' exclusive right to explore for continental shelf resources in the area which it claims. Furthermore, the action by the plaintiffs will, with finality, usurp the decision-making power of our legislature. I believe that Massachusetts has no remedy at law for the above injury, which it will suffer unless the status quo *pendente lite* is preserved. I further believe that the granting of such an injunction could not cause any undue damage or inconvenience to the plaintiff.

For the convenience of the Court, I am annexing as Exhibit 2 to this Affidavit a geographic sketch prepared by the Geodetic Division, Massachusetts Department of Public Works, at the request of the Department of the Attorney General. This sketch shows the offshore areas referred to in our Motion and in the Affidavit by Sidney Smookler, Esquire, Assistant Attorney General; it shows the continental shelf area claimed by Massachusetts, the area subject to the Digicon permit, and the location of Georges Bank. This sketch is included for convenience of reference and is not intended as an accurate maritime map showing the areas under discussion.

(s) HENRY HERRMANN
Special Assistant
Attorney General
Commonwealth of Massachusetts

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

Then before me personally appeared the above named Henry Herrmann and made oath that the above statement is true to the best of his knowledge and belief.

(s) DAVID J. PAYNE
Notary Public

My Commission Expires:
January 14, 1977

EXHIBIT 1

UNITED STATES DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
WASHINGTON, D.C. 20242

May 4, 1972

Mr. Richard C. Finn
Digicon Incorporated
3701 Kirby Drive — Suite 112
Houston, Texas 77006

Re: OCS Permit E 2-72

Dear Mr. Finn:

Your letter of April 20 requests authorization for Digicon Inc. to conduct a seismic survey in the Georges Bank area in the Atlantic Ocean utilizing pneumatic devices (air guns) for the energy source. The approximate location of an area within which you propose to conduct the operations is shown on the enclosed plat (Enclosure I).

Approval is hereby granted for Digicon Inc. to conduct the proposed operations during the period from May 15 to October 15, 1972, along the 700-Series lines shown on the plat (dated 4-10-72) received with your letter insofar as they lie within the "Outer Continental Shelf" (as defined in Section 2 of the Outer Continental Shelf Lands Act of August 7, 1953), subject to the following conditions:

1. That you send notices or reports to this office at the address shown on the attached sheet (Enclosure II), with copies to the Commander, Eastern Sea Frontier and to appropriate offices of the U.S. Coast Guard and the National Marine Fisheries Service, also shown on Enclosure II, as follows:

(a) To be mailed a few days prior to com-

mencement of operations: Date you expect to commence operations.

(b) To be mailed at the end of successive periods of operations not exceeding two weeks each: Report stating the approximate number of days operations were conducted and the approximate number of miles of line run subsequent to each preceding report, and your estimate of the time which will be required to complete the survey.

(c) To be mailed upon completion of operations: Report stating the date on which the operations were completed.

(d) All such notices or reports must contain a reference to "U.S. Geological Survey OCS Permit E 2-72".

2. That upon completion or suspension of the operations, you furnish this office with two copies of a large scale plat showing the lines or portions of lines completed.

3. That you report to this office immediately any difficulty encountered with other users of the sea.

4. That, when requested by this office, offshore quarters and offshore transportation be provided for a representative of the Geological Survey or for such other Federal personnel designated by me to permit inspection or observation of the operations at any time.

5. That this permit may be amended, suspended, or revoked at any time should circumstances develop which would warrant such action.

6. That no operations shall be conducted under this permit after October 15, 1972, unless an extension of time is granted.

7. That as to any area covered by this permit in which the water depth exceeds 200 meters, the fol-

lowing shall be applicable: In accordance with the policy statement of the President dated May 23, 1970, exploration permits issued pursuant to Section 11 of the Outer Continental Shelf Lands Act of 1953 pertaining to areas of the seabed beyond the depth of 200 meters are subject to the provisions of any future treaty, regarding the exploration and exploitation of the natural resources of these areas, to which the United States is a party. Accordingly, this permit is subject to the policy conditions incorporated in that statement.

Copies of this letter and your letter of April 20 are being furnished to the parties shown on Enclosure II.

Sincerely yours,

(s) H. A. DuPont
Regional Oil and
Gas Supervisor
Eastern Region

Enclosures

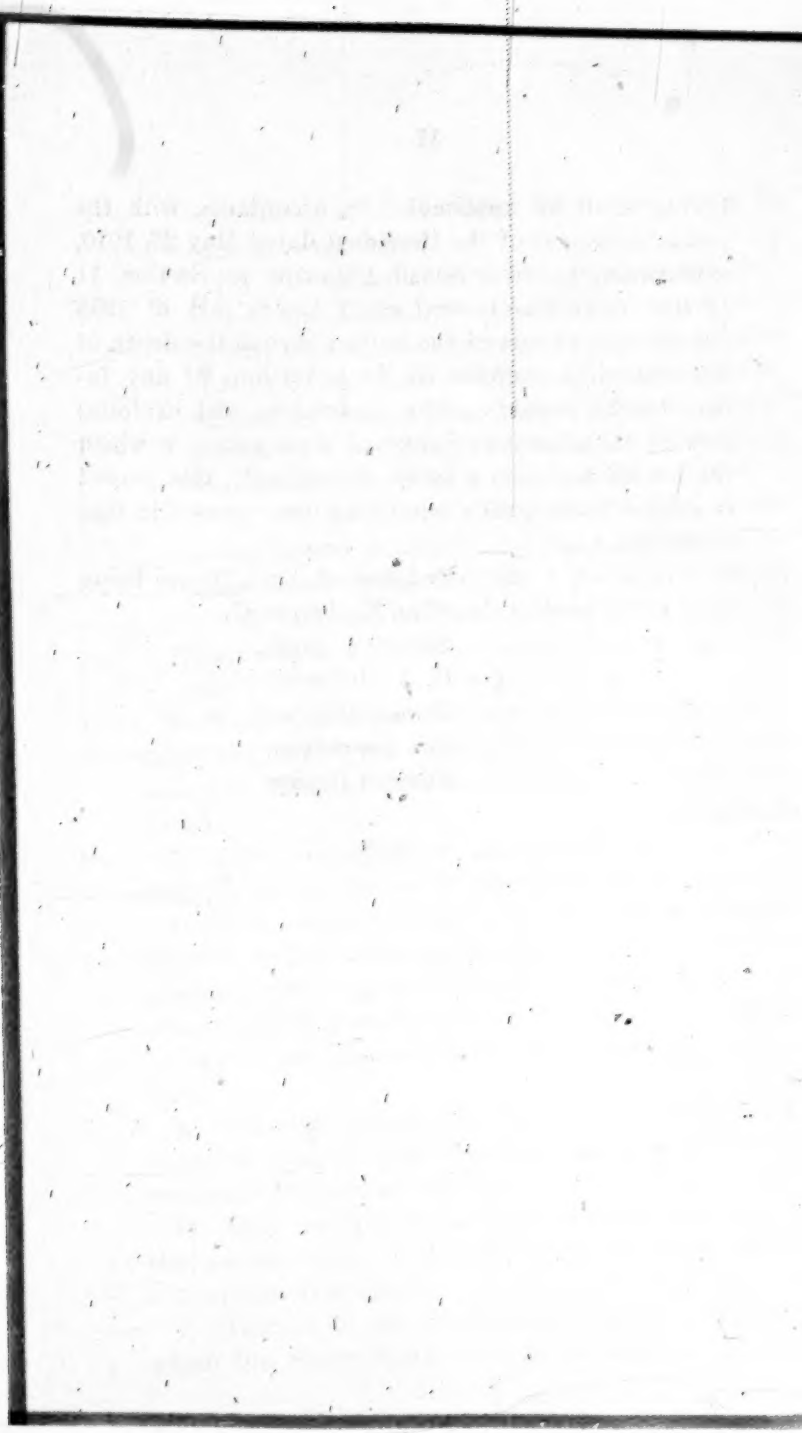
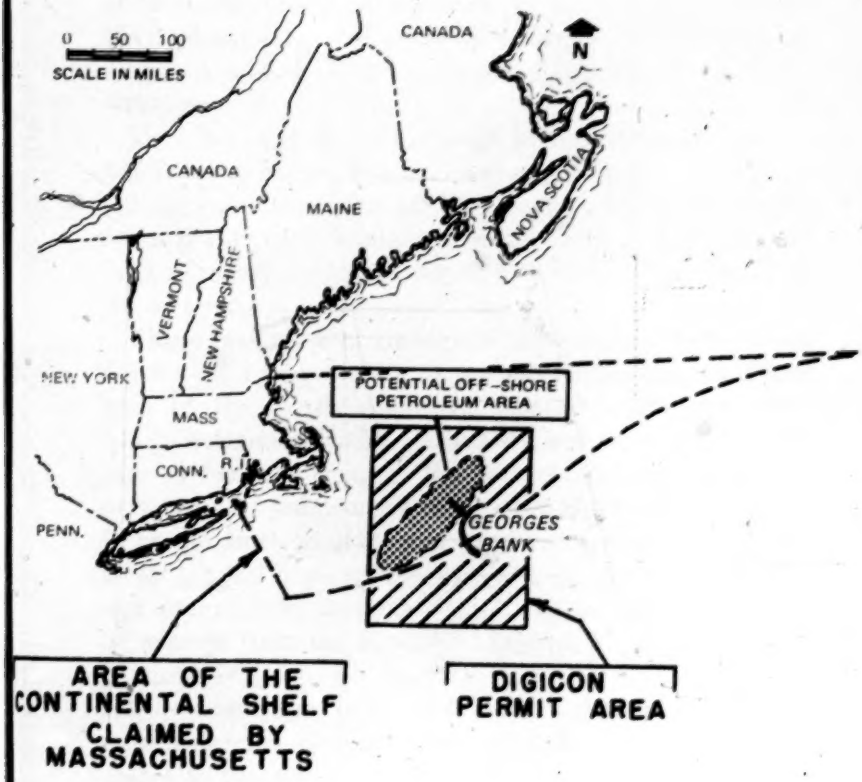


EXHIBIT NO. 2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POTENTIAL OFF-SHORE PETROLEUM AREA
GEORGES BANK
AREA OF THE CONTINENTAL SHELF CLAIMED BY MASSACHUSETTS
DIGICON PERMIT AREA

AFFIDAVIT

My name is Sidney Smookler.

I am an Assistant Attorney General of the Commonwealth of Massachusetts. I am a member of the Massachusetts and the Federal Bar, and am also a Registered Professional Engineer and a Registered Massachusetts Land Court Examiner.

My office is at the Department of the Attorney General, 131 Tremont Street, Boston, Massachusetts.

I am submitting this affidavit in support of the Motion for a preliminary injunction being filed by Massachusetts in the case of *United States* v. *The State of Maine, et al, No. 35 Original.*

I have read the aforementioned Motion for a Preliminary Injunction. I prepared the Description in the Motion of that area of the North American Atlantic continental shelf which is claimed by Massachusetts and is in issue in the case at bar, according to the best of my professional experience, and judgment. I believe the aforesaid description to be the most accurate and proper one that I could construct on the basis of the available applicable legal data and geographical methodology. I was assisted in the task by experts from the Geodetic Division, Massachusetts Department of Public Works.

This description is the best possible delimitation of this area under the circumstances and I do not intend to represent to the Court that the legal principles and geographical methods employed are necessarily conclusive.

I have in my possession a photostatic copy of a permit issued by the United States Geological Survey to Digicon, Inc. of Houston, Texas. This permit authorizes Digicon to conduct a "seismic survey" in the "Georges Bank area" in the Atlantic Ocean. The off-shore area to which this exploration permit applies is shown on a roughly drawn

plat marked as permit enclosure I, and encompasses a rectangle whose perimeter is located approximately between latitude 40° N to 42° 13′ N and longitude 69° E to 66° E.

I have made a professional determination that a substantial portion of the Digicon permit area is within the area encompassed by the description in the Motion. Furthermore, the proposed Digicon explorations in the Georges Bank area would place them well within a geographical area which would certainly appertain to Massachusetts if the latter prevailed in this case, and which would not be affected by issues of the delimitation of off-shore lateral boundaries with Massachusetts' neighboring states.

(s) SIDNEY SMOOKLER
Assistant Attorney General
Commonwealth of Massachusetts

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

On this 7th day of June, 1972 before me personally appeared Sidney Smookler to me known to be the person described in, and who executed the foregoing Affidavit, and he acknowledged that he executed the same, and made oath as to its truth.

(s) DAVID J. PAYNE
Notary Public

My Commission expires:
January 14, 1977

AFFIDAVIT

My name is David M. Bartley.

I am the Speaker of the Massachusetts House of Representatives, and have my office at the State House, Boston, Massachusetts,

I am submitting this Affidavit in support of the Motion being submitted to the Supreme Court of the United States by the Attorney General of Massachusetts, which seeks to enjoin any exploration for oil in the disputed area of the Continental Shelf off the coast of Massachusetts, by any federal agency or private party, until such time as a decision is rendered in the case of *United States* v. *The State of Maine, et al.*

In the event that Massachusetts were to prevail in this lawsuit, it would clearly be within the prerogative of the Massachusetts Legislature to make the fundamental decision whether it would be in the best interests of the citizens of this Commonwealth to permit any exploration for, and any exploitation of, the oil and gas deposits which may be present in the area of the Continental Shelf to which Massachusetts makes claim.

In my opinion, the conduct of explorations in this area by the Federal Government and or its licensees, which will accumulate data not presently available as to the location or probable location of oil and gas deposits in this disputed area, would usurp the decision of our legislature as to whether further exploration should be undertaken at all. It is my considered opinion as the Speaker of the Massachusetts House of Representatives, therefore, that further exploration by the Federal Government, or its licensees, before a final decision in this lawsuit, would create a serious and irreparable harm to the interest of this Commonwealth. Our legislature will have an important and complex decision to make on this conservation issue if the Commonwealth prevails in this action. It is my belief that the

legislative decision-making process would be disrupted by the premature accumulation of this oil and gas exploration data.

Furthermore, I have been advised by The Honorable Robert H. Quinn, Attorney General of Massachusetts, that the exclusive right to explore for oil and gas is an important property right. That right is claimed by Massachusetts with respect to the off-shore area in controversy. The usurpation by the Federal Government, during the pendency of this lawsuit, of this exclusive property right claimed by Massachusetts, would therefore cause substantial financial damage to the interests of the Commonwealth, in an amount very difficult to determine now or after the outcome of this lawsuit. Disruption by the Federal Government of the status quo would, therefore, in the event Massachusetts ultimately prevails, also create an irreparable harm to the property interests of this Commonwealth as well as cause an irreparable harm to the orderly conduct of the legislative decision-making process and its implementation, as I have indicated above.

(s) DAVID M. BARTLEY
Speaker, House of Representatives
Commonwealth of Massachusetts

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

On this fifth day of June, 1972 before me personally appeared David M. Bartley to me known to be the person described in, and who executed the foregoing Affidavit, and he acknowledged that he executed the same, and made oath as to its truth.

(s) ALBERT PETER O'NEIL
Notary Public

My Commission Expires:
May 3, 1974

AFFIDAVIT

My name is Charles J. Strumski.

I am the President of The Massachusetts Wildlife Federation, with headquarters at 201 Prospect Street, Norwood, Massachusetts. This organization, which has as its primary purpose the conservation of the wildlife and natural resources of the Commonwealth of Massachusetts, is affiliated with the National Wildlife Federation.

In furtherance of our purpose, we have consistently opposed exploration for oil in the Continental Shelf off our coast, and the granting of exploitation leases for the off-shore area.

I am submitting this affidavit in support of the Motion being submitted to the Supreme Court of the United States by the Attorney General of Massachusetts, which seeks to enjoin any exploration for oil in the disputed area of the Continental Shelf off the coast of Massachusetts, by any federal agency or private party, until such time as a decision is rendered in the case of *United States* v. *The State of Maine, et al.* It is my considered opinion, based upon my experience in formulating conservation policy and furthering its implementation in Massachusetts, that in the event the Commonwealth of Massachusetts were to prevail in the aforementioned litigation, a prior increase of data available as to the amount, nature, and precise location of the off-shore natural resources in question, without the prior consent of the Massachusetts Legislature, would cause a serious and irreparable injury to the interests of the Commonwealth.

I am basing my opinion on the fact that, in the event that Massachusetts were to prevail in this lawsuit, it would then be the prerogative of the Massachusetts Legislature to make the determination whether there should be any drilling for oil on the continental shelf controlled by Massachusetts, or whether there should be a moratorium or

permanent ban on such activities. In the event that Massachusetts were to determine that, under the present state of technology, the exploration for, and exploitation of, such submarine oil deposits (if any), would pose too grave a threat to the marine life and overall coastal environment of our state, the consistent and effective implementation of such a legislative purpose would be hampered by the unnecessary prior accumulation of off-shore oil exploration data. If a conservationist approach is taken by our Commonwealth to this complex problem, it would definitely be desirable to minimize the available information on the precise location of any off-shore oil. The availability of such data, prior to a legislative decision, would undoubtedly generate substantial social, economic and political pressures to immediately exploit the resources whose location is known, rather than to explore for alternate sources elsewhere in our nation, in such areas where the proper political decision-making body has determined that such exploration should occur.

(s) CHARLES J. STRUMSKI
President, Massachusetts
Wildlife Federation

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss:

On this second day of June, 1972 before me personally appeared Charles J. Strumski to me known to be the person described in, and who executed the foregoing Affidavit, and he acknowledged that he executed the same, and made oath as to its truth.

(s) DAVID J. PAYNE
Notary

My Commission Expires:
Jan. 14, 1977

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 35,
ORIGINAL

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA.

Statement

This action was brought by the Plaintiff United States of America against the thirteen Atlantic coastal states, including the Defendant Commonwealth of Massachusetts, in order to establish, as against the defendants, that the United States has the exclusive right to explore and exploit the natural resources of the North American Atlantic continental shelf more than three miles seaward from the coast line. The complaint generally alleged that the United States had these rights prior to the enactment, in 1953,

of the Submerged Lands Act. [67 Stat. 29, 43 U.S.C. 1301-1315.]

The complaint further alleged that this Act gave the defendants the ownership of the seabed within their boundaries to a maximum of three miles seaward from the low water mark, but that the United States, by virtue of the Submerged Lands Act retained jurisdiction over the remainder of the continental shelf. Also alleged in the complaint is that the defendants claim rights to this remainder of the continental shelf which are adverse to the plaintiff. The United States prayed for a declaration of its exclusive rights to the area in question as described above.

The Defendant Commonwealth of Massachusetts specifically denied the allegations in the plaintiff's complaint, and in addition asserted in an affirmative defense that the Commonwealth of Massachusetts, as the successor to certain royal charters, is entitled "to exercise exclusive dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line, subject to the limits of national seaward jurisdiction established by the plaintiff;" Massachusetts prayed for a declaration of its rights as against the plaintiff to exclusive dominion and control to the seabed and subsoil in question. All defendants except Florida submitted answers generally paralleling Massachusetts' historical claim.

In January of 1970 the plaintiff moved the Court for judgment on the ground that allegedly no genuine issue of material fact existed and that it was entitled to judgment as a matter of law. The defendants in January of 1970 moved that the Court refer the case to a master. By its order of June 8, 1970, the Court granted the latter motion and referred the case to a special master.

The case is presently being heard before the Special Master, the Honorable Albert Branson Maris, Senior United

States Circuit Judge, pursuant to his procedural order of August 27, 1971.

As stated on the attached affidavits, the Defendant Commonwealth of Massachusetts is concerned that the acts of the plaintiff will unilaterally disrupt the status quo, to the serious and irremediable harm of Massachusetts before this case is decided on its merits; for this reason, Massachusetts makes its motion for a preliminary injunction.

Questions Presented

1. Is the right of the Plaintiff United States of America to conduct or license explorations for mineral resources on the outer continental shelf in issue in the case at bar?
2. Will such explorations *pendente lite* disrupt the status quo to the irremediable harm of Massachusetts?
3. Is Massachusetts entitled to a preliminary injunction to preserve the status quo under the factual situation it has alleged?

Statutes Involved

1. The Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331-1343, provides in pertinent part:

SEC. 2.

When used in this subchapter—

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

(b) The term "Secretary" means the Secretary of the Interior;

(c) The term "mineral lease" means any form of authorization for the exploration for, or development or removal of deposits of, oil, gas, or other minerals; and

(d) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation. [67 Stat. 462, 43 U.S.C. 1331.]

SEC. 3.

(a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter. [67 Stat. 462, 43 U.S.C. 1332.]

• • • •

SEC. 5.

(a) (1) The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. [67 Stat. 464, 43 U.S.C. 1334(a)(1).]

• • • •

SEC. 11.

Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the outer Continental Shelf, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this subchapter, and which are not unduly harmful to aquatic life in such area. [67 Stat. 469, 43 U.S.C. 1340.]

2. The Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301-1315, provides in pertinent part:

SEC. 2.

When used in this chapter—

(a) The term "lands beneath navigable waters" means—

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or

the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

• • • • •

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

• • • • •

(g) The term "State" means any State of the Union;

[67 Stat. 29, 43 U.S.C. 1301.]

• • • • •

SEC. 9.

Nothing in this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 1301 of this title, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed.

[67 Stat. 32, 43 U.S.C. 1302.]

SEC. 3.

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the

lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) (1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources;....

[67 Stat. 30, 43 U.S.C. 1311(a)-(b)(1).]

* * * *

SEC. 4.

The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that

line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

[67 Stat. 31, 43 U.S.C. 1312.]

3. *Geological Survey.*

Section 31 of Title 43, United States Codes, provides in pertinent part:

(a) The Director of the Geological Survey, which office is established, under the Interior Department, shall be appointed by the President by and with the advice and consent of the Senate. This officer shall have the direction of the Geological Survey, and the classification of the public lands and examination of the geological structure, mineral resources, and products of the national domain. The Director and members of the Geological Survey shall have no personal or private interests in the lands or mineral wealth of the region under survey, and shall execute no surveys or examinations for private parties or corporations.

(b) The authority of the Secretary of the Interior, exercised through the Geological Survey of the Department of the Interior, to examine the geological structure, mineral resources, and products of the national domain, is expanded to authorize such examinations outside the national domain where determined by the Secretary to be in the national interest.

[20 Stat. 394, *as amended* by
76 Stat. 427, 43 U.S.C. 31(a)-(b).]

Summary of Argument

Massachusetts alleges that during the pendency of this action the Plaintiff United States of America has, through the United States Geological Survey, licensed a private person, Digicon Inc., to conduct seismic explorations for oil deposits in that area of the North American Atlantic continental shelf which would be subject to the exclusive exploration right of Massachusetts if it prevailed in the case at bar; in addition, the Geological Survey plans to conduct similar explorations of its own in this area. Massachusetts claims that the federal statutes under which plaintiff asserts it's purported exploratory rights are invalid, and are squarely in issue in this case; therefore, the plaintiff is not entitled to assert its claimed exploration rights *pendente lite.*

The exclusive right to explore for oil is an important property right; thus, the conduct of the plaintiff and its licensee threatens to disrupt the status quo by damaging this right claimed by Massachusetts, and, further, by wrongfully pre-empting the decision whether to permanently prohibit exploration on environmental policy grounds, a decision which, if Massachusetts prevails, its legislature is entitled to make. The damage threatened to Massachusetts is serious and irremediable; in contrast, a preliminary injunction would not create an undue hardship to the plaintiff. Under the applicable doctrines of equity, Massachusetts is entitled to a preliminary injunction which will preserve the status quo (the present aggregate of oil exploration data for this area) pending a final decision by this Court.

Argument

I. THE UNITED STATES GEOLOGICAL SURVEY PLANS TO CONDUCT, *Pendente lite*, EXPLORATIONS OF THAT PORTION OF THE OUTER CONTINENTAL SHELF SUBJECT TO THE CLAIMS OF MASSACHUSETTS, AND HAS APPROVED, *Pendente lite*, SUCH EXPLORATIONS BY PRIVATE PERSONS IN THAT AREA; IN SO DOING, THE GEOLOGICAL SURVEY IS ACTING SOLELY IN RELIANCE ON PURPORTED FEDERAL STATUTORY AUTHORITY WHICH IS UNDER CHALLENGE IN THE CASE AT BAR.

A. *The Alleged Statutory Authority For The Activity By The Federal Government Which Massachusetts Seeks To Enjoin Is The Outer Continental Shelf Lands Act, Sec. 11, 67 Stat. 462, 43 U.S.C. 1340.*

The basis for the alleged authority of the United States Geological Survey to conduct such explorations itself and to approve of their being conducted by private persons, is the Outer Continental Shelf Lands Act, sec. 11, 67 Stat. 462, 43 U.S.C. 1340. This statute states:

> Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the outer Continental Shelf, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this subchapter, and which are not unduly harmful to aquatic life in such area. [43 U.S.C. 1340.]

Before discussing the relevance of this statute, we would like to make some preliminary comments on its interpretation and present implementation. The words "any agency of the United States" could not, we believe, be interpreted as an omnibus enabling act for any federal agency to con-

duct such explorations even if the latter had no possible relevance to its general purpose or function. Rather, these words would seem to refer to any federal agency otherwise legally authorized to carry on general activities of this nature. The latter interpretation is supported by the legislative history of this section. Hearings on S. 1901 Before the Committee on Interior and Insular Affairs, 83 Cong., 1st Sess. (1953) 638.

The second comment we would make on the wording of this statute is that the requirement for authorization by the Secretary pertains only to "persons" as defined in the Act; there is no need for an "agency" to obtain this authorization. This is clearly indicated by the legislative history —the Justice Department recommended that "persons" be obliged to obtain approval by the Secretary as a prerequisite to exploration. Hearings on S. 1901, *supra,* at 706.

We submit, therefore, that an accurate paraphrasing of this statute is that the relevant offshore area is open to exploration by any federal agency, otherwise legally authorized, and by persons who obtain the approval of the Secretary of the Interior. The Secretary of the Interior has delegated to the Director of the United States Geological Survey this alleged prerogative to authorize exploration by "persons."

We return now to the relevance of this Section to the subject matter of this Motion—as we argue, this Section is the sole authority which the Geological Survey can allege for its conduct of exploration of this offshore area. We think it most significant that the Department of the Interior, which has under it the Geological Survey, [See Act of Mar. 3, 1879, 20 Stat. 394, 43 U.S.C. 31(a).] has expressed precisely the same position in a document of most recent vintage. The Chairman of the Senate Committee on Interior and Insular Affairs submitted a series of questions to Mr. Hollis M. Dole, Assistant Secretary for Mineral Re-

sources; Department of the Interior. One of several questions under the heading "The Present Legal Regime For The Outer Continental Shelf" was "Which entities within which Federal Agencies have been assigned O.C.S. [Outer Continental Shelf] responsibilities...?" The Assistant Secretary of the Interior replied: "The Geological Survey is also responsible for geological and geophysical exploration under section 11 of the OCS Act (43 U.S.C. §1340)." Oversight Hearings held pursuant to S. Res. 45, by the Senate Committee on Interior and Insular Affairs, 92nd Cong., 2nd Sess. (Mar. 23, 1972) part A., p. 2. These were written questions and answers, prepared in advance of the hearings and inserted into the record at the Under Secretary's request. Oversight Hearings, *supra*, "Opening Remarks," p. 8.

B. *Absent The Provisions Of Section 11 Of The Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1340, The United States Geological Survey Has No Other Legal Authority To Conduct These Explorations Of The Outer Continental Shelf.*

The question now arises whether, if section 11 (43 U.S.C. 1340) is invalid, the Geological Survey has any recourse to other legal authority for its explorations of this offshore area. We submit it has none. It is our contention that the Geological Survey could not rely on its general enabling act, (20 Stat. 394, *as amended* by Act of Sept. 5, 1962, 76 Stat. 427, 43 U.S.C. 31(a)-(b).), to give legitimacy to its Outer Continental Shelf exploration. That statute provides in subsection (a) that the Director of the Geological Survey "...shall have the ... examination of the geological structure, mineral resources, and products of the national domain." [43 U.S.C. 31(a).] Surprisingly, the term "national domain", which has existed in that statutory context since

1879, has apparently never been afforded a precise statutory or judicial definition. The term has been rather loosely defined by a Louisiana statute (which admittedly is not controlling here):

> "The national domain, properly speaking, comprehends all the landed estate and all the rights which belong to the nation, whether the latter is in the actual enjoyment of the same, or has only a right to reenter on them." Art. 486, West La. Civil Code (1952).

In our opinion, perhaps the most encompassing definition of "national domain" which we could advance to the Court would parallel the delineation of the areas subject to the authority of the Conservation Division of the Geological Survey:

> "... lands under the supervision or control of the Federal Government. These lands are divided for administrative purposes into five categories: First, the public lands or, as sometimes referred to, the public domain; second, the acquired lands which are lands acquired by the Federal Government for various purposes; third, the Indian lands, both tribal and allotted, for which the United States acts as trustee for the Indian owners; fourth, certain naval petroleum reserve lands by virtue of a cooperative arrangement with the Department of the Navy; fifth, the so-called military and miscellaneous lands, which are not subject to any of the mineral leasing laws." Hearings on S. 1901 Before the Committee on Interior and Insular Affairs, 83rd Cong., 1st Sess. (1953) 563. (Statement of H.J. Duncan, Chief, Conservation Div., Geological Survey, Dept. of Int.).

We would note that only the assertion of federal dominium by virtue of the Submerged Lands Act, §9 [67 Stat. 29, 43 U.S.C. 1302] and the Outer Continental Shelf Lands Act, § 3A [67 Stat. 462, 43 U.S.C. 1332] would suffice to justify an argument by the plaintiff that the Outer Continental Shelf is included within the aforegoing definition of "national domain." The validity of federal assertion of dominium, however, is precisely what is in issue, and that is why we argue that the Geological Survey cannot rely, in this instance, on its statutory authority to explore the "national domain." We would further note that while we cannot state with utter precision what the "national domain" *is*, we have certain clear indications what it is *not:* as the word "domain" and the above quoted Louisiana statute indicate, the term is by no means co-extensive with the imperium of the United States Government. Further, "national domain" does *not* include the Outer Continental Shelf even if the Federal Government did have dominium over this area. We justify this assertion on the legislative history to the Congressional extension, in 1962, of the authority of the Geological Survey to areas *outside* the national domain. [Act of Sept. 5, 1962, 76 Stat. 427, 43 U.S.C. 31(b).]

The Senate Report on the bill (S. 981) stated, in the paragraph entitled "NEED FOR LEGISLATION": "Passage of S. 981 would permit the Geological Survey to conduct investigations of the Outer Continental Shelves and ocean floor...." S. Rep. No. 650, 87th Cong., 1st Sess. (1961) 1. This much seems clear: if the Geological Survey, in order to explore the Outer Continental Shelf, required authority to operate *outside* the "national domain," then the latter was *not* considered to encompass the Outer Continental Shelf. We would like to add that "Outer Continental Shelf," in this Senate Report, had to refer to the Continental Shelves of the Coasts of the United States since "Outer Continental Shelf" has no legal or scientific meaning other

than a term of art created by the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331-1343.[1]

The fact that the Geological Survey, since 1962, has had its exploration authority extended *outside* the "national domain" raises the question whether the Survey could rely on this amendment in the case at bar, assuming as we argue, that the Outer Continental Shelf Lands Act is invalid and that the Outer Continental Shelf is not *within* the "national domain." We submit that the Survey definitely cannot rely on this extension of its authority to areas outside the "national domain"; the clear implication of this 1962 amendment is that the Survey may operate outside the national domain (anywhere in the world) subject to the consent of the relevant property owner, whether the latter be the foreign, state, or local government or private person having dominium over the area to be explored. Only in the case of *res nullius* could the Survey act unilaterally. For example, the legislative history to the 1962 Amendment states that explorations by the Survey in foreign countries was contemplated. H. Rep. No. 2156, 87th Cong., 2nd Sess. (1962) 2. It seems axiomatic that Congress did not intend to authorize the Survey to conduct explorations in areas subject to the political control of a foreign government *without* the latter's consent. We suggest, further, that there is no need for the Court to reach the issue whether it would be within the legitimate exercise of Congressional authority to authorize the Geological Survey to explore the oil and gas deposits *anywhere* within the imperium of the United States Government, if the lands in question were State or privately owned. If we assume, *arguendo*, that this would indeed be within the power of the Congress, then the imple-

[1] The term "Outer Continental Shelf" is utilized in this brief for convenience of geographical reference only; we do not thereby recognize any legal implications of the creation of that term by a federal statute, the validity of which we are challenging.

mentation of such authority to survey would have to be accompanied by just compensation to the property owners involved together with proper procedural safeguards. The exclusive right of an owner to explore for oil and gas on his land has been held to be an important property right by all federal and state courts which have had occasion to rule on this issue: *See*, e.g., *Phillips Pet. Co.* v. *Cowden*, 241 F.2d 586 (5th Cir. 1957); *Holcombe* v. *Superior Oil Co.*, 213 La. 684, 35 So. 2d 457 (1948); *Layne Louisiana Co.* v. *Superior Oil Co.*, 209 La. 1014, 1020, 26 So. 2d 20, 22 (1946). Therefore, if we were to interpret the provision of the 1962 amendment, 76 Stat. 427, 43 U.S.C. 31(b), as omnibus authority for the Geological Survey to explore for oil and gas on state or privately owned land, we submit that the exercise of this authority, against the will of the property owner involved, would, in the absence of due process and just compensation, be unconstitutional by virtue of the provisions of the Fifth Amendment to the United States Constitution. We submit that the same argument would apply to any federal agency other than the Geological Survey which purported to have the right to explore this area under color of federal law.

The alleged authority of the Geological Survey, by delegation of the Secretary of the Interior, to license private "persons" to conduct such explorations can find no basis other than the above discussed Section 11 of the Outer Continental Shelf Lands Act (43 U.S.C. 1340) which is under challenge here. We would further argue that any attempt by the Congress to authorize other federal officers or agencies to grant such licenses to private persons would be subject to the same constitutional limitations discussed above in the event that the private licensee did not obtain the relevant property owner's consent.

C. *The Statutory Authority Relied Upon By The Plaintiff United States Of America To License And Conduct These Continental Shelf Explorations Is Directly In Issue In The Case At Bar, Since Both The Plaintiff And The Defendant Massachusetts Claim, In Their Pleadings, The Exclusive Right To The Offshore Area In Question.*

On page seven of Plaintiff's Brief in Support of Motion for Judgment, the plaintiff stated the "*Question Presented*" as being: "Whether the right to explore and exploit the natural resources of the continental shelf underlying the Atlantic Ocean beyond three miles from the coast line belongs to the United States or to the Defendant States." Furthermore, in the "*Introduction and Summary*" to the argument in the aforementioned brief, the plaintiff stated:

> "*The* issue in this case is whether the United States has, as against the defendant states, *the exclusive right to explore* and exploit the natural resources of the continental shelf under the Atlantic Ocean, more than three miles from the coast line." Brief of the United States in Support of Motion for Judgment, *supra*, pp. 10-11. (Emphasis supplied.)

In its answer, the Commonwealth of Massachusetts alleged as an affirmative defense that it is "entitled to exercise exclusive dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line, subject to the limits of national seaward jurisdiction established by the Plaintiff;" Mass. Ans., p. 4. In so alleging, the Commonwealth of Massachusetts has directly challenged Plaintiff's United States' contention of exclusive right to explore and exploit the na-

tural resources in question, which according to the plaintiff's pleadings is the issue in this case.

This central issue which has been joined in this case, directly puts into issue also those federal statutes which assert federal dominium over the geographical area in controversy.

With respect to domestic law, the first federal statute to assert the claim of the United States (as against the states) to the natural resources of the area now referred to as the Outer Continental Shelf was the Submerged Lands Act, sec. 9 (67 Stat. 29, 43 U.S.C. 1302).

That section purported to "confirm" the "jurisdiction and control" of the United States, and had the purpose of emphasizing that the Submerged Lands Act would not affect the rights of the United States to the area seaward of the historical boundaries of the States (the Outer Continental Shelf). Federal dominium over this offshore area was subsequently re-affirmed and expanded by the Outer Continental Shelf Lands Act (67 Stat. 462, 43 U.S.C. 1331-1343). Section 3(a) states:

> "It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition...." 43 U.S.C. 1332(a).

It is crucial to note that federal dominium, presently and at the time of the aforementioned legislation, is precisely what is at issue in this case; if the defendants prevail, the federal legislation which asserts United States dominium is invalid. The federal "right of disposition" under the Outer Continental Shelf Lands Act, sec. 3(a) as manifested, for example in section 11 of that Act (43 U.S.C. 1340), which the Geological Survey relies on, would be non-existent.

Upon protest by the Commonwealth of Massachusetts, the Department of the Interior agreed not to disrupt the status quo *pendente lite* by means of undertaking leasing procedures under the provisions of the Outer Continental Shelf Lands Act 67 Stat. 462, 43 U.S.C. 1331-43. We submit that this is a clear indication that the plaintiff, through the Secretary of the Interior and his solicitor, realizes full well that federal dominium, by virtue of the Outer Continental Shelf Lands Act, is directly in issue in this case. As alleged in the attached affidavit by Henry Herrmann, Special Assistant Attorney General, there were a series of telephone conversations on November 3, 1971 between Mr. Herrmann and both the Honorable Erwin N. Griswold, Solicitor General of the United States and the Honorable William T. Pecora, Under Secretary of the Interior, relating to the grave concern by Massachusetts that the Department of the Interior would upset the status quo *pendente lite*. It was on the next day, according to a letter dated November 23, 1971 to Mr. Herrmann from David E. Lindgren, Esq., Associate Solicitor, Department of the Interior, that the Secretary of the Interior issued a press release which according to the letter, "noted that the issue of seabed jurisdiction, presently in litigation in *United States* v. *State of Maine*, No. 35, Original, is a paramount consideration;" and that in consequence Secretary Morton's press release stated:

> "No leasing procedures—*no action toward such procedures, in fact*—can be undertaken until the Supreme Court decides that boundary issue or the States and the Federal Government make interim arrangements for leasing pending the Supreme Court decision." [emphasis added.]

Mr. Lindgren added that this appeared to meet the concerns expressed by the Attorney General of Massachusetts.

We are totally at a loss to understand by what reasoning the Federal Government, through the Department of the Interior, recognizes, on one hand, that it has no right *pendente lite* to disrupt the status quo by exercising its leasing prerogatives under the Outer Continental Shelf Lands Act, yet on the other hand, blithely assumes that it may conduct explorations under that same Act. In granting an oil drilling lease under a disputed statute (which the Interior Department admits it cannot do) and granting a permit to a private company for "explorations," under the very same disputed statute (which the Interior Department is confident it can do) there is at best a narrow distinction (and one of dubious relevance) in the context of this Motion for temporary equitable relief. If, as the plaintiff recognizes, federal dominium is in issue, then the plaintiff does not, we submit, have the right unilaterally to make the decision which of its alleged rights under the Outer Continenetal Shelf Lands Act it will assert or refrain from asserting pending a final decision by this Court.

II. The Explorations Which the Plaintiff and Its Licensees Intend To Conduct Will Result in a Change in the Status Quo *Pendente Lite*, to the Serious and Irremediable Harm of Massachusetts, Which, Lacking an Adequate Remedy at Law, Is Entitled to a Preliminary Injunction.

A. *The Purpose Of A Preliminary Injunction Is To Preserve The Status Quo Pendente Lite; The Latter Constitutes, In This Case, The Present Aggregate Of Exploration Data For The Relevant Geographical Area.*

"The purpose of the preliminary injunction is to preserve the status quo until the rights of the parties can be fairly and fully investigated and determined by strictly legal

proofs and according to the principles of equity." *Sinclair Refining Co.* v. *Midland Oil Co.*, 55 F.2d 42 (4th Cir. 1932), at 45. Accord, *Meiselman* v. *Paramount Film Distributing Corp.*, 180 F.2d 94 (4th Cir. 1950).

The issue that is in the forefront, therefore, is how to delineate the status quo which Massachusetts seeks to preserve *pendente lite*. We maintain it is certainly *not* definable as the past conduct of the plaintiff and its licensees with respect to explorations in this area (and we would note that we have no reliable knowledge as to their occurrence). Rather the status quo should be defined as the present cumulative result of any such past activities by these parties. Since Massachusetts claims the exclusive right to explore for oil in the relevant continental shelf area, therefore, the status quo is the accumulated data available at the present time; any increase in the aggregate of exploration or survey data is a disruption of the status quo, and an irremediable one. This would hold true whether the exploration data obtained after the present time showed negative or positive results, since the crucial *res* under discussion is the state of knowledge as to the nature, amount, and location of any mineral resources that may or may not be present. The uncertainty as to the presence of oil or gas is an important element in the marketability of the owner's property right (the right to grant exploration permits); *Phillips Pet. Co.* v. *Cowden*, 241 F.2d 586 (5th Cir. 1957); *Layne Louisiana Co.* v. *Superior Oil Co.*, 209 La. 1014, 26 So. 2d 20 (1946). Therefore, a decrease in this element of uncertainty is a change in the status quo. The threatened disruption of the status quo would not be mitigated by any allegations that the results will be confidential pending the outcome of this case. *Cf. Shell Pet. Corp.* v. *Scully*, 71 F.2d 772 (5th Cir. 1934), where recovery was allowed, notwithstanding the fact that the defendant surrendered to the plaintiff the information unlawfully ob-

tained. In view of the large number of major oil companies involved in the current Digicon exploration effort, (as alleged in Mr. Hermann's affidavit) it would be naive to argue that as a practical matter the data thus obtained will not materially affect the marketability of exploration rights to this area in the future. We do not know what the Geological Survey plans to do with the data it wishes to accumulate by its own efforts, but we think it fair to presume that, at least general information as to the data in question will sooner or later reach the oil industry, and thereby affect the commercial value of the exploration rights claimed by Massachusetts.

B. *The Disruption Of The Status Quo By The Plaintiff And Its Licensees During The Pendency Of This Action Will Cause Serious And Irreparable Harm To Massachusetts.*

As we have indicated above, in *Phillips Pet. Co.* v. *Cowden*, 241 F.2d 586 (5th Cir. 1957), for example, the exclusive right to explore or survey for oil and gas is an important property right, and injury thereto is clearly actionable. Nor is this right necessarily coupled to the surface estate of the land involved; *Holcombe* v. *Superior Oil Co.*, 213 La. 684, 35 So. 2d 457 (1948); even the owner of oil and gas rights that have been fully severed from the ownership of the land in question can maintain an action against persons conducting an unauthorized survey for oil on that property. *Phillips Pet. Co.* v. *Cowden, supra.* The fact, therefore, that Massachusetts cannot restrict the free passage of vessels in the waters above the continental shelf in no way attentuates its position to protect its exploration rights. A leading case succinctly states the essence of the right Massachusetts seeks to protect and the manner in which it may be injured:

It is a well-known and accepted fact in this, the third largest oil producing State, that the right to geographically explore land for oil, gas or other minerals is a valuable right. Large sums of money are annually paid landowners for the mere right to go upon their land and make geophysical and seismograph tests. The information obtained as the result of such tests is highly valuable to the person or corporation by whom they are made. If the information thus obtained be favorable, it can be used and is used in dealing with the landowner for his valuable mineral rights. If the information be unfavorable, the fact quickly becomes publicly known and thus impairs the power of the landowner to deal advantageously with his valuable mineral rights. Where that information, which is exclusively his [the owner] by virtue of his ownership of the land, is unlawfully obtained by others, the landowner is clearly entitled to recover compensatory damages for the disregard of his property rights.

Layne Louisiana Co. v. *Superior Oil Co.*, 209 La. 1014, 1020, 26 So. 2d 20, 22 (1946) at 1020, 22

While it seems settled that this exploratory right exists and that an injury to it is actionable, there is unfortunately utter disagreement and uncertainty as to both what the relevant measure of damages shall be and what proof as to damages is admissible. That is because it is extremely difficult for a finder of fact to evaluate what an exploration permit as to a given area of land would have been worth before the survey, if the results are known to be negative. This becomes even more speculative when only the most promising locations in a large area of land are unlawfully explored. In that event, the issue is whether damages should be appraised only with regard to the acreage actually surveyed, or whether the decreased marketability of the

exploration right to the entire area should be taken into account. After an exhaustive discussion of the elements of this complex appraisal issue, the court in *Phillips Pet. Co.* v. *Cowden, supra,* held (at p. 593 of 241 F.2d) that "[i]n any case it is necessary to establish the reasonable market value of the use appellants made of appellees' property, and this value is independent of the benefit that appellants *actually* received from that use." (citation omitted). In *Holcombe* v. *Superior Oil Co.*, 35 So. 2d 457, 213 La. 684, (1948), for example, in measuring the damages for an unauthorized survey it was admissible to show comparative value of exploration privileges which the defendant had on other acreage, and the proximity of the area subject to the plaintiff's rights, to the site of actual oil production. In the present factual situation it would be impossible to gauge the market value of the exploration rights which are claimed by Massachusetts, since there are no production sites in the area, and no established regional per acre market rates for exploration privileges (as is the case in the established oil producing states). *See, e.g., Shell Pet. Corp.* v. *Scully,* 71 F.2d 772 (5th Cir. 1934). The exploration rights to the continental shelf area claimed by Massachusetts may have immense market value, but we submit that a trial court would face an insuperable task in trying to appraise it according to any rational guideline. Therefore, while the exploration rights claimed by Massachusets are threatened by unauthorized survey of the area in question, Massachusetts would be left with no adequate remedy at law since the damages would be as difficult to gauge as they would be immense. For this reason, we maintain that Massachusetts is entitled to the equitable remedy of a preliminary injunction.[2]

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[2] In seeking to enjoin activity only on its claimed portion of the continental shelf (as per its geological definition), Massachusetts does not thereby waive its seaward delimitation of its claim "as the

The threat to Massachusetts' property interest is by no means the only basis which we advance as justification for interim equitable relief. Perhaps even more important is the threat to the vital right of the Massachusetts Legislature to permanently proscribe any further exploration for offshore oil or gas in the territory that Massachusetts will control if it ultimately prevails. Our Legislature may well decide, after balancing the hoped for benefits against the environmental dangers, that offshore oil exploitation is simply not an acceptable option under the present state of technology. In that event, as the affidavits of the Honorable David M. Bartley, Speaker of the Massachusetts House of Representatives and of Mr. Charles J. Strumski, President of the Massachusetts Wildlife Federation, state, the formulation and implementation of a legislative decision against offshore oil exploitation would probably be impeded by the prior compilation of specific data as to the location and amount of oil resources in our territory. It is axiomatic that the social, economic and political pressures engendered by the known presence of oil deposits increase exponentially with the certitude of their location. Moreover, to argue that, if Massachusetts ultimately prevails, it can decide for itself how to utilize any previously compiled data and would therefore suffer no injury, is to beg the entire issue. After a favorable judgment, Massachusetts is entitled to decide that offshore oil exploitation in its territory is an environmental Pandora's box; thus Massachusetts is also entitled

limits of national seaward jurisdiction established by the plaintiff" (Ans. p. 4.) However, in view of the present uncertainty as to the legal definition, under International law, of the continental shelf beyond the depth of 200 meters, Massachusetts did not wish to be in a position of seeking to enjoin explorations by the United States or its licensees in areas which might, conceivably, under the present rules of International law and the current state of technology, be explored with impunity by foreign vessels. (See Digicon Permit, section 7 — Affidavit by Mr. Herrmann, Exhibit 1).

to insist that the lid stay tightly shut during the pendency of this action.[3]

A criteria frequently stated by the courts for the balancing of the equities in a motion for a preliminary injunction is the seriousness of the irreparable harm alleged by the moving party against the possible damage that the opposing party would incur after injunction was granted. *West Virginia Highlands Conserv.* v. *Island Creek Coal Co.*, 441 F.2d 232, 235-36 (4th Cir. 1971); *Unicorn Management Corp.* v. *Koppers Co., Inc.*, 366 F.2d 199, 205 (2nd Cir. 1966). In the present situation, we cannot envisage what material damages could be incurred by the plaintiff if the preliminary injunction prayed for by Massachusetts is granted.[4] The time until the final outcome of this action is extremely limited when measured against the long term program of oil exploration and exploitation which the plaintiff plans. The plaintiff would have difficulty in arguing that delaying exploration until this Court renders its decision, would be detrimental to the national welfare. To maintain successfully such an argument, the plaintiff would have the burden of showing that, even admitting a very temporary slowdown in the location of new American petroleum sources, this limited delay could not be effectively offset by intensified

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[3] We further contend that the plaintiff cannot argue that *pendente lite* it is relying on or enforcing a statute which furthers the public interest, and that this factor takes precedence over whatever good cause is shown by Massachusetts in support of its Motion. Massachusetts, as a state of the Union, is entitled to have its own viewpoint of the public interest given due weight until such time as the Court ultimately determines which governmental body shall have the right to make the pertinent value judgments. *Cf. West Virginia Highlands Conserv.* v. *Island-Creek Coal Co.*, 441 F.2d 232, 236 (1971).

[4] There is also no risk of liability to its licensee if the plaintiff is enjoined to suspend or amend the Digicon permit, which states that it "may be amended, suspended, or revoked at any time should circumstances develop which would warrant such action". (Exhibit 1, section 5, to Mr. Hermann's affidavit.)

explorations if it ultimately prevails. We are not seeking interim equitable relief which could affect the maintenance, (for any significant period of time,) of this Nation's aggregate of known petroleum resources. Increased activity by the plaintiff, if it prevails, can undo the effect of any preliminary injunction, which is in sharp contrast to the irremediable injury faced by Massachusetts at this time.

C. *In Its Original Pleadings, Massachusetts Has Raised Serious Issues Going To The Merits Of This Case, And, Under The Applicable Equitable Doctrines, Is Entitled To A Preliminary Injunction.*

It is our contention that to justify the issuance of a preliminary injunction at this time, it is sufficient for Massachusetts to show that in its original pleadings, it has raised questions going to the merits which are serious and difficult, so as to render the issues raised proper for litigation and further deliberation. It is not necessary for Massachusetts to demonstrate that it will with reasonable certainty prevail upon a final hearing. *Unicorn Management Corp.* v. *Koppers Co., Inc.*, 366 F.2d, 199 (2d Cir. 1966). In *Bergen Drug Co., Inc.* v. *Parke, Davis and Co.*, 307 F.2d, 725 (3rd Cir. 1962), the court held at 727:

> The possibility that the court may decide the right to permanent relief adversely to plaintiff does not preclude it from granting the temporary relief.

As the court stated in *Unicorn Management Corp., supra*, a showing of reasonable certainty that the moving party will ultimately prevail is usually imposed only where the movant has failed to show irreparable damage. Thus, for example, in *Zugsmith* v. *Davis*, 108 F. Supp. 913 (S.D. N.Y. 1952) where the court denied a preliminary injunction be-

cause the moving party had not shown a reasonable certainty that it must succeed upon a final hearing, the court had also found that the moving party had not shown a lack of adequate remedy at law or immediately impending irreparable injury to it. The standard which we suggest as applicable here is set forth in a very recent environmental protection case. In *West Virginia Highlands Conserv.* v. *Island Creek Coal Co.*, 441 F.2d, 232 (4th Cir. 1971) a nonprofit membership corporation sought a preliminary injunction to preserve the wilderness characteristics of a particular area. In affirming the granting of interlocutory relief by the district judge, the court pointed out that, while it was expressing no opinion on the merits of the issues raised, it could nevertheless say:

> that their resolution is not immediately apparent. That is enough to say that [movant] has not embarked on frivolous litigation, and thus interlocutory relief is not improper if [movant] can also show a need for protection which outweighs any probable injury to [respondent.] 441 F.2d at 235.

We respectfully submit that the above discussed test can be met by Massachusetts here. The progress of this lawsuit shows that Massachusetts' claim to these exclusive exploration rights is not frivolous, but, rather, merits further consideration by this Court. In its Motion for Judgment filed with the Court in January of 1970, the plaintiff moved for judgment as prayed for in its Complaint, on the ground that there was no genuine issue as to any material fact, and asserting that the United States was entitled to judgment as a matter of law. In its Brief in Support of Motion, the plaintiff argued on pages 18 and 19: "Accordingly, we believe the present motion is appropriate. If, after considering briefs and oral arguments by

the parties ... the Court should conclude that no State claim in the continental shelf beyond three miles is sustainable, the United States would be entitled to judgment ... If, on the other hand, the Court were to conclude that State claims beyond three miles in the Atlantic are legally tenable, two options would be open. The Court might well now resolve itself the ultimate validity and extent of such claims .... Or it might refer all or part of the remaining questions to a Special Master." The Court did in fact refer this case to a Special Master by its order of June 8, 1970. We would not presume to draw any inference from the Court's reference to a Special Master. We would, nevertheless, submit that it would be fair to infer that in the opinion of the plaintiff, the Court's reference is a prima facie indicia that state claims are "legally tenable," since the plaintiff stated that such a referral would be one of the two options available to the Court if state claims are "legally tenable." Therefore, at the very least until the Special Master submits his report to the Court, we argue that the plaintiff's demeanor and actions should be consistent with the assumption that the claim by Massachusetts to the exclusive right of exploration and exploitation is "legally tenable."

III. In The Event That The Court, In Its Discretion, Deems It Meet And Proper To Grant A Preliminary Injunction, Then Massachusetts Submits That A Bond Should Not Be Required.

We submit that the discretion of the Court as to whether to grant the temporary equitable relief sought may also incline it to dispense with the requirement of a bond, in the event that the Court grants our Motion.

Rule 9.2. of the rules of this Court provides that the Federal Rules of Civil Procedure, "where their applica-

tion is appropriate, may be taken as a guide to procedure in original actions in this Court." Fed. R. Civ. P. 65(c) provides "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof."

We suggest that the aforestated provision exempting the United States from the requirement of providing security is an indication that this particular rule is one which cannot be applied in unmodified form in an original action in this Court; it's application would not be "appropriate" within the meaning of rule 9.2. of this Court. The very rationale for the constitutional provision that actions between a State and the Federal Government shall be subject to the original jurisdiction of this Court would be defeated if a rule of civil procedure for the lower courts were to be applied so as to put the two parties on an unequal footing before this Court. Since the relevant rule of Federal Civil Procedure provides that no security shall be required of the United States, we suggest that it would be appropriate if Massachusetts, as a State of the Union before the Court on original jurisdiction, should likewise be exempt from the requirement of giving security as a prerequisite for the issuance of a preliminary injunction. For the reason above stated, we respectfully submit that this Court need not reach the issue of whether Rule 65(c) of the Federal Rules of Civil Procedure would require the giving of security by a private litigant under the present circumstances. However, we would like to point out that it has been held that the trial court has wide discretion as to the matter of a bond, and may dispense with this re-

quirement entirely under the proper circumstances. *Ferguson* v. *Tabah*, 288 F.2d 665 (2nd Cir. 1961). Similarly, in *Urbain* v. *Knapp Brothers Manufacturing Co.*, 217 F.2d 810 (6th Cir. 1964), the court held that

> the failure of the District Court to require the prescribed security before issuing the restraining order is not reversible error. The rule leaves it to the District Judge to order the giving of security in such sum as the court considers proper. This would indicate plainly that the matter of requiring security in each case rests in the discretion of the District Judge. Moreover, in the circumstances encountered here, it would appear that no material damage will ensue to appellants from the failure of the District Judge to require bond of appellees. 217 F.2d at 815.

We maintain that the plaintiff will not be able to show that material damage will ensue to it if the preliminary injunction issues. Further, in *Continental Oil Co.* v. *Frontier Refining Co.*, 338 F.2d 780 (10th Cir. 1964) the court held that no bond is necessary absent a proof of likelihood of harm. An important criteria that the court applied was that the movant was a corporation with considerable assets, and would, therefore, have been able to respond in damages if the party enjoined had suffered injury thereby. While we do not place the balance sheets of the Continental Oil Company and of the Commonwealth of Massachusetts in comparison here, we do, nevertheless, suggest that this dispensation granted a "corporation with considerable assets" be likewise granted to a State of the Union.

Conclusion

For the reasons above stated, the Defendant Commonwealth of Massachusetts respectfully submits that it is entitled to a preliminary injunction to preserve it from serious and irremediable injury during the pendency of this action.

COMMONWEALTH OF MASSACHUSETTS

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 35, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET AL.

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION BY THE COMMONWEALTH OF MASSACHUSETTS

STATEMENT

This is an action between the United States and 12 Atlantic Coast States, including the Commonwealth of Massachusetts, to determine the respective rights of the parties to the natural resources of the seabed and subsoil of the continental shelf of the United States in the Atlantic Ocean more than 3 geographical miles seaward of the coastline. The case was referred to a Special Master on June 8, 1970. 398 U.S. 947. Hearings have been concluded and the Post-Trial Brief for the United States is due to be submitted to the Special Master in June 1973. On May 18, 1973, Massachusetts filed the present motion for a preliminary injunction, seeking to enjoin the United States

504-573—73——1

from drilling or boring for oil and gas exploration, or for other general or specific data-seeking purposes, beyond a depth of 25 feet below the water column, within the area of the Atlantic continental shelf claimed by Massachusetts in this litigation.

1. Massachusetts' motion is substantially similar to its motion for a preliminary injunction made to this Court on June 9, 1972. At that time the State sought to enjoin the federal government from conducting or authorizing any exploration for the location or probable location of the natural resources of the seabed and subsoil of the Atlantic Ocean which is claimed by Massachusetts, or communicating any information obtained through such activities. The apparent factual basis for that motion by Massachusetts was the issuance by the federal government of a permit to conduct seismic, geophysical exploration in the area of the shelf claimed by Massachusetts in this litigation. The State alleged that the accumulation of information about the shelf would result in irreparable injury to the State and would disrupt the status quo during the litigation. The Court denied the motion. 408 U.S. 917.

As noted at pages 2–3 of our June 1972 brief in opposition to Massachusetts' previous motion for a preliminary injunction ("1972 Br."), the parties' differences over the rights of the federal government to continue exploration activities during the pendency of these proceedings date back to 1971. In late 1971, the defendant States expressed concern to the federal government that their rights in this litigation were being threatened by activities of the federal government in

the area of the Atlantic continental shelf. The United States met with representatives of the defendant States, including Massachusetts, in Philadelphia, on December 7, 1971, and outlined the procedures involved in the exploration and exploitation of the resources of the seabed under Section 11 of the Outer Continental Shelf Lands Act, 43 U.S.C. 1340, and explained those activities in which it would engage as well as those activities in which it would refrain from engaging during the pendency of the litigation without the consent of the defendant States. As noted in our earlier brief (1972 Br. 2–3), the United States unequivocally stated that it would continue with geological and geophysical exploration and informal information gathering activities which would include seismic tests and shallow core sampling. Shallow core sampling, it was explained, does not constitute deep drilling which can be done only pursuant to an exploitation lease. The United States also stated that it would not take any formal preleasing action which it described as including the call for nominations, preparation and circulation of an environmental impact statement and notice of sale of leases, among other things.

This understanding between the United States and the States, including Massachusetts, was confirmed by an exchange of correspondence with the defendant States subsequent to the meetings. The United States has in good faith continued to abide by this commitment, with the apparent approval of all the Atlantic States except Massachusetts.

2. On April 18, 1973, President Nixon stated in his Energy Message to Congress (9 Presidential Documents 389, 393–394):

> I am also asking the Chairman of the Council on Environmental Quality to work with the Environmental Protection Agency, in consultation with the National Academy of Sciences and appropriate Federal agencies, to study the environmental impact of oil and gas production on the Atlantic Outer Continental Shelf and in the Gulf of Alaska. No drilling will be undertaken in these areas until its environmental impact is determined. Governors, legislators and citizens of these areas will be consulted in this process.

The United States does not intend to conduct even shallow core drilling in the area claimed by Massachusetts in this case before the environmental impact of such drilling has been determined by the Council on Environmental Quality.

On May 1, 1973, members of the Department of the Interior met with Massachusetts officials to describe federal plans to authorize for information gathering purposes shallow core drilling at specific locations on the Atlantic Outer Continental Shelf off Massachusetts. While the plans called for a maximum penetration into the seabed of 1000 feet, it was explained that actual penetration into consolidated material[1] would not exceed 50 feet. The remaining drilling through

[1] Oil and gas are found only in consolidated material. The purpose of shallow core drilling, however, is not to discover oil or gas, but to gather information on rock formations (see p. 7, *infra*).

unconsolidated material such as sand and mud would be necessary simply to reach the consolidated material from which core samples would be taken. The federal representatives also informed the Massachusetts officials that no final decision to authorize the shallow core drilling had been made. Subsequent to the May 1 meeting, the United States decided not to authorize any shallow core drilling off Massachusetts this summer.

In its present motion, Massachusetts alleges that the proposed drilling would be unlawful and contrary to the rights of exclusive exploration and exploitation asserted by Massachusetts in this litigation, that the marine environment in Massachusetts would be exposed to irreparable injury for which there is no adequate remedy at law, and that a preliminary injunction is necessary to preserve the status quo until the merits of the case can be decided.

In our view the questions raised by this motion are essentially the same as the questions raised by Massachusetts' previous motion.

ARGUMENT

As we argued in response to Massachusetts' initial motion (1972 Br. 4), it is well established that a preliminary injunction is extraordinary relief which is not granted by the courts except in cases clearly warranting it. *Connecticut* v. *Massachusetts,* 282 U.S. 660; *Dymo Industries, Inc.* v. *Tapeprinter, Inc.,* 326 F. 2d 141 (C.A. 9). When a motion for a preliminary injunction is presented, a court is called upon to exercise its discretion on the basis of its estimates concerning

the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of ultimate success or failure of the suit, and the balancing of damage and convenience generally. Unless the party seeking such extraordinary relief can satisfy the court that the relief is warranted on the basis of all these considerations, the injunction will be denied. *Doeskin Products, Inc.* v. *United Paper Co.*, 195 F. 2d 356 (C.A. 7).

I

THERE HAS BEEN NO CLEAR SHOWING OF IMMINENT IRREPARABLE HARM TO THE STATE

In its motion, Massachusetts alleges (p. 51) that the shallow core drilling being considered by the United States poses a serious threat to the State's environment because an accidental penetration of an oil retaining structure would result in incalculable damage to recreational facilities, the fishing industry and marine ecology generally. Massachusetts recognizes that "the Federal Government has at present complete freedom to conduct seismic surveys and 'shallow' core sampling * * *" (p. 52). We are informed by the Department of the Interior that the contemplated drilling comes within the meaning of shallow core sampling as that term is generally understood. Rather than contend that the proposed drilling does not come within the definition of shallow core drilling, the State alleges that the proposed 1000-foot holes create a radically increased magnitude of risk to the environment and are therefore a fundamental departure from alleged previous practice (p. 48).

Massachusetts' allegation of environmental risk misconceives the nature of the federal government's proposal. As noted above, a core sample comes only from consolidated material and the United States proposes to drill only 50 feet into such material.

The purpose of shallow core drilling is to determine the age and characteristics—such as rock type, mineralogy, chemical composition, organic matter content and interstitial water composition—of the rocks that underlie the surface of the continental margin. The object is not to locate accumulations of gas and oil, but to provide data about the sedimentary materials that form the bulk of the continental margin so that reasonably accurate predictions can be made about the age and physical and chemical characteristics of materials to be found under other areas of the continental margin. Sites have been carefully examined by geophysical methods to avoid geological structures which might contain pockets of hydrocarbons. The 50-foot maximum drilling depth is much less than the depth at which hydrocarbon traps are normally found throughout the world. We have been informed by the Department of the Interior that if and when shallow core drilling is conducted by the United States off the coast of Massachusetts, the penetration of gas or oil deposits will be highly unlikely; the accidental release of oil and gas from such drilling would be even less likely.[2]

[2] In its motion, Massachusetts seeks only to enjoin drilling "beyond a depth of twenty-five feet below the water column * * *" (p. 2), since it "does not seek to enjoin mere

Even if there were a significant chance that oil or gas might be released into the sea by shallow core drilling, the likelihood of substantial damage to the environment has not been shown. The proposed core sampling site nearest to the coast of Massachusetts is more than 50 miles offshore. Current and wind directions on George's Bank indicate that material floating on the surface would move offshore and is unlikely ever to reach the land. Whether damage to the fishing industry and marine ecology would result from shallow core drilling is highly speculative.

In any event, no shallow core drilling will be authorized without the additional study of the potential environmental impact pursuant to the President's Energy Message. If there is drilling, precautions will be taken to prevent pollution in the unlikely event that oil or gas is encountered.

It is well established that in order to justify a preliminary injunction, the threat of injury must be real not fancied, actual not prospective, and threatened not imagined. *Connecticut* v. *Massachusetts,* 282 U.S. 660. Massachusetts has not shown that the shallow core drilling which the United States may undertake in the

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technical violations of what it claims to be its exclusive exploration rights, but only acts which pose a serious threat to its environment" (p. 52). But the deepest penetration of consolidated material (some of which is located on the ocean floor and some of which is buried under substantial layers of unconsolidated material) contemplated by the federal government is only 50 feet. Massachusetts has not shown that the drilling of a 50-foot hole in consolidated material entails a substantially greater risk of environmental harm than the drilling of a 25-foot hole.

future under conditions not yet fully developed will present a real threat to its environment.

II

THERE HAS BEEN NO SHOWING OF A REASONABLE PROBABILITY OF SUCCESS

In order to justify a preliminary injunction, Massachusetts must make a showing of a reasonable probability that it will succeed in the litigation. *American Metropolitan Ent. of N.Y.* v. *Warner Bros. Records,* 389 F. 2d 903 (C.A. 2). However, the State has made no attempt in either its initial or its present motion to make such a showing.

The United States, on the other hand, in its Motion for Judgment on the Pleadings (pp. 11, 18, 21–24), has argued that this Court's decisions regarding State claims in the Pacific Ocean and the Gulf of Mexico, as well as congressional action, established the right of the United States as against the States to the natural resources of the seabed and subsoil of the outer continental shelf in the Atlantic Ocean. *United States* v. *California,* 332 U.S. 19; *United States* v. *Louisiana,* 339 U.S. 669; *United States* v. *Texas,* 339 U.S. 707; Submerged Lands Act, 43 U.S.C. 1301–1315; Outer Continental Shelf Lands Act, 43 U.S.C. 1331–1343; *United States* v. *Louisiana, et al.,* 363 U.S. 1. While the States in this action were not parties to those cases and thus are not bound by them as *res judicata,* Massachusetts has not shown that there is a reasonable probability that this Court will now overrule or otherwise depart from those prior holdings.

III

THERE HAS BEEN NO CLEAR SHOWING THAT THE STATE WILL SUFFER GREATER HARDSHIP THAN THE UNITED STATES

The third requirement which the State has failed to meet in order to justify the granting of an injunction is a showing that it will suffer greater hardship if the injunction is denied than the United States will suffer if the injunction is granted.

Massachusetts contends that the United States will not suffer any material damage from the granting of a preliminary injunction (p. 53). This assertion, however, overlooks the fact that both the President and Congress have recognized the imminent threat of an "energy crisis" in the United States. This Court can take judicial notice of the current national shortage of petroleum.

Critical decisions must be made in the near future by the President and Congress with respect to how to meet the energy crisis. It is obviously desirable that these decisions be based on as complete an evaluation of the scope of our natural resources as possible. If an injunction is granted to Massachusetts in this case, information concerning one alternative source of energy will be less complete and will remain incomplete for as long as the injunction remains in force. The result, of course, would be that decisions relating to the development of United States energy sources will be impaired. It is in the interest of the United States to obtain information now on the seabed resources off the Atlantic coast so that, if the United States ultimately prevails on the merits and

determines that mineral exploitation of the continental shelf is desirable, leasing may proceed expeditiously.

Finally, as we noted in our brief in opposition to Massachusetts' previous motion (1972 Br. 9), exploration of the Atlantic seabed has been in progress since 1960 and the proposed shallow core drilling represents only the latest step in the information collecting process. Apart from seismic or geophysical exploration already conducted, approximately 15 shallow core samples have already been taken from holes of up to 1000 feet off the Atlantic coast. This sampling extended from the Cape Hatteras, North Carolina area almost to the Canadian border. No oil or gas pockets were penetrated. To deny the United States now the authority to authorize such activity would alter the status quo that has existed since 1960.

CONCLUSION

For the foregoing reasons, Massachusetts' motion for a preliminary injunction should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WALLACE H. JOHNSON,
Assistant Attorney General.
BRUCE C. RASHKOW,
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JUNE 1973.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 35, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET AL.

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION BY THE COMMONWEALTH OF MASSACHUSETTS

STATEMENT

This is an action between the United States and 12 Atlantic Coast States, including the Commonwealth of Massachusetts, to determine the respective rights of the parties to the natural resources of the seabed and subsoil of the continental shelf of the United States in the Atlantic Ocean more than 3 geographical miles seaward of the coastline. The case was referred to a Special Master on June 8, 1970. 398 U.S. 947. Hearings have been concluded and the Post-Trial Brief for the United States is due to be submitted to the Special Master in June 1973. On May 18, 1973, Massachusetts filed the present motion for a preliminary injunction, seeking to enjoin the United States

504-573—73——1

from drilling or boring for oil and gas exploration, or for other general or specific data-seeking purposes, beyond a depth of 25 feet below the water column, within the area of the Atlantic continental shelf claimed by Massachusetts in this litigation.

1. Massachusetts' motion is substantially similar to its motion for a preliminary injunction made to this Court on June 9, 1972. At that time the State sought to enjoin the federal government from conducting or authorizing any exploration for the location or probable location of the natural resources of the seabed and subsoil of the Atlantic Ocean which is claimed by Massachusetts, or communicating any information obtained through such activities. The apparent factual basis for that motion by Massachusetts was the issuance by the federal government of a permit to conduct seismic, geophysical exploration in the area of the shelf claimed by Massachusetts in this litigation. The State alleged that the accumulation of information about the shelf would result in irreparable injury to the State and would disrupt the status quo during the litigation. The Court denied the motion. 408 U.S. 917.

As noted at pages 2–3 of our June 1972 brief in opposition to Massachusetts' previous motion for a preliminary injunction ("1972 Br."), the parties' differences over the rights of the federal government to continue exploration activities during the pendency of these proceedings date back to 1971. In late 1971, the defendant States expressed concern to the federal government that their rights in this litigation were being threatened by activities of the federal government in

the area of the Atlantic continental shelf. The United States met with representatives of the defendant States, including Massachusetts, in Philadelphia, on December 7, 1971, and outlined the procedures involved in the exploration and exploitation of the resources of the seabed under Section 11 of the Outer Continental Shelf Lands Act, 43 U.S.C. 1340, and explained those activities in which it would engage as well as those activities in which it would refrain from engaging during the pendency of the litigation without the consent of the defendant States. As noted in our earlier brief (1972 Br. 2–3), the United States unequivocally stated that it would continue with geological and geophysical exploration and informal information gathering activities which would include seismic tests and shallow core sampling. Shallow core sampling, it was explained, does not constitute deep drilling which can be done only pursuant to an exploitation lease. The United States also stated that it would not take any formal preleasing action which it described as including the call for nominations, preparation and circulation of an environmental impact statement and notice of sale of leases, among other things.

This understanding between the United States and the States, including Massachusetts, was confirmed by an exchange of correspondence with the defendant States subsequent to the meetings. The United States has in good faith continued to abide by this commitment, with the apparent approval of all the Atlantic States except Massachusetts.

2. On April 18, 1973, President Nixon stated in his Energy Message to Congress (9 Presidential Documents 389, 393–394):

> I am also asking the Chairman of the Council on Environmental Quality to work with the Environmental Protection Agency, in consultation with the National Academy of Sciences and appropriate Federal agencies, to study the environmental impact of oil and gas production on the Atlantic Outer Continental Shelf and in the Gulf of Alaska. No drilling will be undertaken in these areas until its environmental impact is determined. Governors, legislators and citizens of these areas will be consulted in this process.

The United States does not intend to conduct even shallow core drilling in the area claimed by Massachusetts in this case before the environmental impact of such drilling has been determined by the Council on Environmental Quality.

On May 1, 1973, members of the Department of the Interior met with Massachusetts officials to describe federal plans to authorize for information gathering purposes shallow core drilling at specific locations on the Atlantic Outer Continental Shelf off Massachusetts. While the plans called for a maximum penetration into the seabed of 1000 feet, it was explained that actual penetration into consolidated material[1] would not exceed 50 feet. The remaining drilling through

[1] Oil and gas are found only in consolidated material. The purpose of shallow core drilling, however, is not to discover oil or gas, but to gather information on rock formations (see p. 7, *infra*).

unconsolidated material such as sand and mud would be necessary simply to reach the consolidated material from which core samples would be taken. The federal representatives also informed the Massachusetts officials that no final decision to authorize the shallow core drilling had been made. Subsequent to the May 1 meeting, the United States decided not to authorize any shallow core drilling off Massachusetts this summer.

In its present motion, Massachusetts alleges that the proposed drilling would be unlawful and contrary to the rights of exclusive exploration and exploitation asserted by Massachusetts in this litigation, that the marine environment in Massachusetts would be exposed to irreparable injury for which there is no adequate remedy at law, and that a preliminary injunction is necessary to preserve the status quo until the merits of the case can be decided.

In our view the questions raised by this motion are essentially the same as the questions raised by Massachusetts' previous motion.

ARGUMENT

As we argued in response to Massachusetts' initial motion (1972 Br. 4), it is well established that a preliminary injunction is extraordinary relief which is not granted by the courts except in cases clearly warranting it. *Connecticut* v. *Massachusetts*, 282 U.S. 660; *Dymo Industries, Inc.* v. *Tapeprinter, Inc.*, 326 F. 2d 141 (C.A. 9). When a motion for a preliminary injunction is presented, a court is called upon to exercise its discretion on the basis of its estimates concerning

the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of ultimate success or failure of the suit, and the balancing of damage and convenience generally. Unless the party seeking such extraordinary relief can satisfy the court that the relief is warranted on the basis of all these considerations, the injunction will be denied. *Doeskin Products, Inc.* v. *United Paper Co.*, 195 F. 2d 356 (C.A. 7).

I

THERE HAS BEEN NO CLEAR SHOWING OF IMMINENT IRREPARABLE HARM TO THE STATE

In its motion, Massachusetts alleges (p. 51) that the shallow core drilling being considered by the United States poses a serious threat to the State's environment because an accidental penetration of an oil retaining structure would result in incalculable damage to recreational facilities, the fishing industry and marine ecology generally. Massachusetts recognizes that "the Federal Government has at present complete freedom to conduct seismic surveys and 'shallow' core sampling * * *" (p. 52). We are informed by the Department of the Interior that the contemplated drilling comes within the meaning of shallow core sampling as that term is generally understood. Rather than contend that the proposed drilling does not come within the definition of shallow core drilling, the State alleges that the proposed 1000-foot holes create a radically increased magnitude of risk to the environment and are therefore a fundamental departure from alleged previous practice (p. 48).

Massachusetts' allegation of environmental risk misconceives the nature of the federal government's proposal. As noted above, a core sample comes only from consolidated material and the United States proposes to drill only 50 feet into such material.

The purpose of shallow core drilling is to determine the age and characteristics—such as rock type, mineralogy, chemical composition, organic matter content and interstitial water composition—of the rocks that underlie the surface of the continental margin. The object is not to locate accumulations of gas and oil, but to provide data about the sedimentary materials that form the bulk of the continental margin so that reasonably accurate predictions can be made about the age and physical and chemical characteristics of materials to be found under other areas of the continental margin. Sites have been carefully examined by geophysical methods to avoid geological structures which might contain pockets of hydrocarbons. The 50-foot maximum drilling depth is much less than the depth at which hydrocarbon traps are normally found throughout the world. We have been informed by the Department of the Interior that if and when shallow core drilling is conducted by the United States off the coast of Massachusetts, the penetration of gas or oil deposits will be highly unlikely; the accidental release of oil and gas from such drilling would be even less likely.[2]

[2] In its motion, Massachusetts seeks only to enjoin drilling "beyond a depth of twenty-five feet below the water column * * *" (p. 2), since it "does not seek to enjoin mere

Even if there were a significant chance that oil or gas might be released into the sea by shallow core drilling, the likelihood of substantial damage to the environment has not been shown. The proposed core sampling site nearest to the coast of Massachusetts is more than 50 miles offshore. Current and wind directions on George's Bank indicate that material floating on the surface would move offshore and is unlikely ever to reach the land. Whether damage to the fishing industry and marine ecology would result from shallow core drilling is highly speculative.

In any event, no shallow core drilling will be authorized without the additional study of the potential environmental impact pursuant to the President's Energy Message. If there is drilling, precautions will be taken to prevent pollution in the unlikely event that oil or gas is encountered.

It is well established that in order to justify a preliminary injunction, the threat of injury must be real not fancied, actual not prospective, and threatened not imagined. *Connecticut* v. *Massachusetts,* 282 U.S. 660. Massachusetts has not shown that the shallow core drilling which the United States may undertake in the

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technical violations of what it claims to be its exclusive exploration rights, but only acts which pose a serious threat to its environment" (p. 52). But the deepest penetration of consolidated material (some of which is located on the ocean floor and some of which is buried under substantial layers of unconsolidated material) contemplated by the federal government is only 50 feet. Massachusetts has not shown that the drilling of a 50-foot hole in consolidated material entails a substantially greater risk of environmental harm than the drilling of a 25-foot hole.

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In order to justify a preliminary injunction, Massachusetts must make a showing of a reasonable probability that it will succeed in the litigation. *American Metropolitan Ent. of N.Y.* v. *Warner Bros. Records,* 389 F. 2d 903 (C.A. 2). However, the State has made no attempt in either its initial or its present motion to make such a showing.

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THERE HAS BEEN NO CLEAR SHOWING THAT THE STATE WILL SUFFER GREATER HARDSHIP THAN THE UNITED STATES

The third requirement which the State has failed to meet in order to justify the granting of an injunction is a showing that it will suffer greater hardship if the injunction is denied than the United States will suffer if the injunction is granted.

Massachusetts contends that the United States will not suffer any material damage from the granting of a preliminary injunction (p. 53). This assertion, however, overlooks the fact that both the President and Congress have recognized the imminent threat of an "energy crisis" in the United States. This Court can take judicial notice of the current national shortage of petroleum.

Critical decisions must be made in the near future by the President and Congress with respect to how to meet the energy crisis. It is obviously desirable that these decisions be based on as complete an evaluation of the scope of our natural resources as possible. If an injunction is granted to Massachusetts in this case, information concerning one alternative source of energy will be less complete and will remain incomplete for as long as the injunction remains in force. The result, of course, would be that decisions relating to the development of United States energy sources will be impaired. It is in the interest of the United States to obtain information now on the seabed resources off the Atlantic coast so that, if the United States ultimately prevails on the merits and

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Finally, as we noted in our brief in opposition to Massachusetts' previous motion (1972 Br. 9), exploration of the Atlantic seabed has been in progress since 1960 and the proposed shallow core drilling represents only the latest step in the information collecting process. Apart from seismic or geophysical exploration already conducted, approximately 15 shallow core samples have already been taken from holes of up to 1000 feet off the Atlantic coast. This sampling extended from the Cape Hatteras, North Carolina area almost to the Canadian border. No oil or gas pockets were penetrated. To deny the United States now the authority to authorize such activity would alter the status quo that has existed since 1960.

CONCLUSION

For the foregoing reasons, Massachusetts' motion for a preliminary injunction should be denied.

Respectfully submitted.

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OCTOBER TERM, 1968

No. 35,
ORIGINAL

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA AND GEORGIA.

SUPPLEMENTARY AFFIDAVIT IN SUPPORT OF MOTION BY THE DEFENDANT, COMMONWEALTH OF MASSACHUSETTS FOR PRELIMINARY INJUNCTION

ROBERT H. QUINN
Attorney General
HENRY HERRMANN
Special Assistant
Attorney General
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Assistant Attorney General

Blanchard Press, Inc., Boston, Mass. — Law Printers

AFFIDAVIT

My name is Henry Herrmann.

I am submitting this Affidavit in order to amend and supplement the one filed in support of the Motion by the Defendant Commonwealth of Massachusetts for a Preliminary Injunction on Friday, June 9, 1972.

In that Affidavit, I referred to an article appearing in the February 8th edition of the Boston Evening Globe, and stated that the Globe reporter with whom I had discussed the substance of that article had attended a Department of the Interior press conference in Washington.

The latter statement was due to a misunderstanding on my part. No one from the Boston Globe attended a press conference; rather, the substance of that February 8th article was verified two days later by Boston Globe reporter James Ayres in a telephone interview with Dr. Wayland, Chief, Conservation Division, United States Geological Survey.

(s) HENRY HERRMANN
Henry Herrmann
Special Assistant
Attorney General
Commonwealth of Massachusetts

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

Then before me personally appeared the above named

Henry Herrmann and made oath that the above statement is true to the best of his knowledge and belief.

(s) LAWRENCE J. O'KEEFE
Notary Public

My Commission Expires:
August 19, 1977.

E COPY

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U. S.
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REBUTTAL BRIEF BY THE DEFENDANT COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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REBUTTAL BRIEF BY THE DEFENDANT COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Introduction

The Defendant Commonwealth of Massachusetts reaffirms its legal arguments in its brief, and its reliance upon the authorities cited. We submit that the Brief by the

United States in Opposition only warrants rebuttal on several specific points.

Argument

I. Massachusetts Denies That It Has Approved of the Continental Shelf Explorations Under Discussion.

The Plaintiff United States of America alleges on pages 2 and 3 of its Brief that, at a meeting in Philadelphia, an understanding was reached between the Defendant States and the plaintiff that the latter could "continue with geological and geophysical exploration and informal information gathering activities which would include seismic tests and shallow core sampling"; the plaintiff further alleges that this "understanding" was "confirmed by an exchange of correspondence with the defendant States subsequent to the meetings," and that the plaintiff, "with the apparent approval of the States," continues to abide by this "commitment."

Massachusetts is obliged to deny that it either has orally or in writing approved or assented to the explorations which are the subject of the motion. We cannot speak for our Sister States, but we can and we do deny that the correspondence between the Massachusetts Attorney General's Office and the plaintiff "confirmed" such an alleged understanding. While we are indeed reluctant to burden the Court with further documentation in this interlocutory matter, we feel obliged, in the face of plaintiff's allegations, to annex hereto, in chronological order, the relevant correspondence in its entirety, so that the Court may draw its own conclusions.

The final communication between the plaintiff and the Attorney General of Massachusetts on this subject is the telegram of March 8, 1972. The Under Secretary of the Interior stated therein: "The Department has no plans to

conduct exploratory work on the Atlantic Continental Shelf." He goes on to say that "Our only plans are for a continuation of bottom sampling and shallow coring as part of our program of continuous information gathering." The semantic structure of this telegram is worth noting: The activity which Massachusetts seeks to enjoin is classified as "explorations" under Section 11 of the Outer Continental Shelf Lands Act, 67 Stat 469, 43 U.S.C. 1340. Befitting the present age of euphemisms, the Interior Department does not designate these "explorations" as "explorations" but, rather, as "information gathering;" the question then arises what "Exploratory Work on the Atlantic Continental Shelf" could possibly mean. We submit it is reasonable to assume that it encompasses the very activity which Massachusetts seeks to enjoin.

Furthermore, we submit that the wording of this telegram lends itself with facility to the interpretation that what the Interior Department planned was an examination of the characteristics of the continental shelf somehow sharply differentiated from the crux of that verbal exchange, namely, explorations for offshore oil and gas deposits. We would note, also, that there is no mention whatsoever of seismic survey or exploration.

This, then, is the correspondence which the plaintiff has alleged confirms an understanding with Massachusetts that the plaintiff may conduct the very explorations which we seek to enjoin!

II. Massachusetts Has Alleged Imminent And Irreparable Harm Different From That Discussed In Plaintiff's Brief.

Massachusetts, in its brief, alleged imminent and irreparable harm to its right, if it prevails, to authorize

and market *exploration* privileges. This, we have argued, is a property interest quite distinct from the right to market *exploitation* privileges. It is a distinction which is not observed in the Plaintiff's Brief, Part I, which speaks only of the "resource rights in the continental shelf." (Plaintiff's Brief, p. 5.) Massachusetts, further, has not alleged that the actions sought to be enjoined "would prevent the State legislature from proscribing seabed and subsoil exploitation rights. . . ." (Plaintiff's Brief, p. 5). Rather, we have argued that their actions would prevent our legislature from proscribing *exploration* activities, if, in its judgment, exploration could create an undesirable momentum towards exploitation.

III. The Plaintiff Has Failed To Show That It Will Suffer Material Damage In The Event It Is Enjoined.

Massachusetts has not, as the plaintiff' contends, (Plaintiff's Brief, p. 8) overlooked "the fact that both the President and Congress have recognized the imminent threat of an 'energy crisis' in the United States." What the plaintiff has not demonstrated is that the scope of the injunction and its duration would pose any material obstruction to the formulation of national policy dealing with this "energy crisis." The plaintiff has not shown that during the remaining pendency of this action, a comprehensive and explicit national policy statement will issue, and that an injunction would thereby impair the informational impact underlying such a policy formulation. The plaintiff's argument is also flawed by the implicit assumption that the Federal Government will ultimately prevail, for, if it did not, Presidential and Congressional decisions *pendente lite,* as to the development of offshore energy sources, would be nullified if the successful defendant

States oppose such development. If the dominium over these offshore resources, therefore, is *arguendo,* a crucial factor in the formulation of national energy policy, then we submit the formulation of this energy sources policy might judiciously be postponed until this Court has rendered a final decision.

Furthermore, even if, *arguendo,* the plaintiff ultimately prevails, the contingency that "leasing may proceed expeditiously" (Plaintiff's Brief, p. 9) is most unlikely. The plaintiff would still have to comply with the formal procedures specified in the National Environmental Policy Act of 1969, (42 U.S.C. 4321 *et seq.*) procedures which, it should be noted, the plaintiff has pledged not to initiate prior to the final outcome of this action. Due to the complexity and gravity of the problems involved, it is not unreasonable to assume that compliance with the aforesaid Act would involve a period of time, *subsequent* to the outcome of this action, which would be comparable to the duration of a preliminary injunction. Since exploitation leasing could not be initiated pending compliance with the National Environmental Policy Act subsequent to the outcome of this law suit, we submit that the plaintiff, if it ultimately prevails, will be afforded precisely that opportunity to undo any temporary effect of an injunction by means of intensified seismic survey.

IV. The Plaintiff Has Not Cited Convincing Authority For Its Contention That Massachusetts Has The Burden Of Showing A Reasonable Probability Of Ultimate Success In This Case.

In support of its contention that Massachusetts must demonstrate a reasonable probability of ultimate success, the plaintiff has cited only *American Metropolitan Enter-*

prises of New York, Inc. v. *Warner Bros. Records, Inc.*, 389 F.2d 903 (2nd Cir. 1968) (Plaintiff's Brief, p. 6).

That case, however, did not so hold. The plaintiff's proposition derives from dictum quoted in the case; the court, in affirming the denial of a preliminary injunction, seemed to base its holding on the plaintiff's failure to demonstrate irreparable injury and the absence of an adequate remedy at law.

V. The Plaintiff's Formulation Of The Status Quo Bears No Relevance To The Existing Factual Situation Under Discussion.

The plaintiff alleges on page nine of its brief that ". . . exploration of the Atlantic seabed has been in progress since 1960. . . ." That may well be. However, "Atlantic seabed" is such a broad concept that we fail to see how its mention here affects the issues. At issue in the case at bar is merely the Atlantic *Continental Shelf*, not the Atlantic *seabed* (which includes the deep ocean); what is at issue in this motion is only that *segment* of the *Continental Shelf* to which Massachusetts makes claim. Furthermore, it is unclear whether the "exploration" referred to by plaintiff includes the type of activity which Massachusetts presently seeks to enjoin.

We point this out to show that even if the Court were to adopt the plaintiff's basic concept of status quo (alleged prior activity) there has been a dearth of factual presentation of prior activity that would relate to the subject matter of this motion. However, the conceptual nature of the status quo advocated by Massachusetts is the *present aggregate of exploration data*. We contend that the very argument of the plaintiff suggests that the latter is the correct delineation. For, if as the plaintiff contends, an intensive exploration program dur-

ing the remaining pendency of this action is essential even to formulate policy as to these offshore resources, it is apparent that the actions which Massachusetts seeks to enjoin, will, notwithstanding any vaguely alleged prior conduct, result in a change in the aggregate of exploration data so fundamental as to differ; not in degree, but in kind, from the status quo.

Conclusion

For the reasons above stated, the Defendant Commonwealth of Massachusetts respectfully submits that it is entitled to a preliminary injunction.

COMMONWEALTH OF MASSACHUSETTS

Respectfully submitted,

ROBERT H. QUINN
Attorney General
HENRY HERRMANN
Special Assistant
Attorney General
THOMAS J. CROWLEY
Assistant Attorney General

CERTIFICATION

I, Robert H. Quinn, Attorney General of the Commonwealth of Massachusetts, do hereby certify that the statements contained in the attached Rebuttal Brief by the Defendant Commonwealth of Massachusetts in support of its Motion for Preliminary Injunction are true to the best of my knowledge and belief, and, further, that the copies annexed in the Appendix thereto are true copies of the correspondence in my files.

(s) ROBERT H. QUINN
Attorney General
Commonwealth of Massachusetts

APPENDIX

[SEAL]
ROBERT H. QUINN
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE, BOSTON

December 13, 1971

The Honorable Erwin N. Griswold
Solicitor General
Department of Justice
Washington, D. C. 20530
The Honorable Mitchell Melich
Solicitor
United States Department of the Interior
Washington, D. C. 20240
Gentlemen:

This will confirm certain understandings reached at a meeting in Philadelphia on December 7, 1971, between representatives of the Departments of Interior and Justice, namely, Francis A. Cotter, Senior Attorney, Office of the Solicitor, Department of the Interior; Samuel Huntington, Assistant to the Solicitor General, Department of Justice; Jonathan Charney, Attorney, Marine Resources Section, Land and Natural Resources Division, Department of Justice; Bruce Rashkrow, Attorney, Marine Resources Section, Land and Natural Resources Division, Department of Justice; and Lawrence Shearer, Attorney, Marine Resources Section, Land and Natural Resources Division, Department of Justice; and representatives of the following parties defendants in *United States* v. *Maine, et al.*, namely, Andrew P. Miller, Attorney General of Virginia; Gerald L. Baliles, Assistant Attorney General of Virginia; Elias Abelson, Assistant Attorney General of New

Jersey; Vernon Stuart, Assistant Attorney General of New York; Kevin P. Curry, Assistant Attorney General of Massachusetts; David H. Souter, Assistant Attorney General of New Hampshire; W. Slater Allen, Jr., Assistant Attorney General of Rhode Island; and E. Stephen Murray, Assistant Attorney General of Maine.

The meeting was requested by the parties defendants to seek clarification of the position of the United States in regard to proposed leasing of the Outer Continental Shelf (OCS) lying off the Atlantic Coast. More Specifically, the parties defendants voiced concern about extensive reports in the news media that the United States was contemplating moving toward the issuance of leasing for offshore oil exploration for OCS areas and, further, that public hearings in connection therewith would be held in the near future. Moreover, the United States communicated with the governors of the Atlantic Seaboard States, which communication included a telegram dated November 4, 1971, establishing the intent of the Department of the Interior to hold a joint meeting with the governors ". . . for the purpose of exchanging information leading to an appropriate course of action for the future."

At the December 7th meeting, in order to assist the defendants states in their consideration of an appropriate course of action, answers to specific questions were sought. The areas of inquiry included the following:

(1) What action, if any, does the United States propose to take *pendente lite* relative to the development of the mineral resources of the Atlantic Seaboard OCS?

(2) What arrangements does the United States propose for communication between the United States and the Atlantic Seaboard Attorneys General when the United States proposes to discuss with the defendants states and their officials matters

related to the seabed and subsoil resources of the OCS?

The United States assured the States' representatives that, absent agreement or arrangement to the contrary, it would take no action toward leasing procedures with respect to the Atlantic OCS prior to the determination by the United States Supreme Court of the respective rights of all the parties. This assurance included undertakings not to call for, or to act upon, nominations of possible leasehold areas; not to call for, or to issue, drafts of environmental impact statements related to proposed leasehold areas; not to hold any hearings with respect to proposed leasehold areas; and, generally, not to take any action which, in the course of proceedings normally followed by the United States in moving toward leasing, is taken subsequently to the call for nominations.

It was further represented by the United States that no agreement or arrangement with any defendant state would be negotiated without the presence and participation of its attorney general or his representative. The United States also expressed willingness, upon the request of the governor of any of the defendant states, to provide the attorney general of said defendant state copies of all future communications with any state official on any matter related to the natural resources of the OCS.

Your cooperation in this matter is appreciated.

Sincerely yours,

(s) ROBERT H. QUINN
Attorney General
Chairman,
Atlantic Coast Conference
of Attorneys General

CC: The Honorable
Governor of Massachusetts
Francis W. Sargent

RHQ:KPC:oe

[SEAL]
U. S. DEPARTMENT
OF THE INTERIOR

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Dec. 30, 1971

Honorable Robert H. Quinn
Attorney General
Commonwealth of Massachusetts
State House
Boston, Massachusetts

Dear Mr. Quinn:

Thank you for your letter of December 13, 1971, summarizing the conclusions reached at the meeting in Philadelphia between representatives of the United States and most of the States involved in the case of *United States* v. *State of Maine, et al.*, S. Ct. No. 9, Original [sic]. Your summary is accurate subject to the following clarifications.

You have stated that we have agreed not to take any action towards "leasing procedures" nor "hold any hearings with respect to proposed leasehold areas" unless agreements or arrangements were entered into with the adjacent State. The definition of "leasing procedures" is crucial. We believe that it was made clear at the meeting that the "leasing procedures" referred to were "formal pre-leasing procedures", that is, those involving the published call for nominations and subsequent procedures leading to the issuance of Outer Continental Shelf (OCS) leases as provided for in the applicable regulations. Thus, the United States reserves the right to continue information-gathering activities and hold informal hearings for the purposes of obtaining information relevant to possible mineral development of the OCS off the East Coast.

In the last paragraph of your letter, you mentioned that upon the request of a Governor of a particular State the United States undertook to send copies of all "future communications" with that State relating to "the natural resources of the Outer Continental Shelf" to the Attorney General of that State. We believe that our commitment was somewhat more limited. We proposed that upon the request of the Governor of an individual State we would send to the Attorney General of that State copies of all correspondence between the Federal government and the State's officials on matters of policy relating to the development of the natural resources of the OCS adjacent to that State. Thus, we excluded from this the routine technical communications between the State and the Federal government that have no close relationship to the matters that we have been discussing with you.

It was pointed out by the Federal government's representatives at the Philadelphia meeting that the assurances given at that time were in fact but an amplification of previously announced Federal policy on these matters. This point was stressed in view of the erroneous impressions in some quarters that the United States intended to move unilaterally towards leasing of the OCS off the East Coast.

If we can be of further assistance in clarifying these understandings we shall be glad to do so.

Sincerely yours,

(s) RAYMOND COULTER
Acting Solicitor

[SEAL]
DEPARTMENT
OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D.C. 20530

January 3, 1972

Honorable Robert H. Quinn
Attorney General of Massachusetts
State House
Boston, Massachusetts 02133

Dear Mr. Quinn:

Thank you for your letter of December 13, 1971, summarizing the conclusions reached at the December 7 meeting in Philadelphia between representatives of the United States and most of the States involved in the case of *United States* v. *State of Maine, et al.*, S.Ct., No. 9, Original [sic].

Subject to the clarifications contained in a letter being sent to you by Raymond C. Coulter, Acting Solicitor of the United States Department of the Interior, * we concur in your summary.

Very truly yours,
(s) ERWIN N. GRISWOLD
Erwin N. Griswold
Solicitor General

* A copy of Mr. Coulter's letter is attached.

TELEGRAM TO:
HON. ROGERS C. B. MORTON, SECRETARY
UNITED STATES DEPARTMENT
OF THE INTERIOR
WASHINGTON, D.C. 20240
(COPY TO HON. ERWIN H. GRISWOLD,
SOLICITOR GENERAL
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530)
I AM ADVISED IN NEWS MEDIA THAT SOME SORT OF AGREEMENT MAY HAVE BEEN ENTERED UPON BETWEEN YOU AS SECRETARY OF INTERIOR AND GOVERNOR FRANCIS W. SARGENT OF MASSACHUSETTS CONCERNING EXPLORATORY WORK ON THE FLOOR OF THE OUTER CONTINENTAL SHELF. BE ADVISED BY THIS TELEGRAM THAT, PENDING FURTHER NOTIFICATION YOU SHOULD TAKE NO ACTION IN RELIANCE UPON ANY SUCH AGREEMENT. LETTER WILL FOLLOW.

ROBERT H. QUINN
ATTORNEY GENERAL
COMMONWEALTH OF
MASSACHUSETTS

FILED
MAY 18 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 35, Original

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA AND GEORGIA.

MOTION BY THE DEFENDANT, COMMONWEALTH OF MASSACHUSETTS FOR PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT THEREOF

ROBERT H. QUINN
Attorney General
HENRY HERRMANN
Special Assistant Attorney General
THOMAS J. CROWLEY
Assistant Attorney General

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 35, Original

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA AND GEORGIA.

MOTION BY THE DEFENDANT, COMMONWEALTH OF MASSACHUSETTS FOR PRELIMINARY INJUNCTION

Defendant, Commonwealth of Massachusetts, moves the Court for a preliminary injunction against the Plaintiff, United States of America, its elected and appointed officials and officers, and its agents, servants, employees, attorneys and all persons in active concert and participation with it, pending final hearing and determination of the action:

1. Enjoining them from drilling or boring, by what-

ever method, for oil and gas exploration or for other general or specific data-seeking purposes, beyond a depth of twenty-five feet below the water column, within the area of the Atlantic Continental Shelf which is claimed by Massachusetts and which is in issue in the case at bar, to wit, without limitation, an area: (a) starting at a point three miles from the New Hampshire/Massachusetts boundary with a coordinate of latitude 42°58′30″N., and longitude 70°47′00″W., and continuing along a line on a bearing of N86.07°30′E to a point of intersection with the 200 meter isobar of the North American Atlantic Continental Shelf, thence in a general southwesterly direction following the 200 meter isobar of the Continental Shelf to a point having the coordinate latitude 40°02′00″N., and longitude 70°34′00″E., thence continuing landward in a general northwesterly direction on a bearing of N35°W., thence to a point in the vicinity of Block Island having the coordinate latitude 41°03′N. and longitude 71°31′E., thence northeasterly on a bearing N34°E., to a point 3 miles from the Massachusetts/Rhode Island coastal boundary having a coordinate of latitude 71°09′N., and longitude 41°27′30″, thence returning to the point of origin near the New Hampshire/Massachusetts boundary along a line 3 miles off the coastline of Massachusetts; and, (b) the Continental Shelf area abutting and seaward of the territory delineated in 1(a) above as far as the Plaintiff, United States of America claims national jurisdiction as against foreign nations under applicable international law.

2. Enjoining them from licensing, permitting, or otherwise authorizing any non-federal governmental entity, and any legal and natural person from performing the acts delineated in prayer one (a and b) above;

provided, however, that nothing contained in the prayers one and two above shall be construed to interfere with the Armed Forces of the United States in the performance of their national defense role;

on the grounds that

1. Unless enjoined by this Court the Plaintiff, United States of America will commit the acts referred to in prayers numbered one and two above;
2. Such action by the Plaintiff will result in serious and irreparable harm to the Defendant as more particularly appears in the Affidavits attached hereto;
3. The issuance of a preliminary Injunction herein will not cause undue inconvenience or loss to the Plaintiff, but will prevent serious and irreparable harm to the Defendant, Commonwealth of Massachusetts.

And the Defendant, Commonwealth of Massachusetts further moves that in view of the seriousness and urgency of the subject matter of this Motion, the Plaintiff, United States of America, be required to respond hereto within such period of time as the Court may deem meet and proper to enable the Court to consider and rule on this Motion within the present Term of Court.

ROBERT H. QUINN
Attorney General
Commonwealth of Massachusetts

May, 1973

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 35, Original

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA AND GEORGIA.

DRAFT

Preliminary Injunction

This cause came on to be heard on Defendant Commonwealth of Massachusetts' motion for a preliminary injunction and the Court having considered the motion, the affidavits in support of the motion and the affidavits in opposition thereto, and having considered the pleadings filed by the Plaintiff United States of America in opposition, the Court makes the following

Findings of Fact

1. The Plaintiff United States of America, during the pendency of this action and before same can be heard on its merits

a. Proposes to conduct drilling activities, through the Geological Survey in that portion of the North American Atlantic Continental Shelf with respect to which both the plaintiff and the defendant, Commonwealth of Massachusetts, claim the exclusive right of exploration and exploitation of the mineral resources of the subsoil; and

b. Proposes to contract with private companies to carry on the activity referred to in 1(a) above.

2. Defendant Commonwealth of Massachusetts contends that the plaintiff's conduct of such drilling as referred to in 1(a) above, and the plaintiff's contracting with private persons as referred to in 1(b) above would be unlawful and contrary to the rights of exclusive exploration, and the exclusive right to control and regulate such activity asserted by Defendant Commonwealth of Massachusetts in its answer, and further, that the alleged statutory authority which the plaintiff asserts as justification for the acts complained of by the Defendant Commonwealth of Massachusetts in its Motion for a Preliminary Injunction is directly in issue in this action.

3. The Defendant Commonwealth of Massachusetts further contends that the plaintiff's acts referred to in (1) above would expose Massachusetts to irreparable injury and serious damages, in an amount difficult or impossible to determine, resulting from oil spills in the area off the Massachusetts coast leading to serious, widespread, and irreparable damage to the marine environment in that area, and the defendant, Commonwealth of

Massachusetts further contends that it is without any adequate remedy at law.

4. Defendant Commonwealth of Massachusetts further contends that the issuance of a Preliminary Injunction herein will not cause undue inconvenience or loss to the plaintiff.

5. The Defendant Commonwealth of Massachusetts further contends that if the Court rules affirmatively on its motion, it should be exempted from the requirement of providing a bond.

6. The granting of a Preliminary Injunction is necessary to preserve the status quo until the merits of the case can be decided.

Conclusions of Law

1. Defendant Commonwealth of Massachusetts is entitled to a Preliminary Injunction on the terms of, and with the effect of, the ORDER set forth below.

And it is therefore

ORDERED that the plaintiff, United States of America, its elected and appointed officials and officers, and its agents, servants, employees, attorneys and all persons in active concert and participation with it, pending final hearing and determination of the action be

1. Enjoined from drilling or boring, by whatever method, for oil and gas exploration or for other general or specific data-seeking purposes, beyond a depth of twenty-five feet below the water column, within the area

of the Atlantic Continental Shelf which is claimed by Massachusetts and which is in issue in the case at bar, to wit, without limitation, an area: (a) starting at a point three miles from the New Hampshire/Massachusetts boundary with a coordinate of latitude 42°58′30″N., and longitude 70°47′00″W., and continuing along a line on a bearing of N86.07°30′E to a point of intersection with the 200 meter isobar of the North American Atlantic Continental Shelf, thence in a general southwesterly direction following the 200 meter isobar of the Continental Shelf to a point having the coordinate latitude 40°02′00″N., and and longitude 70°34′00″E., thence continuing landward in a general northwesterly direction on a bearing of N34°W., thence to a point in the vicinity of Block Island having the coordinate latitude 41°03′N. and longitude 71°31′E., thence northeasterly on a bearing N34°E., to a point 3 miles from the Massachusetts/Rhode Island coastal boundary having a coordinate of latitude 71°09′N., and longitude 41°27′30″, thence returning to the point of origin near the New Hampshire/Massachusetts boundary along a line 3 miles off the coastline of Massachusetts; and, (b) the Continental Shelf area abutting and seaward of the territory delineated in 1(a) above as far as the Plaintiff, United States of America claims national jurisdiction as against, foreign nations under applicable international law.

2. Enjoined from licensing, permitting or otherwise authorizing any non-federal governmental entity, and any legal and natural person from performing the acts delineated in prayer one (a and b) above;

provided, however, that nothing contained in the prayers one and two above shall be construed to interfere with the Armed Forces of the United States in the performance of their national defense role.

AFFIDAVIT

My name is Henry Herrmann.

I am a Special Assistant Attorney General of Massachusetts with an office at the Department of the Attorney General, 131 Tremont Street, Boston, Massachusetts. I am a member of the Massachusetts and the Federal Bar.

I am submitting this Affidavit in support of the Motion being submitted to the Supreme Court of the United States, by the Attorney General of Massachusetts, which seeks to enjoin any drilling beyond a depth of twenty-five feet, by any federal agency or its licensee, in the area of the continental shelf to which Massachusetts makes claim in the case of *United States* v. *The State of Maine et al* until such time as the Court shall have rendered a decision in that litigation.

On May 1, 1973, at a meeting held at the office of the Department of the Massachusetts Attorney General, I was informed by representatives of the United States Geological Survey (Messrs. John Behrendt and John Hathaway) that the latter agency plans this summer to initiate a core drilling program off the coast of Massachusetts. I was given a copy of U. S. Geological Survey Map No. I-451 which had twenty prospective drilling sites indicated by markers thereon.

A cartographical analysis of this map revealed that all the sites marked thereon are in the offshore area claimed by Massachusetts in the case at bar. For the convenience of the Court, I attach hereto as Exhibit "A" a reproduction of the relevant portion of that map showing the sites marked by the Geological Survey.

I was informed by the Geological Survey that the core holes it intends to drill will have a depth of up to 50 feet in consolidated material and up to 1000 feet in unconsolidated material.

The purpose of this drilling program was alleged to be an analysis of the geological structure of this continental shelf area for scientific purposes; it was conceded, however, that "resource evaluation" was one of the motivating factors for this drilling.

The Geological Survey stated that there has been "shallow" drilling and bottom sampling of less than fifty feet in depth performed in the past both by the Survey and by private researchers in this area. The Survey admitted, however, that to their knowledge there had been no drilling in the past in this area even approaching the depths planned for this summer (up to 1000 feet).

The Survey representatives stated they had attempted to minimize the possibility of accidentally drilling into an oil or gas pocket by careful choice of the drilling sites based on the available seismic data, which includes the results of last years "Digicon Survey" (which Massachusetts sought to enjoin). Since the latter data is proprietory and restricted, the Geological Survey Scientist responsible for the choice of the sites stated that he had had access to only a part of what is alleged to be the latest and most accurate seismic survey of this area.

The Geological Survey conceded that the data they hoped to amass by this drilling would be of substantial benefit to oil companies if the latter obtained a lease for that area.

It was stated by the Survey that they hoped to begin the drilling in July of this year, subject to final approval by the Director of the Geological Survey and final confirmation of a $200,000 appropriation for this drilling project. The actual work would be contracted out to a commercial offshore drilling company.

The Survey representatives stated that they did not at this time consider it desirable or legally necessary that an Environmental Impact Statement under the National

Environmental Policy Act of 1969 be prepared. They stated that an "in house" environmental assessment was in the final stages of preparation, but that they were unable to provide Massachusetts with a copy at this time.

The Attorney General of Massachusetts wrote to the Secretary of the Interior of the United States on May 10, 1973, requesting "immediate and explicit" assurance that the drilling would not be conducted. No reply has as yet been received.

On the basis of the affidavits of Messrs. Cornelius J. Wilson and Donald J. Zinn, as expert witnesses, attached hereto, I believe that prospective federal drilling program in this area exposes Massachusetts to the risk of accidental oil spillage and resultant serious harm to its marine environment. Consequently, I believe that Massachusetts is threatened with immediate, serious, and irreparable harm for which it lacks an adequate remedy at law.

(s) HENRY HERRMANN
HENRY HERRMANN
Special Assistant
Attorney General
Commonwealth of Massachusetts

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, ss.

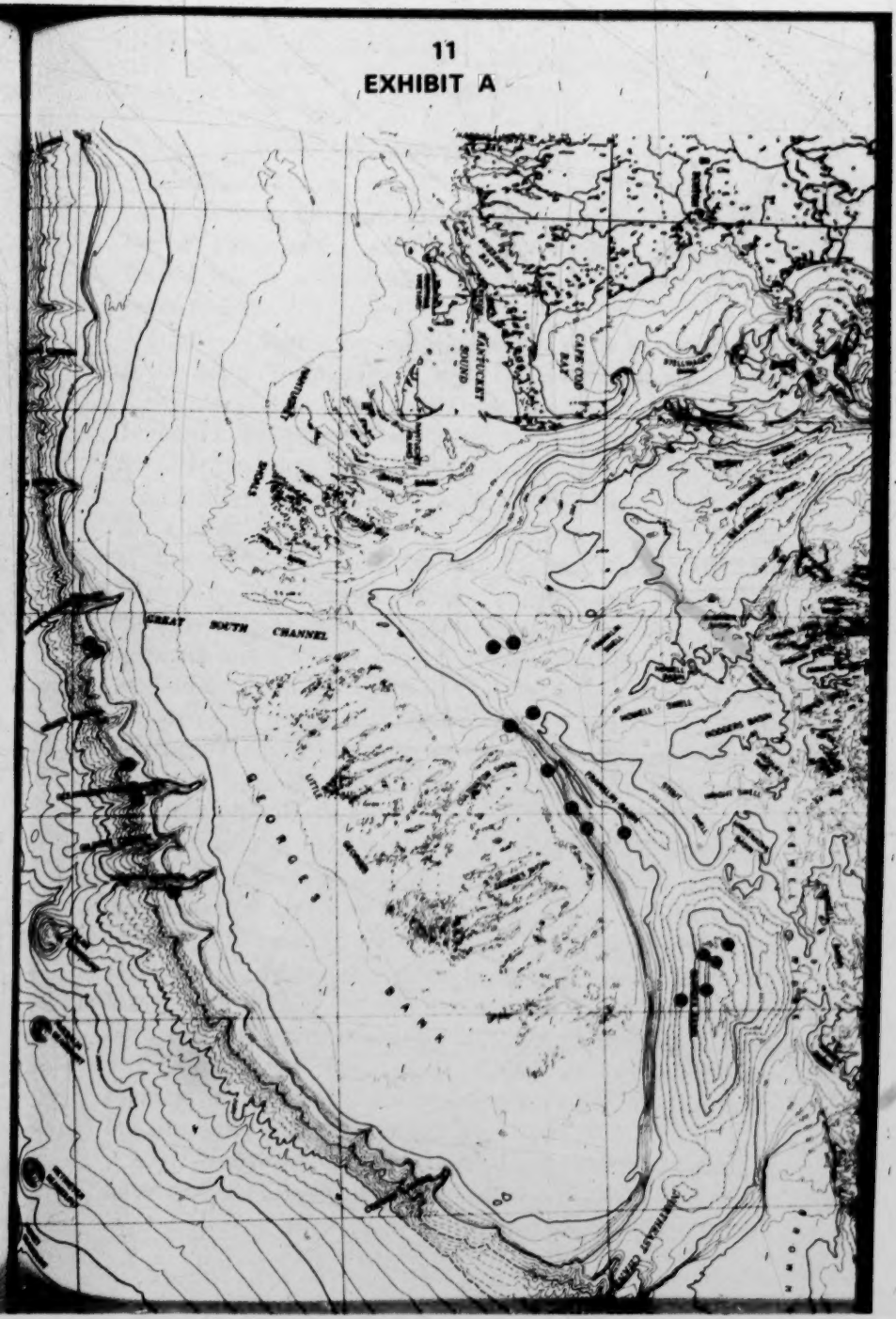
On this seventeenth day of May, 1973 before me personally appeared Henry Herrmann to me known to be the person described in, and who executed the foregoing Affidavit, and he acknowledged that he executed the same, and made oath as to its truth.

(s) COLEMAN G. COYNE, JR.
COLEMAN G. COYNE, JR.
Notary Public

My Commission Expires:
June 27, 1979

11

EXHIBIT A



AFFIDAVIT

My name is Cornelius J. Wilson. I am Assistant Director of Engineering and Research at the University of Rhode Island, a position which I have held for the last seven years.

I have a degree in engineering from the Massachusetts Institute of Technology. I hold engineering licenses from the State of New York and from the State of California. I am the President-elect of the Providence Engineering Society, the state engineering association in Rhode Island.

Immediately following World War II, as a Colonel in the United States Air Force, I was appointed Director of the entire German chemical industry under SHAEF (Supreme Headquarters Allied Expeditonary Forces).

Thereafter, I was employed for over ten years as an engineer and a Senior Project Engineer in the oil industry, including Union Oil Company of California, C. F. Braun Construction Engineers, and the Shell Oil Company. In addition, for over two years, I was the Assistant Technical Director of the National Oil Fuel Institute, a national oil industry organization.

As a result of over thirty years professional experience, all of it related to the petroleum industry, I consider myself conversant with all major aspects of the petroleum industry. I have in recent years been particularly interested in offshore petroleum technology, and I have followed with special interest the matter of the Santa Barbara offshore spill, especially its causes. For this reason, I consider myself professionally qualified to testify concerning the inherent risk factors in the offshore core drilling presently under consideration.

At the office of the Massachusetts Attorney General, I have had the opportunity to examine in detail U. S. Geological Survey Map No. I-451, which shows the offshore

area in which the Geological Survey intends to drill core holes of up to 1,000 feet in depth in unconsolidated material and up to fifty feet in depth in consolidated material. The prospective drilling sites were indicated on the map. In addition, I have examined the available published geological data relating to these sites and this overall continental shelf area.

It is my professional opinion that there is an element of risk, in the drilling of these holes, of accidentally penetrating an oil or gas retaining geological structure. The degree of risk would, of course, vary with the precise location of the drilling site and the precise depth. However, even assuming that a particular site has been carefully chosen, on the basis of seismic data of the most precise and up-to-date nature, with a view to minimizing such risk, a certain degree of risk nevertheless is inherent in this activity and cannot be discounted or eliminated. This is because the present state of the art is not an exact science. If seismic data were sufficient, there would clearly be no need at all for core drilling. Any such drilling venture has to be a journey into the unknown to some extent. I would like to point out that the major oil companies lose many millions of dollars annually in dry holes at sites where, based on information obtained by present state of the art technology, they had fully expected to strike oil.

Obviously, the converse is true: there can be no assurance that one will not strike oil even if one is attempting to avoid doing so, especially in a general area which has generated exploration interest. This is certainly the case at the drilling depths under consideration in the present instance.

The same element of inherent uncertainty pertains to the extent of damage if oil were to be accidentally released. The damage would, of course, vary with the

amount of release, the duration of release, and water currents and meteorological conditions. Rapidly containing an accidental release can be a major enterprise of uncertain success, depending on many interrelated complex factors.

(s) CORNELIUS J. WILSON
CORNELIUS J. WILSON

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

On this fifteenth day of May, 1973 before me personally appeared Cornelius J. Wilson to me known to be the person described in, and who executed the foregoing Affidavit, and he acknowledged that he executed the same, and made oath as to its truth.

(s) JOHN J. WARD
JOHN J. WARD
Notary Public

My Commission Expires:
July 3, 1975

AFFIDAVIT

My name is Donald J. Zinn. I am Professor of Zoology specializing in Marine Ecology and a Research Associate of the Narragansett Marine Laboratory at the University of Rhode Island.

I am a graduate of Harvard College with a degree in Zoology, and I hold a Ph.D. in Zoology from Yale University.

In addition to several other professional organizations, I am a member of the Marine Biological Association of the United Kingdom. I am co-editor of the bulletin *Psammonalia,* which deals with the microscopic fauna of the marine sediment. I have devoted considerable time and research to the problem of oil pollution in the marine environment. My most recent publications in this area are "Recommendations for Research on Deep-Ocean Fouling" published by the U. S. Naval Ordnance Systems Command (Tech. Report 4004-1, April, 1970) and "The Impacts of Oil on the East Coast" published by the Wildlife Management Institute, in 1971.

I have been informed of the proposed drilling program by the United States Geological Survey this summer in the continental shelf area off Massachusetts. In this connection, I have examined, at the office of the Massachusetts Attorney General, the U. S. Geological Survey Map No. I-451, which shows the proposed drilling sites.

I consider myself qualified to testify as to the damage that could be caused by the release of oil in any considerable quantity from any holes drilled in this area.

I would first distinguish between long term and short term effects. The latter can be extremely severe and can involve massive fish kills, destruction of marine birds, and the fouling of beaches and resultant effect on recreational use.

The long term effects, even though they have not received equal attention in the news media, are even more severe, and the full extent thereof may not become apparent for years and is at present not yet fully understood.

It seems certain that the toxic material in crude oil will enter the marine food chains and will ultimately have long term effects on innumerable marine species,

including species of important food fishes. The Georges Bank area, of course, is one of the world's most important fisheries grounds and is vital to the Massachusetts fishing industry. The hydrocarbons from oil, once incorporated into a particular marine organism, are stable and pass from one member of a food chain to another.

I would like to provide some specific examples of such damage: Black Quahogs, used in making chowder, have been killed in immense quantities in New Hampshire by oil spills, and the species have not recovered as yet. The same occurred with respect to such commercially important crustaceans such as crabs and lobsters. Professor Blumer of Woods Hole Oceanographic Institute has done fascinating work which indicates that even minute traces of oil in the water may destroy the lobster as a local species by interfering with the animal's sophisticated and, as yet not fully understood, chemical signal mechanisms.

There is presently no known method of satisfactory oil cleanup once the spill has spread along the ocean bottom to any extent. The long term biological effects I have touched upon above could therefore not be arrested or reversed once such a spill has, in fact, occurred.

Damage to the marine environment, on the ocean bottom, off Massachusetts, if oil is released in any quantity, would therefore be of a grievous and permanent nature according to what is presently known.

I therefore look with deep misgiving and concern upon any drilling program in this area, under the presently existing technology, which poses even a slight risk of accidental oil release.

(s) DONALD J. ZINN
DONALD J. ZINN

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss:

On this fifteenth day of May, 1973 before me personally appeared Donald J. Zinn to me known to be the person described in, and who executed the foregoing Affidavit, and he acknowledged that he executed the same, and made oath as to its truth.

(s) COLEMAN G. COYNE, JR.
COLEMAN G. COYNE, JR.
Notary Public

My Commission Expires;
June 27, 1979

AFFIDAVIT

My name is Sidney Smookler.

I am an Assistant Attorney General of the Commonwealth of Massachusetts. I am a member of the Massachusetts and Federal Bar, and am also a Registered Professional Engineer and a Registered Massachusetts Land Court Examiner.

My office is at the Department of the Attorney General, 131 Tremont Street, Boston, Massachusetts.

I am submitting this affidavit in support of the Motion for a preliminary injunction being filed by Massachusetts in the case of *United States* v. *The State of Maine, et al, No. 35 Original.*

I have read the aforementioned Motion for a Preliminary Injunction. I prepared the description in the Motion of that area of the North American Atlantic Continental Shelf which is claimed by Massachusetts and is in issue in the case at bar, according to the best of my professional

experience and judgment. I believe the aforesaid description to be the most accurate and proper one that I could construct on the basis of the available applicable legal data and geographical methodology. I was assisted in the task by experts from the Geodetic Division, Massachusetts Department of Public Works.

This description is the best possible delimitation of this area under the circumstances and I do not intend to represent to the Court that the legal principles and geographical methods employed are necessarily conclusive.

I have examined a copy of the United States Geological Map No. I-451 which I am informed was turned over by the Geological Survey to Special Assistant Attorney General Henry Herrmann, showing twenty drilling sites marked by the Geological Survey.

I have made a professional determination that these drilling sites are within the area encompassed by the description in the Motion.

(s) SIDNEY SMOOKLER
SIDNEY SMOOKLER
Assistant Attorney General
Commonwealth of Massachusetts

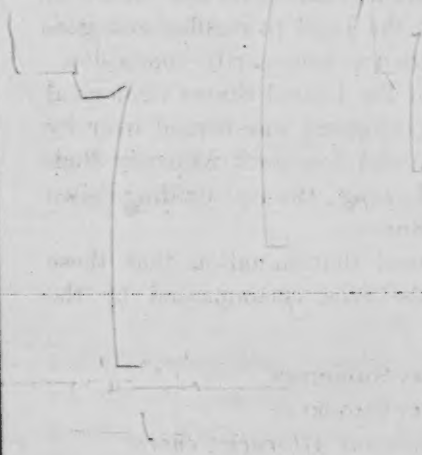
COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss:

On this 18th day of May, 1973 before me personally appeared Sidney Smookler to me known to be the person described in, and who executed the foregoing Affidavit, and he acknowledged that he executed the same, and made oath as to its truth.

(s) LAWRENCE J. O'KEEFE
LAWRENCE J. O'KEEFE

My Commission expires:
August 17, 1977



In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 35, Original

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA AND GEORGIA.

STATEMENT

This action was brought by the Plaintiff United States of America against the thirteen Atlantic coastal states, including the Defendant Commonwealth of Massachusetts, in order to establish, as against the defendants, that the United States has the exclusive right to explore and exploit the natural resources of the North American Atlantic Continental Shelf more than three miles seaward from the coast line. The complaint generally alleged that the United States had these rights prior to the enactment, in 1953, of the Submerged Lands Act (67 Stat. 29, 43 U.S.C. 1301-1315).

The complaint further alleged that this Act gave the defendants the ownership of the seabed within their boundaries to a maximum of three miles seaward from the low water mark, but that the United States, by virtue of the Submerged Lands Act retained jurisdiction over the remainder of the continental shelf. Also alleged in the complaint is that the defendants claim rights to this remainder of the continental shelf which are adverse to the plaintiff. The United States prayed for a declaration of its exclusive rights to the area in question as described above.

The Defendant Commonwealth of Massachusetts specifically denied the allegations in the plaintiff's complaint, and in addition asserted in an affirmative defense that the Commonwealth of Massachusetts, as the successor to certain royal charters, is entitled "to exercise exclusive dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line, subject to the limits of national seaward jurisdiction established by the plaintiff;" Massachusetts prayed for a declaration of its rights as against the plaintiff to exclusive dominion and control to the seabed and subsoil in question. All defendants except Florida submitted answers generally paralleling Massachusetts' historical claim.

In January of 1970 the plaintiff moved the Court for judgment on the ground that allegedly no genuine issue of material fact existed and that it was entitled to judgment as a matter of law. The defendants in January of 1970 moved that the Court refer the case to a master. By its order of June 8, 1970, the Court granted the latter motion and referred the case to a special master. The Defendant State of Florida was severed from the case for all purposes on June 28, 1971.

The case proceeded to be heard before the Special Master, the Honorable Albert Branson Maris, Senior United States Circuit Judge, pursuant to his procedural order of August 27, 1971.

On June 9, 1972 the Defendant Commonwealth of Massachusetts moved the Court for a preliminary injunction against oil exploration by the United States and its licensees. The Motion was denied by the Court in its order of June 26, 1972.

The hearing of the case before the Special Master has recently been concluded. The Special Master has ordered that the Plaintiff, United States of America submit to him its proposed findings, conclusions and supporting brief on or before June 1, 1973. Pleadings by the Defendants in response thereto are due August 1, 1973.

As stated on the attached affidavits, the Defendant Commonwealth of Massachusetts is concerned that the acts of the plaintiff will unilaterally disrupt the status quo, to the serious and irremediable harm of Massachusetts before this case is decided on its merits; for this reason, Massachusetts makes its motion for a preliminary injunction.

Questions Presented

1. Is the right of the Plaintiff United States of America to conduct or license explorations on the outer continental shelf in issue in the case at bar?

2. Will such explorations by means of drilling *pendente lite* disrupt the status quo to the irremediable harm of Massachusetts?

3. Is Massachusetts entitled to a preliminary injunction to preserve the status quo under the factual situation it has alleged?

Statutes Involved

1. The Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331-1343, provides in pertinent part:

Sec. 2.

When used in this subchapter—

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

(b) The term "secretary" means the Secretary of the Interior;

(c) The term "mineral lease" means any form of authorization for the exploration for, or development or removal of deposits of, oil, gas, or other minerals; and

(d) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation. [67 Stat. 462, 43 U.S.C. 1331.]

Sec. 3.

(a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter. [67 Stat. 462, 43 U.S.C. 1332.]

Sec. 5.

(a) (1) The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. [67 Stat. 464, 43 U.S.C. 1334(a)(1).]

Sec. 11.

Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the outer Continental Shelf, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this subchapter, and which are not unduly harmful to aquatic life in such area. [67 Stat. 469, 43 U.S.C. 1340.]

2. The Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301-1315, provides in pertinent part:

Sec. 2.

When used in this chapter —

(a) The term "lands beneath navigable waters" means—

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high

water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and

plant life but does not include water power, or the use of water for the production of power:
(g) The term "State" means any State of the Union; [67 Stat. 29, 43 U.S.C. 1301.]

Sec. 9.

Nothing in this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 1301 of this title, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed. [67 Stat. 32, 43 U.S.C. 1302.]

Sec. 3.

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recoginzed, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;
(b) (1) The United States releases and relinquishes unto said States and persons aforesaid, ex-

cept as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources . . . . [67 Stat. 30, 43 U.S.C. 1311 (a)-(b)(1).]

Sec. 4.

The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress. [67 Stat. 31, 43 U.S.C. 1312.]

3. *Geological Survey.*

Section 31 of Title 43, United States Codes, provides in pertinent part:

(a) The Director of the Geological Survey, which office is established, under the Interior Department, shall be appointed by the President by and with the advice and consent of the Senate. This officer shall have the direction of the Geological Survey, and the classification of the public lands and examination of the geological structure, mineral resources, and products of the national domain. The Director and members of the Geological Survey shall have no personal or private interests in the lands or mineral wealth of the region under survey, and shall execute no surveys or examinations for private parties or corporations.

(b) The authority of the Secretary of the Interior, exercised through the Geological Survey of the Department of the Interior, to examine the geological structure, mineral resources, and products of the national domain, is expanded to authorize such examinations outside the national domain where determined by the Secretary to be in the national interest. [20 Stat. 394, as amended by 76 Stat. 427, 43 U.S.C. 31 (a)-(b).]

Summary of Argument

Massachusetts alleges that during the pendency of this action the Plaintiff United States of America plans, through the United States Geological Survey, to conduct explorations, by means of drilling up to 1,000 feet in depth, in that area of the North American Atlantic Continental Shelf which would be subject to the exclusive exploration right of Massachusetts if it prevailed in the case at bar. Massachusetts claims that the federal statutes under which the plaintiff asserts its purported exploratory rights are invalid, and are squarely in issue in this case;

therefore, the plaintiff is not entitled to assert its claimed exploration rights *pendente lite.*

The drilling which the Geological Survey plans to conduct poses a serious threat to the Massachusetts environment. Accidental penetration of an oil retaining structure would result in incalculable damage to recreational facilities, to the Massachusetts fishing industry, and to the marine ecology. The commencement of this drilling program by the Geological Survey is therefore a significant and dangeruos alteration of the status quo. Massachusetts will have the right to decide for itself, if it prevails in this lawsuit, whether it will permit this type of drilling off its coast, and this crucial decision-making right should not be preempted by the opposing litigant at this time.

The damage threatened to Massachusetts is serious and irremediable, with no remedy at law available; in contrast, a preliminary injunction would not create an undue hardship to the plaintiff. Under the applicable doctrines of equity, Massachusetts is entitled to a preliminary injunction which will preserve the status quo pending a final decision by this Court.

Argument

I. THE UNITED STATES GEOLOGICAL SURVEY PLANS TO CONDUCT, *Pendente lite*, EXPLORATIONS, BY MEANS OF DRILLING, OF THAT PORTION OF THE OUTER CONTINENTAL SHELF SUBJECT TO THE CLAIMS OF MASSACHUSETTS; IN SO DOING, THE GEOLOGICAL SURVEY IS ACTING SOLELY IN RELIANCE ON PURPORTED FEDERAL STATUTORY AUTHORITY WHICH IS UNDER CHALLENGE IN THE CASE AT BAR.

A. *The Alleged Statutory Authority For The Activity By The Federal Government Which Massachusetts Seeks To Enjoin Is The Outer Continental Shelf Lands Act, Sec. 11,67 Stat. 462, 43 U.S.C. 1340.*

The basis for the alleged authority of the United States Geological Survey to conduct such explorations itself and to approve of their being conducted by private persons, is the Outer Continental Shelf Lands Act, sec. 11, 67 Stat. 462,43 U.S.C. 1340. This statue states:

> Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the outer Continental Self, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this subchapter, and which are not unduly harmful to aquatic life in such area. [43 U.S.C. 1340.]

Before discussing the relevance of this statute, we would like to make some preliminary comments on its interpretation and present implementation. The words "any agency of the United States" could not, we believe, be interpreted as an omnibus enabling act for any federal agency to conduct such explorations even if the latter had no possible relevance to its general purpose or function. Rather, these words would seem to refer to any federal agency otherwise legally authorized to carry on general activities of this nature. The latter interpretation is supported by the legislative history of this section. Hearings on S. 1901 Before the Committee on Interior and Insular Affairs, 83rd Cong., 1st Sess. (1953) 638.

The second comment we would make on the wording of this statute is that the requirement for authorization by the Secretary pertains only to "persons" as defined in the Act; there is no need for an "agency" to obtain this authorization. This is clearly indicated by the legislative history — the Justice Department recommended that "persons" be obliged to obtain approval by the Secretary

as a prerequisite to exploration. Hearings on S. 1901, *supra*, at 706.

We submit, therefore, that an accurate paraphrasing of this statute is that the relevant offshore area is open to exploration by any federal agency, otherwise legally authorized, and by persons who obtain the approval of the Secretary of the Interior. The Secretary of the Interior has delegated to the Director of the United States Geological Survey this alleged prerogative to authorize exploration by "persons."

We return now to the relevance of this Section to the subject matter of this Motion — as we argue, this Section is the sole authority which the Geological Survey can allege for its conduct of exploration of this offshore area. We think it most significant that the Department of the Interior, which has under it the Geological Survey, [see Act of Mar. 3, 1879, 20 Stat. 394, 43 U.S.C. 31(a).] has expressed precisely the same position in a document of most recent vintage. The Chairman of the Senate Committee on Interior and Insular Affairs submitted a series of questions to Mr. Hollis M. Dole, Assistant Secretary for Mineral Resources, Department of the Interior. One of several questions under the heading "The Present Legal Regime For The Outer Continental Shelf" was "Which entities within which Federal Agencies have been assigned O.C.S. [Outer Continental Shelf] responsibilities . . .?" The Assistant Secretary of the Interior replied: "The Geological Survey is also responsible for geological and geophysical exploration under section 11 of the OCS Act (43 U.S.C. §1340)." Oversight Hearings held pursuant to S. Res. 45, by the Senate Committee on Interior and Insular Affairs, 92nd Cong., 2nd Sess. (Mar. 23, 1972) part A., p. 2. These were written questions and answers, prepared in advance of the hearings and inserted into

the record at the Under Secretary's request. Oversight Hearings, *supra,* "Opening Remarks," p. 8.

B. *Absent The Provisions of Section 11 Of The Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C., 1340, The United States Geological Survey Has No Other Legal Authority To Conduct These Explorations Of The Outer Continental Shelf.*

The question now arises whether, if section 11 (43 U.S.C. 1340) is invalid, the Geological Survey has any recourse to other legal authority for its explorations of this offshore area. We submit it has none. It is our contention that the Geological Survey could not rely on its general enabling act, (20 Stat. 394, *as amended* by Act of Sept. 5, 1963, 76 Stat. 427, 43 U.S.C. 31(a)-(b).), to give legitimacy to its Outer Continental Shelf exploration. That statute provided in subsection (a) that the Director of the Geological Survey ". . . shall have the . . . examination of the geological structure, mineral resources, and products of the national domain." [43 U.S.C. 31(a).] Surprisingly, the term "national domain", which has existed in that statutory context since 1879, has apparently never been afforded a precise statutory or judicial definition. The term has been rather loosely defined by a Louisiana statute (which admittedly is not controlling here):

> The national domain, properly speaking, comprehends all the rights which belong to the nation, whether the latter is in the actual enjoyment of the same, or has only a right to reenter on them. Art. 486, West La. Civil Code (1952).

In our opinion, perhaps the most encompassing definition of "national domain" which we could advance to the Court

would parallel the delineation of the areas subject to the authority of the Conservation Division of the Geological Survey:

> . . . lands under the supervision or control of the Federal Government. These lands are divided for administrative purposes into five categories: First, the domain; second, the acquired lands which are lands acquired by the Federal Government for various purposes; third, the Indian lands, both tribal and allotted, for which the United States acts as trustee for the Indian owners; fourth, certain naval petroleum reserve lands by virtue of a cooperative arrangement with the Department of the Navy; fifth, the so-called military and miscellaneous lands, which are not subject to any of the mineral leasing laws. Hearings on S. 1901 Before the Committee on Interior and Insular Affairs, 83rd Cong., 1st Sess. (1953) 563. (Statement of H. J. Duncan, Chief, Conversation Div., Geological Survey, Dept. of Int.).

We would note that only the assertion of federal dominium by virtue of the Submerged Lands Act, §9 [67 Stat. 29, 43 U.S.C. 1302] and the Outer Continental Shelf Lands Act, §3A [67 Stat. 462, 43 U.S.C. 1332] would suffice to justify an argument by the plaintiff that the Outer Continental Shelf is included within the aforegoing definition of "national domain." The validity of federal assertion of dominium, however, is precisely what is in issue, and that is why we argue that the Geological Survey cannot rely, in this instance, on its statutory authority to explore the "national domain." We would further note that while we cannot state with utter precision what the "national domain" *is*, we have certain clear indications

what it is *not*: as the word "domain" and the above quoted Louisiana statute indicate, the term is by no means co-extensive with the imperium of the United States Government. Further, "national domain" does *not* include the Outer Continental Shelf even if the Federal Government did have dominium over this area. We justify this assertion on the legislative history to the Congressional extension, in 1963, of the authority of the Geological Survey to areas *outside* the national domain. [Act of Sept. 5, 1962, 76 Stat. 427, 43 U.S.C. 31(b).]

The Senate Report on the bill (S. 981) stated, in the paragraph entitled "NEED FOR LEGISLATION": "Passage of S. 981 would permit the Geological Survey to conduct investigations of the Outer Continental Shelves and ocean floor . . . ." S. Rep. No. 650, 87th Cong., 1st Sess. (1961) 1. This much seems clear: if the Geological Survey, in order to explore the Outer Continental Shelf, required authority to operate *outside* the "national domain," then the latter was *not* considered to encompass the Outer Continental Shelf. We would like to add that "Outer Continental Shelf," in this Senate Report, had to refer to the Continental Shelves of the Coasts of the United States since "Outer Continental Shelf" has no legal or scientific meaning other than a term of art created by the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331-1343.[1]

The fact that the Geological Survey, since 1962, has had its exploration authority extended *outside* the "national domain" raises the question whether the Survey could rely on this amendment in the case at bar, assuming as we argue, that the Outer Continental Shelf Lands Act is invalid and that the Outer Continental Shelf is not *within*

[1] The term "Outer Continental Shelf" is utilized in this brief for convenience of geographical reference only; we do not thereby recognize any legal implications of the creation of that term by a federal statute, the validity of which we are challenging.

the "national domain." We submit that the Survey definitely cannot rely on the extension of its authority to areas outside the "national domain"; the clear implication of this 1962 amendment is that the Survey may operate outside the national domain (anywhere in the world) subject to the consent of the relevant property owner, whether the latter be the foreign, state, or local government or private person having dominium over the area to be explored. Only in the case of *res nullius* could the Survey act unilaterally. For example, the legislative history to the 1962 amendment states that explorations by the Survey in foreign countries was contemplated. H. Rep. No. 2156, 87th Cong., 2nd Sess. (1962) 2. It seems axiomatic that Congress did not intend to authorize the Survey to conduct explorations in areas subject to the political control of a foreign government *without* the latter's consent. We suggest, further, that there is no need for the Court to reach the issue whether it would be within the legitimate exercise of Congressional authority to authrize the Geological Survey to explore the oil and gas deposits *anywhere* within the imperium of the United States Government, if the lands in question were State or privately owned. If we assume, *arguendo,* that this would indeed be within the power of the Congress, then the implementation of such authority to survey would have to be accompanied by just compensation to the property owners involved together with proper procedural safeguards. The exclusive right of an owner to explore for oil and gas on his land has been held to be an important property right by all federal and state courts which have had occasion to rule on this issue: *See, e.g., Phillips Pet. Co.* v. *Cowden,* 241 F.2d 586 (5th Cir. 1957); *Holcombe* v. *Superior Oil Co.,* 213 La. 684, 35 So. 2d 457 (1948); *Layne Louisiana Co.* v. *Superior Oil Co.,* 209 La. 1014, 1020, 26 So. 2d 20, 22 (1946). Therefore, if we were to

interpret the provision of the 1962 amendment, 76 Stat. 427, 43 U.S.C. 31(b), as omnibus authority for the Geological Survey to explore for oil and gas on state or privately owned land, we submit that the exercise of this authority, against the will of the property owner involved, would, in the absence of due process and just compensation, be unconstitutional by virtue of the provisions of the Fifth Amendment to the United States Constitution. We submit that the same argument would apply to any federal agency other than the Geological Survey which purported to have the right to explore this area under color of federal law.

The alleged authority of the Geological Survey, by delegation of the Secretary of the Interior, to license private "persons" to conduct such explorations can find no basis other than the above discussed section 11 of the Outer Continental Shelf Lands Act (43 U.S.C. 1340) which is under challenge here. We would further argue that any attempt by the Congress to authorize other federal officers or agencies to grant such licenses to private persons would be subject to the same constitutional limitations discussed above in the event that the private licensee did not obtain the relevant property owner's consent.

C. *The Statutory Authority Relied Upon By The Plaintiff United States Of America To Conduct These Continental Shelf Explorations Is Directly In Issue In The Case At Bar, Since Both The Plaintiff And The Defendant Massachusetts Claim, In Their Pleadings, The Exclusive Right To The Offshore Area In Question.*

On page seven of Plaintiff's Brief in Support of Motion for Judgment, the plaintiff stated the "*Question Presented*" as being: "Whether the right to explore and ex-

ploit the natural resources of the continental shelf underlying the Atlantic Ocean beyond three miles from the coast line belongs to the United States or to the Defendant States." Furthermore, in the "*Introduction and Summary*" to the argument in the aforementioned brief, the plaintiff stated:

> *The* issue in this case is whether the United States has, as against the defendant states, *the exclusive* right to *explore* and exploit the natural resources of the continental shelf under the Atlantic Ocean, more than three miles from the coast line. Brief of the United States in Support of Motion for Judgment, *supra,* pp. 10-11. (Emphasis supplied.)

In its answer, the Commonwealth of Massachusetts alleged as an affirmative defense that it is "entitled to exercise exclusive dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line, subject to the limits of national seaward jurisdiction established by the Plaintiff;" Mass. Ans., p. 4. In so alleging, the Commonwealth of Massachusetts has directly challenged Plaintiff United States' contention of exclusive right to explore and exploit the natural resources in question, which according to the plaintiff's pleadings is the issue in this case.

This central issue which has been joined in this case, directly puts into issue also those federal statutes which assert federal dominium over the geographical area in controversy.

With respect to domestic law, the first federal statute to assert the claim of the United States (as against the states) to the natural resources of the area now referred

to as the Outer Continental Shelf was the Submerged Lands Act, sec. 9 (67 Stat 29, 43 U.S.C. 1302).

That section purported to "confirm" the "jurisdiction and control" of the United States, and had the purpose of emphasizing that the Submerged Lands Act would not affect the rights of the United States to the area seaward of the historical boundaries of the States (the Outer Continental Shelf). Federal dominium over this offshore area was subsequently reaffirmed and expanded by the Outer Continental Shelf Lands Act (67 Stat. 462, 43 U.S.C. 1331-1343). Section 3(a) states:

> It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition . . . . 43 U.S.C. 1332(a).

It is crucial to note that federal dominium, presently and at the time of the aforementioned legislation, is precisely what is at issue in this case; if the defendants prevail, the federal legislation which asserts United States dominium is invalid. The federal "right of disposition" under the Outer Continental Shelf Lands Act, sec. 3(a) as manifested, for example in section 11 of that Act (43 U.S.C. 1340), which the Geological Survey relies on, would be non-existent.

Upon protest by the Commonwealth of Massachusetts, the Department of the Interior agreed not to disrupt the status quo *pendente lite* by means of undertaking leasing procedures under the provisions of the Outer Continental Shelf Lands Act 67 Stat. 462, 43 U.S.C. 1331-43. We submit that this is a clear indication that the plaintiff, through the Secretary of the Interior and his solicitor, realizes full well that federal dominium, by virtue of the Outer

Continental Shelf Lands Act, is directly in issue in this case. On November 23, 1971, in reply to a letter from Henry Herrmann, Special Assistant Attorney General, Mr. David E. Lindgren, Associate Solicitor for the Department of Interior wrote that in a press release, the Secretary of Interior had

> noted that the issue of seabed jurisdiction presently in litigation in *United States* v. *State of Maine,* No. 35, Original, is a paramount consideration, and consequently "No leasing procedures — *no action toward such procedures, in fact* — can be undertaken until the Supreme Court decides that boundary issue or the States and the Federal Government make interim arrangements for leasing pending the Supreme Court decision." [emphasis added.]

Mr. Lindgren added that this appeared to meet the concerns expressed by the Attorney General of Massachusetts.

We are totally at a loss to understand by what reasoning the Federal Government, through the Department of the Interior, recognizes, on one hand, that it has no right *pendente lite* to disrupt the status quo by exercising its leasing prerogatives under the Outer Continental Shelf Lands Act, yet on the other hand, blithely assumes that it may conduct explorations under that same Act. In granting an oil drilling lease under a disputed statute (which the Interior Department admits it cannot do) and in conducting explorations itself by drilling 1,000-foot deep holes, under the very same disputed statute (which the Interior Department is confident it can do) there is at best a narrow distinction (and one of dubious relevance) in the context of this Motion for temporary equitable relief. If, as the plaintiff recognizes, federal dominium is in issue, then the plaintiff does not, we submit, have

the right unilaterally to make the decision which of its alleged rights under the Outer Continental Shelf Lands Act it will assert or refrain from asserting pending a final decision by this Court.

II. THE DRILLING WHICH THE PLAINTIFF INTENDS TO CONDUCT WILL RESULT IN A CHANGE IN THE STATUS QUO *Pendente Lite*, TO THE SERIOUS AND IRREMEDIABLE HARM OF MASSACHUSETTS, WHICH, LACKING AN ADEQUATE REMEDY AT LAW, IS ENTITLED TO A PRELIMINARY INJUNCTION.

A. *The Purpose Of A Preliminary Injunction Is To Preserve The Status Quo Pendente Lite, Which Constitutes, In This Case, Absence Of This Type Of Drilling Activity In The Continental Shelf Area Claimed By Massachusetts, And The Present State Of Its Marine Environment.*

"The purpose of the preliminary injunction is to preserve the status quo until the rights of the parties can be fairly and fully investigated and determined by strictly legal and according to the principles of equity." *Sinclair Refining Co.* v. *Midland Oil Co.*, 55 F.2d 42, 45 (4th Cir. 1932); *accord, Meiselman* v. *Paramount Film Distributing Corp.*, 180 F.2d 94 (4th Cir. 1950).

The issue that is in the forefront, therefore, is how to delineate the status quo which Massachusetts seeks to preserve *pendente lite*. We submit that the status quo, viewed within the scope of this motion and the physical activity against which it is directed, is the absence, at the present time, of the type of drilling intended by the Federal Government in this particular area. We are not aware of any drilling activity being conducted at all at

the present time. Therefore, we argue, this summer's drilling program is a clear-cut change in the status quo.

In the "Brief for the United States in Opposition to Motion for Preliminary Injunction by the Commonwealth of Massachusetts", filed in June of 1972, the United States advanced its own definition of the relevant status quo. It noted on page 9 that "exploration of the Atlantic Seabed has been in progress since 1960" and defined the status quo as being the continuation of the "information collecting process." The meaning of "exploration" in this context was further defined, on page 2 of that brief: ". . . the United States unequivocally stated that it would continue with geological and geophysical explorations and informal information gathering activities which would include seismic tests and shallow core sampling." "Shallow" core sampling was defined, with limited success, as not constituting "deep drilling."

Without getting involved in the fruitless semantic morass of discussing what the maximum depth of a "shallow" hole in the ground can be before it must be designated as "deep," we would merely say that if we use the past activity as a baseline, drilling to 1,000 feet is an activity which creates a radically increased magnitude of risk, and is therefore a fundamental departure from the alleged previous practice. The element of risk in drilling holes of such depth is discussed in the affidavit of Mr. Cornelius J. Wilson, attached hereto. Further, we would emphasize that the United States has as yet to clearly demonstrate, rather than vaguely allege, that even this limited "shallow core sampling" has in fact occurred in the area subject to this motion.

Even if we assume, *arguendo,* that the mere allegation that "shallow core sampling" has taken place at some time in the past in this or in a contiguous area suffices to constitute a continuation of such activity as the status

quo, we would nevertheless argue that the drilling which the Federal Government proposes this summer (up to 1,000 feet in depth) is different in kind, and not in mere degree, from the alleged previous activity.

Massachusetts, therefore, argues that the definition of the status quo in this instance is either the aggregate of alleged prior activity, or a change in the nature of the activity, (a radical increase in drilling depth); under either definition, the proposed drilling is a significant alteration of a material status quo *pendente lite.*

B. *The Disruption Of The Status Quo By The Plaintiff And Its Licensees During The Pendency Of This Action Threatens Serious And Irreparable Harm To Massachusetts.*

A criteria frequently stated by the courts for the balancing of the equities in a motion for a preliminary injunction is the seriousness of the irreparable harm alleged by the moving party against the possible damage that the opposing party would incur after injunction was granted. *West Virginia Highlands Conserv.* v. *Island Creek Coal Co.*, 441 F.2d 232, 235-36 (4th Cir. 1971); *Unicorn Management Corp.* v. *Koppers Co., Inc.*, 366 F.2d 199, 205 (2nd Cir. 1966). We would like to focus at this point on the contrast between the harm with which Massachusetts is threatened, and the absence of possible damage to the United States if the preliminary injunction were granted. If the Federal Government proceeds to drill holes of this depth, the very real possibility exists that there will be substantial oil spillage or leakage, which will be difficult or impossible to contain rapidly. (See Mr. Wilson's affidavit to this effect, attached hereto). We emphasize that the United States should not prevail on an argument that they are attempting

to minimize the risk or that the probability of serious harm is being kept as low as possible.

The fact is that the Geological Survey is *ab initio* not in complete control of the factors which will determine whether an accidental release of oil will occur, since, as Mr. Wilson stated in his affidavit, there is an irreducible element of luck in this venture — "a journey into the unknown," as he put it. The risks involved may well be acceptable to the Geological Survey; however, it is not that Agency, but the Commonwealth of Massachusetts which will have to contemplate the ruination of its coastal recreation area, the economic decline of its important fishing industry, and the general destruction of its offshore environment if the game of chance to which Massachusetts is being unwillingly subjected ends to its disadvantage. Professor Zinn, in his attached affidavit, has outlined how grave the scope of damage is, and how irreparable under our present state of knowledge. This factor, we argue, should certainly be balanced against any statement by the United States that the Agency involved has in good faith attempted to minimize the risk, for, we submit, the element of risk cannot be divorced from the resultant damage. This is not a two-stage analysis, with an abstract exercise in probability, to be followed by a separate and unrelated estimate of damages; the two are intertwined in such a factual situation.

The damages involved would be severe and pervasive; at present, they could not be empirically assessed by present methods of technology, much less quantified or reduced to monetary terms by any rational formula. To assess damages at law would therefore be difficult, if not impossible, to say nothing of the serious legal problems in proving liability and establishing that there is a tortfeasor subject to suit. It is therefore likely that if such grievous damage occurs, Massachusetts may not only lack

an adequate remedy, but may well have no remedy at all. Interim equitable relief is the only means of affording it protection under our legal system.

We therefore submit that Massachusetts should not be exposed, against its will, to this grave risk to its economy and environment before this Court has ruled whether Massachusetts or the United States Government has the exclusive right to decide whether this exploration program should be set into motion at all.

In contrast to the danger to which the Federal Government intends to expose Massachusetts, the former will suffer no appreciable harm if a preliminary injunction were to be granted.

Several factors bear on this issue. The first is the time element. We are not seeking a preliminary injunction which would be of any prolonged duration. It should be noted that in the case at bar, the evidentiary proceedings before the Special Master have now been completd and this preliminary injunction will remain in effect only until this Court renders its decision.

The next factor is the Federal Government's contention that it needs to conduct explorations on this Continental Shelf area *pendente lite* in order to formulate a national energy policy. (Brief for the United States in Opposition to Motion for Preliminary Injunction by the Commonwealth of Massachusetts, pages 8 and 9, — filed June 1972). At that time, Massachusetts had moved the Court to enjoin seismic surveys by the Federal Government's licensee. Whatever validity that argument may have had at that time, we submit that it is severely attenuated by the fact that the Court refused to enjoin such seismic surveying *pendente lite*. An important and useful surveying method is therefore available *pendente lite* to the Federal Government in this area. We would also note that we have restricted our motion to only encompass drilling beyond

the depth of twenty-five feet, with the intent of avoiding unnecessary interference with the bottom sampling and "shallow" coring which has allegedly occurred from time to time. Massachusetts does not seek to enjoin mere technical violations of what it claims to be its exclusive exploration rights, but only acts which pose a serious threat to its environment. We submit that since the Federal Government has at present complete freedom to conduct seismic surveys and "shallow" core sampling, the burden is on it to show convincingly that a delay in drilling merely until the outcome of this lawsuit (if it should prevail) will cause material and irreparable injury to a substantial national interest. In view of the considerable freedom of action the Federal Government presently enjoys, Massachusetts considers the sudden commencement of a radically deeper drilling program during the remainder of this lawsuit to be provocative, unnecessary, and unwise.

A recent case involving the issuance of a preliminary injunction against offshore drilling explicitly balanced the imminent threat of irreparable harm to the plaintiffs and the "energy crisis" argument advanced by the government, and resolved the issue decisively in favor of granting the preliminary injunction. *Natural Resources Defense Council, Inc.* v. *Morton,* 337 F.Supp. 165 (D.D.C. 1971), *aff'd.,* 458 F.2d 827 (D.C. Cir. 1972).

> The Court recognizes that there is a tremendous national energy crisis and that the Outer Continental Shelf has proved to be a prolific source of oil and gas. However, as President Nixon stated in his message to Congress on June 4, 1971, the Outer Continental Shelf "has been the source of troublesome oil spills in recent years." Furthermore, this area of the United States could be seriously harmed and contaminated by the

possible oil pollution resulting from all too frequent oil spills. 337 F.Supp. at 167.

Furthermore, in a related decision, it becomes apparent that the Federal Government had alleged a monetary loss ranging from $750,000 to $2,500,000 per month if the offshore drilling were halted by a preliminary injunction, but the court issued the injunction nevertheless, with only a nominal bond requirement. *Natural Resources Defense Council, Inc.* v. *Morton,* 337 F.Supp. 167 (D.D.C. 1971), *aff'd.,* 458 F.2d 827 (D.C. Cir. 1972).

We submit that the preliminary injunction granted in the *Natural Resources* case, *supra* (458 F.Supp. 165) is extremely significant to the relief sought in this motion. What was complained of by the plaintiffs in that case was non-compliance by the Federal Government with a statutory requirement for an adequate environmental Final Impact Statement. However, as the above quoted language shows, the actual irreparable harm against which the plaintiffs were afforded temporary protection was the danger of accidental oil release from offshore drilling, pending adjudication of the merits (on statutory compliance). We submit that it is also very significant that in that case, even if the plaintiffs had ultimately prevailed on the merits (that the Final Impact Statement was inadequate) this would not have given the plaintiffs the right to halt the drilling permanently, yet the preliminary injunction was granted nevertheless. In the case at bar, in contrast, Massachusetts, if it prevails on the ultimate dispute as to title, will have the exclusive right to determine whether the offshore drilling which it considers a grave threat shall be conducted at all in the future.

In the *Natural Resources* case, *supra,* (337 F.Supp. 167) the Court stressed the "public interest" aspect of the plaintiff's suit. We think this is very relevant to the

relief sought here. *Cf. West Virginia Highlands Conserv.* v. *Island Creek Coal Co.*, 441 F.2d 232, 236 (1971).

Massachusetts moves the Court for this preliminary injunction because of a "public interest" motivation to halt a grave threat to its environment. We further contend that the plaintiff cannot argue that *pendente lite* it is relying on or enforcing a statute which furthers the public interest, and that this factor takes precedence over whatever good cause is shown by Massachusetts in support of its Motion. Massachusetts, as a state of the Union, is entitled to have its own viewpoint of the public interest given due weight until such time as the Court ultimately determines which governmental body shall have the right to make the pertinent value judgments.

C. *In Its Original Pleadings, Massachusetts Has Raised Serious Issues Going To The Merits Of This Case, And, Under The Applicable Equitable Doctrines, Is Entitled To A Preliminary Injunction.*

It is our contention that to justify the issuance of a preliminary injunction at this time, it is sufficient for Massachusetts to show that in its original pleadings, it has raised questions going to the merits which are serious and difficult, so as to render the issues raised proper for litigation and further deliberation. It is not necessary for Massachusetts to demonstrate that it will with reasonable certainty prevail upon a final hearing. *Unicorn Management Corp.* v. *Koppers Co., Inc.*, 366 F.2d, 199 (2d Cir. 1966). In *Bergen Drug Co., Inc.* v. *Parke, Davis and Co.*, 307 F.2d 725 (3rd Cir. 1962), the court held at 727:

> The possibility that the court may decide the right to permanent relief adversely to plaintiff does not preclude it from granting the temporary relief.

As the court stated in *Unicorn Management Corp., supra*, a showing of reasonable certainty that the moving party will ultimately prevail is usually imposed only where the movant has failed to show irreparable damage. Thus, for example, in *Zugsmith* v. *Davis*, 108 F.Supp. 913 (S.D. N.Y. 1952) where the court denied a preliminary injunction because the moving party had not shown a reasonable certainty that it must succeed upon a final hearing, the court had also found that the moving party had not shown a lack of adequate remedy at law or immediately impending irreparable injury to it. The standard which we suggest as applicable here is set forth in a very recent environmental protection case. In *West Virginia Highlands Conserv.* v. *Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971), a non-profit membership corporation sought a preliminary injunction to preserve the wilderness characteristics of a particular area. In affirming the granting of interlocutory relief by the district judge, the court pointed out that, while it was expressing no opinion on the merits of the issues raised, it could nevertheless say

> that their resolution is not immediately apparent. That is enough to say that [movant] has not embarked on frivolous litigation, and thus interlocutory relief is not improper if [movant] can also show a need for protection which outweighs any probable injury to [respondent]. 441 F.2d at 235.

We respectfully submit that the above discussed test can be met by Massachusetts here. The progress of this lawsuit shows that Massachusetts' claim to these exclusive exploration rights is not frivolous, but, rather, merits further consideration by this Court. In its Motion for Judgment filed with the Court in January of 1970, the plaintiff moved for judgment as prayed for in its Com-

plaint, on the ground that there was no genuine issue as to any material fact, and asserting that the United States was entitled to judgment as a matter of law. In its Brief in Support of Motion, the plaintiff argued on pages 18 and 19: "Accordingly, we believe the present motion is appropriate. If, after considering briefs and oral arguments by the parties... the Court should conclude that no State claim in the continental shelf beyond three miles is sustainable, the United States would be entitled to judgment.... If, on the other hand, the Court were to conclude that State claims beyond three miles in the Atlantic are legally tenable, two options would be open. The Court might well now resolve itself the ultimate validity and extent of such claims.... Or it might refer all or part of the remaining questions to a Special Master." The Court did in fact refer this case to a Special Master by its order of June 8, 1970. We would not presume to draw any inference from the Court's reference to a Special Master. We would, nevertheless, submit that it would be fair to infer that in the opinion of the plaintiff, the Court's reference is a prima facie indicia that state claims are "legally tenable," since the plaintiff stated that such a referral would be one of the two options available to the Court if state claims are "legally tenable." Therefore, at the very least until the Special Master submits his report to the Court, we argue that the plaintiff's demeanor and actions should be consistent with the assumption that the claim by Massachusetts to the exclusive right of exploration and exploitation is "legally tenable."

We have contended that as a general proposition of modern equity, under the proper circumstances, it is sufficient for the issuance of a preliminary injunction that the moving party, in its original pleadings, has raised serious and difficult questions going to the merits. This proposition, in support of which we have cited the above

cases, is buttressed by a more specific modern equity rule having particular application to the case at bar, since the latter concerns a title dispute.

What is at issue in this case is dominium, or *title*, to a particular geographical area. It is well settled that a preliminary injunction is available as an interim remedy to prevent injury to land, even though the title thereto be in dispute at law. A leading decision on this doctrine was handed down by this Court. *Erhardt* v. *Boaro et al.*, 113 U.S. 537 (1885).

> It was formerly the doctrine of equity, in cases of alleged trespass on land, not to restrain the use and enjoyment of the premises by the defendant when the title was in dispute, but to leave the complaining party to his remedy at law.... This doctrine has been greatly modified in modern times and it is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the Court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title. 113 U.S. at 538-39.

In the case at bar, the question as to which party shall ultimately prevail on the merits by having the authority to regulate continental shelf drilling (if it is to occur at all) is dependent simply upon which of the litigants shall prevail in the dispute as to the *title* to this area; we contend that, in the language of *Erhardt* v. *Boaro, supra*, "irremediable mischief" is being done or "threatened"

to the land in dispute. For, what Massachusetts is seeking to enjoin at this time is not merely a technical trespass in the form of the drilling of 1,000-foot deep holes; it is the threat of a major mishap which the drilling of these holes poses that constitutes "irremediable mischief" (See affidavit by Professor Zinn, attached hereto).

III. In The Event That The Court, In Its Discretion, Deems It Meet And Proper To Grant A Preliminary Injunction, Then Massachusetts Submits That A Bond Should Not Be Required.

We submit that the discretion of the Court as to whether to grant the temporary equitable relief sought should also incline it to dispense with the requirement of a bond, in the event that the Court grants our Motion.

Rule 9.2. of the rules of this Court provides that the Federal Rules of Civil Procedure, "where their application is appropriate, may be taken as a guide to procedure in original actions in this Court." Fed. R. Civ. P. 65(c) provides "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof."

We suggest that the aforestated provision exempting the United States from the requirement of providing security is an indication that this particular rule is one which cannot be applied in unmodified form in an original action in this Court; its application would not be "appropriate" within the meaning of rule 9.2. of this Court. The very rationale for the constitutional provision that actions

between a State and the Federal Government shall be subject to the original jurisdiction of this Court would be defeated if a rule of civil procedure for the lower court were to be applied so as to put the two parties on an unequal footing before this Court. Since the relevant rule of Federal Civil Procedure provides that no security shall be required of the United States, we suggest that it would be appropriate if Massachusetts, as a State of the Union before the Court on original jurisdiction, should likewise be exempt from the requirement of giving security as a prerequisite for the issuance of a preliminary injunction. For the reason above stated, we respectfully submit that this Court need not reach the issue of whether Rule 65(c) of the Federal Rules of Civil Procedure would require the giving of security by a private litigant under the present circumstances. However, we would like to point out that it has been held that the trial court has wide discretion as to the matter of a bond, and may dispense with this requirement entirely under the proper circumstances. *Ferguson* v. *Tabah*, 288 F.2d 665 (2nd Cir. 1961). Similarly, in *Urbain* v. *Knapp Brothers Manufacturing Co.*, 217 F.2d 810 (6th Cir. 1964), the court held that

> the failure of the District Court to require the prescribed security before issuing the restraining order is not reversible error. The rule leaves it to the District Judge to order the giving of security in such sum as the court considers proper. This would indicate plainly that the matter of requiring security in each case rests in the discretion of the District Judge. Moreover, in the circumstances encountered here, it would appear that no material damage will ensue to appellants from the failure of the District Judge to require bond of appellees. 217 F.2d at 815.

We maintain that the plaintiff will not be able to show that material damage will ensue to it if the preliminary injunction issues. Further, in *Continental Oil Co.* v. *Frontier Refining Co.*, 338 F.2d 780 (10th Cir. 1964) the court held that no bond is necessary absent a proof of likelihood of harm. An important criteria that the court applied was that the movant was a corporation with considerable assets, and would, therefore, have been able to respond in damages if the party enjoined had suffered injury thereby. While we do not place the balance sheets of the Continental Oil Company and of the Commonwealth of Massachusetts in comparison here, we do, nevertheless, suggest that this dispensation granted a "corporation with considerable assets" be likewise granted to a State of the Union.

Finally, we would note, in discussing the discretion of the Court under Rule 65(c), that Massachusetts is acting to prevent damage to its environment. In the *Natural Resources* case, *supra* (337 F. Supp. 167) the court listed several recent cases where federal courts had interpreted their discretionary powers under Rule 65 (c) as permitting them to require only nominal bonds in such factual situations. The Court in *Natural Resources* set the bond at one hundred dollars, notwithstanding, as we have stated above, that the Federal Government had alleged monthly damages of up to two and a half million dollars. The court states (at 337 F. Supp. 169) "It would be a mistake to treat a revenue loss to the government the same as pecuniary damage to a private party."

Conclusion

For the reasons above stated, the Defendant Commonwealth of Massachusetts respectfully submits that it is entitled to a preliminary injunction to preserve it from

serious and irremediable injury during the pendency of this action.

Respectfully submitted,

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AUG 27 1974
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 35 Original

Supreme Court, U.S.
FILED
OCT 15 1974
MICHAEL RODAK, JR., CLERK

UNITED STATES OF AMERICA,

Plaintiff

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA and GEORGIA,

Defendants

Report of Albert B. Maris, Special Master

August 27, 1974

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

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Defendants

Report of Albert B. Maris, Special Master

A. HISTORY OF THE PROCEEDING

1. THE BASIC QUESTION INVOLVED

The basic question involved in this litigation is whether the right to explore and exploit the natural resources of the seabed and subsoil of that portion of the continental shelf underlying the Atlantic Ocean which is more than three geographical miles seaward from the coastline of the United States belongs to the United States or to the defendant States or any of them.

2. INCEPTION OF THE LITIGATION

The present litigation had its inception on April 1, 1969 when the United States filed in this Court a motion for leave to file a complaint against the States of Maine, New Hampshire, Massachusetts, Rhode Island, New

York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida, the 13 States bordering on the Atlantic Ocean. The jurisdiction of this Court was invoked under Article III, section 2, clause 2, of the Constitution of the United States and 28 U.S.C. §1251(b)(2). The State of Maine filed a brief in opposition to the motion, in which the other 12 States joined. The State of Virginia, in addition, filed a separate brief in opposition. On June 16, 1969 this Court granted the motion, 395 U.S. 955, and the complaint of the United States was formally filed.

3. Complaint of the United States

The complaint sets up separate causes of action by the United States against each of the 13 defendant States. It alleges that the United States was entitled prior to the enactment of the Submerged Lands Act of May 22, 1953, 67 Stat. 29, to exercise, to the exclusion of the defendant States, sovereign rights over the seabed and subsoil underlying the Atlantic Ocean seaward from the ordinary low-water mark and outer limit of inland waters on the coast to the outer edge of the continental shelf, for the purpose of exploring the area and exploiting its natural resources. It is further alleged that by the Submerged Lands Act the United States granted to the defendant States the title to and ownership of the submerged lands and natural resources lying in the Atlantic Ocean within their respective boundaries, but not extending seaward more than three geographic miles from the ordinary low-water mark or from the outer limit of inland waters. Nonetheless, asserts the complaint, the defendant States claim some right, title or interest adverse to the United States in the seabed and subsoil of the continental shelf more than three geographic miles seaward from their respective coastlines, and the State of Maine has purported to grant exclusive oil and gas exploration and exploitation rights in approximately 3,300,000 acres of land submerged in the Atlantic Ocean

in the area in controversy. The complaint goes on to assert that the United States remains entitled, to the exclusion of the defendant States, to exercise sovereign rights over the seabed and subsoil underlying the Atlantic Ocean, lying more than three geographic miles seaward from the coastline to the outer edge of the continental shelf for the purpose of exploring the area and exploiting its natural resources, that the United States is entitled to an accounting for all sums of money derived by the defendant States from that area which are properly owing to the United States, that by the Outer Continental Shelf Lands Act of August 7, 1953, 67 Stat. 462, 468, Congress declared "the urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the outer Continental Shelf" and to that end provided for the issuance of mineral leases in that area by the Secretary of the Interior to private operators, and that the defendant States are interfering with and obstructing the exploration, leasing and development of those mineral resources by the United States and will continue to do so to its great and irreparable injury, unless the rights of the United States are declared and established by this Court. In the case of Florida the complaint asserts that the Atlantic Ocean includes the Straits of Florida. The complaint seeks a declaratory decree and a direction for an accounting.

4. ANSWERS OF THE DEFENDANT STATES

All the defendant States filed answers. In addition, the State of Florida subsequently filed an amended answer. The answers differ somewhat in form but in essence they all deny the rights asserted by the United States. The answer of the State of Maine specifically admits that it has granted to a private corporation a conditional license to explore for minerals, oil and gas in, and to take the same from, certain lands submerged in the Atlantic Ocean, some portion of which may be more than three geographic miles from its coastline, but denies that it has received

any sums from that area for which any accounting, even if due, could be made.

All the defendant States except the State of Florida assert by way of affirmative defense that as successors in title to certain grantees of the Crown of England (and, in the case of New York, also of the Crown of Holland) they are entitled to exercise dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to their respective coastlines to the exclusion of any other political entity whatsoever, including the United States, subject only to the limits of national seaward jurisdiction established by the United States, that their power to exercise such dominion and control is not prohibited by the Constitution of the United States and has never been delegated to the United States, and that any attempt by the United States to assert such power with respect to the defendant States violates the Tenth Amendment to the Constitution and is void.

Additional defenses are asserted by certain of the States. Rhode Island asserts that it acquired *dominium* over the submerged lands and the waters of the Atlantic Ocean adjacent to its coastline by virtue of its declaration of independence from the British crown on May 4, 1776. The State of North Carolina asserts that in 1947 its General Assembly by statute declared that the eastern limit and boundary of the State on the Atlantic coast has "always been . . . one marine league eastward from the Atlantic seashore, measured from the extreme low water mark", that this declaration is based upon the provision in its 1868 Constitution that the "limits and boundaries of the State shall be and remain as they now are", which requires a determination of its original eastern boundary at the time of its entry into the Union in 1789. The State of Georgia alleges that any rights which the United States may have had in the disputed area were transferred to the State by the boundary settlement agreement of 1802.

The affirmative defense set up by the State of Florida is quite different from that raised by the other defendant States. In its amended answer it alleges that by the Act of June 25, 1868, 15 Stat. 73, Congress approved the marine boundaries of the State described in Article I of its Constitution of 1868, which boundaries, it asserts, run more than three miles seaward from its coastline in certain parts of the Atlantic Ocean, and that Congress thereby granted to the State whatever interest the United States possessed in the maritime territory within those boundaries. The amended answer denies that the Straits of Florida are a part of the Atlantic Ocean and asserts that they are an arm of the Gulf of Mexico or, in the alternative, that the Florida Keys and the Marquesas and Dry Tortugas Islands are situated in the Gulf of Mexico and that the State is, therefore, entitled to a southern seaward boundary of three leagues from its coastline wherever located in this area.

5. MOTION OF THE UNITED STATES FOR JUDGMENT AND REFERENCE TO SPECIAL MASTER

On January 14, 1970 the United States filed a motion for judgment on the ground that there is in the litigation no genuine issue as to any material fact. On January 30, 1970 the States of Delaware, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, South Carolina and Virginia filed a joint motion submitting that the preferable course would be to refer the case to a master to take evidence, make findings of fact, conclusions of law and recommendations for a decree with special instructions to consider and report upon the scope and validity of the historical claims of the States to the submerged lands in question. The States of New York, New Jersey and Georgia subsequently filed similar motions.

This Court did not act on the motion for judgment, but on June 8, 1970 entered an order appointing the undersigned as special master in this case "with authority to fix

the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for." The order directed the master to submit such reports as he may deem appropriate. The specific directions requested by the States were not given, however. 398 U.S. 947.

6. MOTION OF STATE OF FLORIDA FOR SEVERANCE

On February 9, 1970 the State of Florida moved to sever the cause of action against it from those against the other 12 defendant States. On November 16, 1970 the motion for severance was referred to me as special master. 400 U.S. 914. On January 8, 1971 I granted Florida leave to file an amended answer and the amended answer was filed in this Court on February 4, 1971. On February 19, 1971 I held a hearing on the motion for severance. It was argued that the cause of action asserted against Florida presented factual questions applicable to that State alone and did not involve questions of either fact or law which were common to the other defendant States.

It appeared that in the case of *United States v. States of Louisiana, Texas, Mississippi, Alabama and Florida,* No. 9 Original, in which the rights of the State of Florida in the seabed off the Gulf coast of the State had been adjudicated, 1960, 363 U.S. 121, 364 U.S. 502, supplemental proceedings would be necessary to define more precisely the boundary of the State which delimited its seabed rights on that coast. It also appeared that if the proceedings against Florida in No. 35 with respect to the Atlantic coast were severed, it would be appropriate to consolidate them with the supplemental proceedings against Florida with respect to the Gulf coast, if authorized in No. 9.

Accordingly, on March 29, 1971, I filed a report recommending the severance and consolidation. On June 28, 1971 this Court entered orders granting the severance

and consolidating the severed cause of action with the supplemental proceedings which it authorized in No. 9. The consolidated proceedings were then designated as No. 52 Original, and were also referred to the undersigned as special master. 403 U.S. 949, 950.

In its amended answer filed prior to the severance Florida had alleged a counterclaim for money damages and had demanded a jury trial of the counterclaim. On March 29, 1971 the United States filed a motion to dismiss the counterclaim and deny the demand for a jury trial. On June 28, 1971 this Court referred that motion to me as special master, 403 U.S. 949. I held a hearing on the motion on October 22, 1971 and filed a report recommending that it be granted. On December 20, 1971 this Court adopted my report. 404 U.S. 998. Thereafter the consolidated case proceeded before the special master to completion. My final report as master in No. 52 Original was lodged with this Court on January 18, 1974 and ordered filed on February 19, 1974. 415 U.S. 905.

7. Proceedings of the Special Master

Following the reference to me of case No. 35 Original, I held prehearing conferences in Philadelphia with counsel for all parties on July 28, 1970, October 27, 1970 and January 8, 1971, and following each conference made an order embodying the agreements reached with respect to the procedure to be followed during the course of the proceedings. A further procedural order was made on May 24, 1971. To reflect the severance of the cause of action against the State of Florida from No. 35 Original, which had been ordered on June 28, 1971, and to consolidate the prehearing orders previously made into a single procedural order, on August 27, 1971 I made a consolidated and revised procedural order. On March 7, 1974 I amended paragraph 14 of that order. A copy of the consolidated and revised procedural order as amended is included as an appendix to this report.

Under date of February 8, 1971 the United States served a document entitled "First Formal Interrogatories" on each defendant State. Some of the defendant States answered these interrogatories but the defendant States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland and Virginia filed, in common, objections thereto. On March 12, 1971 I made an order sustaining the objections because the interrogatories were not appropriate in view of the pre-hearing orders which had been made in the case.

Six separate sessions of hearings for the receipt of evidence were held in Philadelphia beginning May 24, 1971 and ending January 24, 1973, aggregating 14 hearing days. Ten witnesses were heard and approximately 1,260 exhibits were received in evidence. The transcript totals 2,800 pages. Throughout my labors I have been greatly aided by the able counsel who have conducted the case for the parties. Their thorough and painstaking work in the presentation of the evidence, both by way of documents and expert testimony and of exhaustive briefs of argument, has been most helpful to me. Their work has accorded to the highest standards of the profession and I wish to acknowledge it with gratitude.

B. THE MOTION OF THE UNITED STATES FOR JUDGMENT

As we have seen, the United States early in this litigation filed with this Court a motion for judgment on the ground that there is no genuine issue as to any material fact and the United States is entitled to judgment as a matter of law. That motion was, however, not then acted upon by the Court which, instead, pursuant to motions by the defendant States, referred the proceeding to me as special master to direct subsequent proceedings, take evidence and make report thereon. I have assumed that this action by the Court was not intended to be con-

strued as a denial of the motion for judgment but rather as an indication of the Court's desire for a full development of and report on the facts in the light of which to consider the issues involved. This was doubtless in accord with the established policy of the Court in controversies of this magnitude between the federal government and the sovereign states. *United States v. Texas*, 1950, 339 U.S. 707, 715. I shall accordingly later in this report consider the evidence offered by the parties and make findings with respect to the facts established thereby. At the outset, however, I deem it incumbent upon me to consider the merits of the motion for judgment.

The motion is based upon the proposition that this Court in *United States v. California*, 1947, 332 U.S. 19; *United States v. Louisiana*, 1950, 339 U.S. 699, and *United States v. Texas*, 1950, 339 U.S. 707, determined that the United States, rather than the States involved, as an attribute of national sovereignty had paramount rights in the submerged lands and natural resources of the territorial sea, seaward of the coastline, that these cases have not been overruled or their authority impaired by subsequent decisions of the Court, that the rule which they lay down applies to all the coastal states, and that it applies with even greater force to the seabed and subsoil of the continental shelf lying seaward of the three-mile limit of the territorial sea. The defendant States urge, on the contrary, that both the reasoning and result of the *California*, *Louisiana* and *Texas* cases have been repudiated by Congress and by subsequent decisions of this Court. They argue, moreover, that those cases were in any event wrongly decided and should now be overruled. It may well be, as the defendant States urge, that this Court, in granting the reference to a special master for a fact finding inquiry, indicated its willingness to reopen and review the issues decided by the *California*, *Louisiana* and *Texas*

cases. However that may be, it is obviously for the Court rather than its special master to undertake such a review. It is for me, as I understand my role, to apply to the facts of this proceeding the law as it now exists, not as the defendant States would like to see it revised. I pass, therefore, to the consideration of the *California*, *Louisiana* and *Texas* cases.

In *United States v. California*, 1947, 332 U.S. 19, this Court was called upon to determine the respective rights of the State and the federal government in the seabed and subsoil of the three-mile belt of marginal sea off the coast of California. California contended that the three-mile marginal sea was within the original boundaries of the State approved by Congress, that the 13 original states had acquired from the English crown ownership of all lands under the navigable waters within their respective boundaries including all lands under the sea within at least three miles of their respective coasts and that California was entitled under the Constitution to stand in this regard on an equal footing with the original states. This Court rejected the contentions of California. After reviewing a multitude of cited documents,* consisting of a great many, but not all, of those included in the present record, it held that the equal footing doctrine did not support the State's claim because the 13 original states had not themselves acquired as colonies and did not separately own the natural resources of the seabed of the adjacent territorial sea. The Court said [pp. 31-34]:

> "It would unduly prolong our opinion to discuss in detail the multitude of references to which the able briefs of the parties have cited us with reference to the evolution of powers over marginal seas exercised by adjacent countries. From all the wealth of material supplied, however, we cannot say that the thirteen

* Neither party suggested any necessity for the introduction of evidence. [332 U.S. at p. 24]

original colonies separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it. *Cf. United States v. Curtiss-Wright Export Corp.*, 229 U.S. 304, 316.

"At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders. Some countries, notably England, Spain, and Portugal, had, from time to time, made sweeping claims to a right of dominion over wide expanses of ocean. And controversies had arisen among nations about rights to fish in prescribed areas. But when this nation was formed, the idea of a three-mile belt over which littoral nation could exercise rights of ownership was but a nebulous suggestion. Neither the English charters granted to this nation's settlers, nor the treaty of peace with England, nor any other document to which we have been referred, showed a purpose to set apart a three-mile ocean belt for colonial or state ownership. Those who settled this country were interested in lands upon which to live, and waters upon which to fish and sail. There is no substantial support in history for the idea that they wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of its wealth.

"It did happen that shortly after we became a nation our statesmen became interested in establishing national dominion over a definite marginal zone to protect our neutrality. Largely as a result of their efforts, the idea of a definite three-mile belt in which an adjacent nation can, if it chooses, exercise broad, if not complete dominion, has apparently at last been generally accepted throughout the world, although as late as 1876 there was still considerable doubt in England about its scope and even its existence. See

> *The Queen v. Keyn*, 2 Ex. D. 63. That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact. *Cunard Steamship Co. v. Mellon*, 262 U.S. 100, 122-124. And this assertion of national dominion over the three-mile belt is binding upon this Court. See *Jones v. United States*, 137 U.S. 202, 212-214; *In re Cooper*, 143 U.S. 472, 502-503."

Both because acquisition of the territorial sea had been accomplished by the national government rather than by the states and because the territorial sea was primarily affected by national concern for defense, international relations, and foreign commerce, the Court held that rights in the submerged lands and resources of the territorial sea, unlike those in inland navigable waters which belonged to the states under the rule of *Pollard v. Hagan*, 1845, 3 How. 212, should be considered attributes of national sovereignty rather than of state sovereignty. The Court concluded [pp. 38-39]:

> "Now that the question is here, we decide for the reasons we have stated that California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil."

In *United States v. Louisiana*, 1950, 339 U.S. 699, and *United States v. Texas*, 1950, 339 U.S. 707, this Court followed and applied the rule of the *California* case. In the *Louisiana* case the State sought to differentiate its case from that of California because a Louisiana statute of 1938 had purported to extend the State's boundary seaward 27 miles from the shoreline. This Court rejected the distinction, saying [p. 705]:

> "We intimate no opinion on the power of a State to extend, define, or establish its external territorial limits or on the consequences of any such extension *vis a vis* persons other than the United States or those acting on behalf of or pursuant to its authority. The matter of state boundaries has no bearing on the present problem."

It pointed out that the predominance of national interests over state interests increases rather than diminishes as one moves farther seaward, saying [pp. 705-706]:

> "If, as we held in California's case, the three-mile belt is in the domain of the Nation rather than that of the separate States, it follows *a fortiori* that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea. Certainly it is not less so. So far as the issues presented here are concerned, Louisiana's enlargement of her boundary emphasizes the strength of the claim of the United States to this part of the ocean and the resources of the soil under that area, including oil."

Texas likewise sought to differentiate its case from that of California. It asserted that prior to its admission to the union as a state, it had been an independent republic which by statute claimed a three-league marginal sea where it exercised all the elements of external as well as domestic sovereignty. This Court rejected that distinction also, holding that when Texas became a state of the union, it necessarily did so on an equal footing with the original states, so that its relinquishment of national sovereignty to the federal government carried with it all the attending attributes of that sovereignty, including paramount rights in the submerged lands and resources of the marginal sea.

The rule laid down by the *California* case that the

federal government has rights in the seabed and its resources underlying the territorial sea which are paramount to any rights claimed by the states is, I believe, based upon two grounds. The first and, as it seems to me, the most fundamental ground is that since the territorial sea is primarily affected by national concern for defense, international relations and foreign commerce, all of them being aspects of external sovereignty, the "protection and control of it has been and is a function of national external sovereignty" [332 U.S. at p. 34], which in our federal union and under our Constitution is vested in the federal government to the exclusion of the states, and that an incident to that sovereignty is full dominion over the resources of the soil under the water of the territorial sea. It is true, of course, that the Court also relied in this regard on its finding that the concept of a territorial sea arose and gained international acceptance after the formation of the union and largely as a result of the efforts of the federal government.

The other ground upon which this Court relied in the *California* case was that California's claim to rights in the seabed of the territorial sea was not supported by its reliance upon its Enabling Act, 9 Stat. 452, under which it was admitted into the union "on an equal footing with the original States in all respects whatever", since, on the basis of the historical material submitted to it, the Court concluded that the 13 original states did not as colonies separately acquire ownership of the three-mile belt or the soil under it. It is true, of course, as the defendant States argue, that this finding, which if adhered to by this Court would effectively foreclose against the present defendant States the factual issues raised by them in the present proceeding, does not bar their claims here under the doctrine of *res judicata* for they were not parties to the *California* case and did not intervene in that case. I note, however, that the States of Massachusetts, New Jersey and New York did participate, directly or indirectly, as *amici curiae* in that case. Also many of the historical documents,

although admittedly not all, which have been introduced as exhibits in this proceeding were before this Court in the *California* case. Accordingly, it appears to me that while litigation of the issues of fact raised by the affirmative defenses of the defendant States in the present proceeding is not barred by the doctrine of *res judicata*, the rule of law laid down in the *California*, *Louisiana* and *Texas* cases is applicable to the present case under the doctrine of *stare decisis* unless it has been modified or overruled by later decisions or legislation. I note that in footnote 140 to its opinion in the second *Louisiana* case, *United States v. Louisiana et al.*, 1960, 363 U.S. 1, 83, this Court said with respect to the defense of the State of Mississippi, one of the defendant States in that case:

> "140. On June 5, 1950, the date of this Court's decision in the *Louisiana* and *Texas* cases, all coastal States were put on notice that the United States was possessed of paramount rights in submerged lands lying seaward of their respective coasts. The Submerged Lands Act, passed in 1953, by which parts of those lands were relinquished to the States, also forgave any monetary claims arising out of the States' prior use of the lands so relinquished. But the United States remains entitled to an accounting for all sums derived since June 5, 1950, from lands not so relinquished.
>
> "Mississippi contends that it is not liable for an accounting, since it was never party to a suit decreeing the United States' rights in offshore lands. However, principles announced in the 1950 *Louisiana* and *Texas* cases are plainly applicable to all coastal States, and Mississippi was put on notice by the decrees in those cases."

An examination of the later decisions of this Court satisfies me that the rule of the *California*, first *Louisiana* and *Texas* cases has not been overruled or impaired. On

the contrary, this Court in the second Louisiana case, 1960, 363 U.S. 1, stated in its opinion [p. 7] that the rule of those cases is "admittedly applicable to all coastal States" and in footnote 140 to that opinion, as we have seen, that the "principles announced in the 1950 *Louisiana* and *Texas* cases are plainly applicable to all coastal States". The defendant States urge that in the second *Louisiana* case and in *United States v. Florida*, 1960, 363 U.S. 121, this Court modified the rule of the *California* case when it approved the claims of Texas and Florida to state boundaries three marine leagues seaward from the coastline, qualifying them for ownership of the seabed and its resources within those limits under the provisions of the Submerged Lands Act. By this action, they argue, the Court indicated that it no longer regarded seabed rights as inseparable from the external sovereignty of the federal government over the surface. I do not agree with this analysis, finding nothing in the *California*, first *Louisiana* or *Texas* cases to support the basic premise underlying the defendants' argument. It is true that this Court in the *California* case said that dominion over the resources of the soil under the water of the territorial belt of the sea is an incident of the paramount rights of the federal government in that belt of the sea. But the Court did not indicate that the federal government by Act of Congress might not, as it did by the subsequently enacted Submerged Lands Act, grant to the riparian states rights to the resources of the federal area, subject to the reservation by the federal government of its rights and powers of regulation and control for purposes of commerce, navigation, national defense, and international affairs. Moreover, this Court's discussion in the *California* case [332 U.S. at p. 38] of the case of *Skiriotes v. Florida*, 1941, 313 U.S. 69, indicated that it recognized that a riparian state might have an interest in a resource of the territorial sea, in that case the sponge fishery, with which it might deal in the absence of conflicting federal legislation and, I would add, *a fortiori*

when expressly so authorized by federal legislation such as the Submerged Lands Act. And I may also add that this Court has recently made it quite clear that a coastal state under its police power may legislate in furtherance of its special concern with respect to oil spillage in its territorial waters. *Askew v. American Waterways Operators, Inc.*, 1973, 411 U.S. 325.

This brings me to consider the Submerged Lands Act which was approved May 22, 1953, 67 Stat. 29, 43 U.S.C. §§ 1301 et seq., following the decisions of this Court in the *California*, first *Louisiana* and *Texas* cases. The defendant States strongly argue that by the Act Congress repudiated the underlying basis of the decisions in those cases which, they assert, was that ownership of the seabed of the territorial sea was required to be vested in the federal government in order to enable it to carry out its responsibilities in conducting the foreign affairs and defense of the nation. As I have already indicated, however, I do not read the cases in question as so holding. It is true that many riparian states had previously assumed that they did have rights in the territorial sea and its seabed resources adjacent to their shores under the rule of *Pollard v. Hagan*, 1845, 3 How. 212, and that a great deal of opposition to the California decision developed, culminating in the enactment of the Submerged Lands Act. It is also true that in the Congressional committee reports on the bill which became the Act the decision was strongly criticized as out of line with decisions of the past and it was indicated that the purpose of the bill was "to write the law for the future as the Supreme Court believed it to be in the past—that the States shall own and have proprietary use of all lands under navigable waters within their territorial jurisdiction, whether inland or seaward, subject only to the governmental powers delegated to the United States by the Constitution." S. Rep. No. 133, 83d Cong., 1st Sess., p. 8. The background and legislative history of the Act are discussed at length by this Court in the second *Louisiana* case, 1960, 363 U.S. at pp. 17-24.

This Court in the second *Louisiana case*, 1960, 363 U.S. 1, 8-10, summarized the provisions of the Submerged Lands Act as follows:

> "The purposes of the Submerged Lands Act are described in its title as follows:
>
> > " 'To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to confirm the jurisdiction and control of the United States over the natural resources of the seabed of the Continental Shelf seaward of State boundaries.'
>
> "To effectuate these purposes the Act, in pertinent part—
>
> "1. relinquishes to the States the entire interest of the United States in all lands beneath navigable waters within state boundaries (§ 3, 43 U.S.C. § 1311);
>
> "2. defines that area in terms of state boundaries 'as they existed at the time [a] State became a member of the Union, or as heretofore approved by the Congress,' not extending, however, seaward from the coast of any State more than three marine leagues in the Gulf of Mexico or more than three geographical miles in the Atlantic and Pacific Oceans (§ 2, 43 U.S.C. § 1301);
>
> "3. confirms to each State a seaward boundary of three geographical miles, without 'questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress' (§ 4, 43 U.S.C. § 1312); and

"4. for purposes of commerce, navigation, national defense, and international affairs, reserves to the United States all constitutional powers of regulation and control over the areas within which the proprietary interests of the States are recognized (§ 6(a), 43 U.S.C. § 1314); and retains in the United States all rights in submerged lands lying beyond those areas to the seaward limits of the Continental Shelf (§ 9, 43 U.S.C. § 1302)."

Justice Harlan, speaking for this Court in the second *Louisiana* case, epitomized the Congressional intent reflected by the Act, as follows:

"By that Act the United States relinquished to the coastal States all of its rights in such lands within certain geographical limits, and confirmed its own rights therein beyond those limits." 363 U.S. at pp. 6-7.

It is quite obvious that Congress could reserve to the federal government all the rights to the seabed of the continental shelf beyond the three-mile territorial belt of sea (or three leagues in the case of certain Gulf states) only upon the basis that it already had the paramount right to that seabed under the rule laid down in the *California* case. For although that rule was announced with respect to the seabed of the three-mile territorial belt of sea, which was the only area involved in the *California* case, its rationale applies *a fortiori* to the area of the sea beyond that belt as this Court specifically pointed out in the first *Louisiana* case, 339 U.S. 699, 705.

What has been said is applicable, as well, to the special defenses raised by the States of Rhode Island and North Carolina to which I have already referred. The special defense raised by the State of Georgia requires further comment, however. That defense is that any rights of the United States in the seabed off the Georgia coast were transferred to the State by the boundary settlement

agreement of April 24, 1802 between the United States and the State of Georgia. The 1802 agreement was negotiated and signed by federal and state commissioners pursuant to the Acts of Congress of April 7, 1798, 1 Stat. 549, and May 10, 1800, 2 Stat. 69, and the Georgia Act of February 15, 1799, Digest of the Laws of Georgia (1801) p. 726. These federal statutes empowered the federal commissioners to make a final settlement of the conflicting claims of the United States and Georgia to lands west of the Chattahoochee River, and other lands claimed by Georgia, upon such terms as to them should appear reasonable. The Georgia Act required that the United States extinguish Indian title to certain lands in Georgia and cede those lands to the State.

The agreement ceded to the United States the lands west of the Chattahoochee River in exchange for certain undertakings by the United States. These included payments to be made from the proceeds of the ceded lands, extinguishment of Indian titles in Georgia and cession to Georgia of the claim, right or title of the United States to the jurisdiction or soil of any lands "lying within the United States" south of the southern boundaries of Tennessee, North Carolina and South Carolina and east of the western lands ceded to the United States by the agreement. Neither the federal commissioners in submitting the agreement to the President, nor the President in submitting it to Congress, gave any hint that it was the purpose to cede to Georgia any federal rights in the seabed. [Ga. Ex. 8] Lands beneath navigable waters, unless they are granted in specific terms, are deemed to remain attached to the sovereignty to which by their nature they appertain. *Martin v. Waddell*, 1842, 16 Pet. 367; *Massachusetts v. New York*, 1926, 271 U.S. 65. In the case of the seabed beneath the ocean seaward of the coastline this Court has held that sovereignty to be the national government, not the coastal state. *United States v. California*, 1947, 332 U.S. 19. But even if it were assumed, although

I find no basis for doing so, that by the agreement of 1802 Georgia received title to the seabed off its coast this would not sustain Georgia's claim. For it could not be held that such title extended out into the area here in controversy, since no one contends that in 1802 the United States claimed any jurisdiction over or title to the seabed of the continental shelf beyond the three-mile belt of territorial sea.

I conclude that the rule announced in the *California*, first *Louisiana* and *Texas* cases and approved and declared to be applicable to all coastal states by the second *Louisiana* case, 363 U.S. 1, 7, remains in full vigor and applies to all the defendant States in this proceeding, foreclosing the issues of fact raised by them and requiring as a matter of law the entry of judgment for the United States on its motion. This conclusion is, of course, subject to the possibility that this Court, as urged by the defendant States, may decide to reconsider the rule laid down by the *California*, first *Louisiana* and *Texas* cases in the light of the facts developed by the parties in the present proceeding. I, therefore, proceed to the consideration of those facts.

C. DISCUSSION

1. Preliminary Considerations

Basic to the case of the defendant States is their contention that this Court erred in its finding in the *California* case [332 U.S. at p. 31] that the 13 original colonies did not separately acquire ownership to the adjacent sea or the soil under it, even if they did acquire elements of the sovereignty of the English crown by their revolution against it, and [332 U.S. at p. 32] that neither the English charters granted to this nation's settlers, nor the treaty of peace with England, nor any other document submitted to this Court, showed a purpose to set apart a three-mile belt of marginal sea for colonial or state ownership. They further contend that this Court erred in holding [332 U.S.

at pp. 32-33] that there is no substantial support in history for the idea that the colonists wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of its wealth. On the contrary, the defendant States have sought to prove in the present case:

(1) that English law and practice prior to and during the seventeenth and eighteenth centuries recognized the sovereignty and ownership by the crown of the English seas and the seabed and subsoil thereof and was not inconsistent with the international law of the period;

(2) that the American colonial charters created territorial seas and conveyed maritime sovereignty and dominion;

(3) that rights of sovereignty and dominion were exercised over the American territorial sea during the colonial period;

(4) that at the American revolution the states individually succeeded to the maritime territorial sovereignty and dominion both of their predecessor colonial governments and of the British crown, and those rights were retained by them after the adoption of the Constitution; and

(5) that the exclusive rights of the states to the continental shelf have not been abandoned or extinguished since 1787.

In addition, the defendant States have introduced evidence which, they assert, establishes the invalidity of the conclusion of this Court in the *California* case [332 U.S. at pp. 34-36] that the exercise of sovereign powers granted to the federal government in the fields of foreign commerce, foreign affairs and national defense requires that the federal government have dominion over the marginal sea and rights to its seabed which are paramount to any claims of the states. They point to the opinion of their expert witness, Professor Lyman B. Kirkpatrick, Jr.,

that upholding the claims of the states would not inhibit or embarrass the federal government in carrying out its foreign affairs and defense responsibilities. However, I do not regard the conclusion in question to have been based upon a factional evaluation by this Court of the relative needs of the federal government in these areas as against the claims of the states. On the contrary, it appears to me to represent the statement of a purely legal principle, namely, that since the Constitution has allotted to the federal government jurisdiction over foreign commerce, foreign affairs and national defense it necessarily follows, as a matter of constitutional law, that as attributes of these external sovereign powers the federal government has paramount rights in the marginal sea. How those rights are to be exercised and by what entities in our federal system is, of course, a question of public policy for the Congress to decide, as it did by the Submerged Lands Act.

The principle is based, I believe, upon the inescapable physical fact that the sea is affected by the interests and activities of other nations in a very different way, and very much more directly and immediately, than is the land, and that the existence and preservation of our national rights in the marginal sea are largely dependent upon the ability of the federal government to carry out its responsibilities in the fields of foreign commerce, international relations and national defense. The land is in no sense comparable to the sea in this respect. For aliens may be, and frequently have been, wholly excluded from the land, whereas the sea, including the marginal sea, has been used by all the maritime nations of the world as a common avenue of commerce and a common source of fishing since the dawn of history. I should add that since this Court has thus held in the *California* case that the United States is vested, as a matter of constitutional law, with dominion over the marginal sea including paramount rights in the resources of the seabed, I do not regard it as within my province to question the ruling as the defendant States

ask me to do. If the ruling is to be departed from it is for the Court to do so and it would be presumptuous on my part as its special master to suggest such action.

Upon the questions of fact and of English and international law raised in the case a great deal of expert testimony and a large number of documents have been offered in evidence by the parties. From the consideration of this evidence, much of it conflicting, and of relevant matters of which judicial notice may be taken, I have made the findings of fact which appear as statements of fact in this report. In my discussion of these facts and of the questions of law involved I shall not attempt to discuss, or even mention, all the documents upon which the parties rely, since to do so would lengthen this report inordinately and unduly delay its completion. I shall confine myself in most instances to discussing only those which I regard as particularly significant or controlling.

In considering the facts it is important to bear in mind what is, and what is not, involved in this case. The sole question which is involved is whether the United States or the respective defendant States have the right to the exclusion of the other to explore and exploit the natural resources of the seabed and subsoil of the continental shelf beyond the three-mile limit of the territorial sea adjacent to the Atlantic coast. The case is not directly concerned with the question whether prior to the enactment of the Submerged Lands Act of 1953 the defendant States had jurisdiction over, title to or ownership of the seabed and subsoil of the continental shelf within the three-mile belt of territorial sea or the exclusive right to explore and exploit the resources of the seabed and subsoil in that area. For as to this question the Submerged Lands Act has "recognized, confirmed, established, and vested in and assigned to" the defendant States, *inter alia*, "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States [which the Act limited to a distance of three geographical miles from

the coastline and confirmed at that distance in the case of the original coastal states], and the natural resources within such lands and waters". It will be recalled that section 9 of the Submerged Lands Act provided that the Act should not affect the rights of the United States to the natural resources of that portion of the seabed and subsoil of the continental shelf lying seaward and outside of the area confirmed to the states by the Act and it expressly confirmed the jurisdiction and control of the United States over those natural resources. It will also be recalled that the jurisdiction and control of the United States over the seabed and subsoil of that portion of the continental shelf lying seaward of the area confirmed to the coastal states by the Submerged Lands Act was, shortly thereafter, expressly claimed by the Outer Continental Shelf Lands Act of August 7, 1953, 67 Stat. 462, 43 U.S.C. §§ 1331 et seq.

I proceed, therefore, to consider the facts which are relevant to the question whether the defendant States have any right to explore and exploit the natural resources of the seabed and subsoil of that portion of the continental shelf lying beyond the three-mile limit, which have survived the enactment of the Submerged Lands Act.

2. English Law Prior to 1776

(a) *Preliminary discussion*

Our discussion begins with the English law of the sea in the centuries before 1776. On this subject the expert testimony of distinguished legal historians was offered by the parties together with a multitude of documents. This testimony as to the course of the English law and as to the significance of the documents relating thereto which are in evidence was sharply conflicting in a great many respects. I have accordingly tested the evidence and exhibits by what I believe to be the most reliable account of the history of the English claims to sovereignty of the sea in the period under discussion, namely, the work of

the English scholar, Professor T. Wemyss Fulton, *The Sovereignty of the Sea* (1911). Judge Philip C. Jessup, the eminent scholar and jurist called by the defendant States as a witness, in his treatise *The Law of Territorial Waters and Maritime Jurisdiction* (1927) p. 10, states that Fulton's work sets forth in admirable detail the history of the early British pretensions from Anglo-Saxon days through the eighteenth century. Similar approval of Fulton's work appears in Wade's Introductory Essay to Boroughs, *The Soveraignty of the British Seas* (1633, Wade ed. 1920) p. 14, note 1; Smith, *The Law and Custom of the Sea* (3d ed. 1959) p. 57, note 1; Brownlie, *Principles of the Public International Law* (1966) p. 208, note 3; and Colombos, *The International Law of the Sea* (6th ed. 1967) p. 48, note 2. The expert testimony which I have found persuasive in the light of my own study of the documents in evidence and of the judicial decisions and public acts to which I have been referred, confirmed and supplemented by the work of Fulton and other scholars, supports the findings and conclusions which follow with respect to the older [i.e. 1200 to 1600] English tradition of sovereignty of the sea, as well as the developments in that regard in the seventeenth and eighteenth centuries.

Although according to the Roman law the sea was common and free to all, in the middle ages certain seas had become more or less effectively appropriated. This took place among the early Italian republics with respect to the Adriatic, Ligurian and Tyrrhenian Seas, and with Denmark, Norway, Sweden and Poland with respect to parts of the North and Baltic Seas. Still more extensive were the claims asserted by Spain and Portugal, which in the sixteenth century sought to divide the great oceans between them. It was those pretensions to the immense waters of the globe which gave rise to the juridical controversies involving the concepts of *mare clausum* and *mare liberum* from which the modern law of the sea arose, and which led Queen Elizabeth I in 1580 to inform

the Spanish ambassador that "the use of the sea and air is common to all; neither can any title to the ocean belong to any people or private man, forasmuch as neither nature nor regard of the public use permitteth any possession thereof."*

In seeking to appropriate their adjacent seas, maritime states were doubtless impelled by consideration of their own immediate interests. But there is also a less selfish explanation. After the breaking up of the Roman empire, pirates swarmed the sea lanes. The seas were then common in the sense of being universally open to depredation. At first associations of merchants and later maritime states began policing the neighboring seas in the exercise of a protective admiralty jurisdiction. By the thirteenth century this jurisdiction came to be regarded as a prerogative of sovereign power.

(b) *English law before 1603*

There is good reason to believe that the English claims to sovereignty of the sea originated in this way through the exercise of jurisdiction by the English admirals to keep the peace and security of the sea and to protect commerce and navigation thereon. The sovereignty thus claimed did not involve, prior to the Stuart era, the concept of property rights in the high seas, however, and it had but little international importance.† The long-continued English insis-

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* Camden, *Annales* (ed. 1635) 225 [quoted in Fulton, *The Sovereignty of the Sea* (1911) p. 107]. Bracton on the Laws and Customs of England, II Thorne ed. (1968), pp. 39-40.

† Fulton, *The Sovereignty of the Sea* (1911) p. 9. It is stated in Holdsworth, I *History of English Law* (3d ed. 1922) p. 550, that "after 1363 the Admiral's criminal jurisdiction was recognized as exclusive on the high seas. This exclusive jurisdiction could be exercised over British subjects, over the crew of a British ship whether subjects or not, and over any one in cases of piracy at common law. It could be exercised over no other persons."

tence that a foreign vessel meeting one of the king's ships should lower its sail and strike its flag, which was known as the right of the flag, and which was first demanded by ordinance of King John in 1201, seems to have been required to enable the king's officers, who were patrolling the sea in order to maintain the security of navigation, to ascertain the true nature of the foreign vessel, whether it was a peaceful trader or a pirate.* The jurisdiction of the admirals continued, under the Plantagenet and Tudor monarchs, to be exercised over English subjects and ships on the high seas and for the protection of commerce in what was frequently described as the Sea of England or the narrow sea, but there is no evidence that that sea extended far from the coast or that the jurisdiction exercised therein differed from that exercised by other maritime states in their adjacent waters. The ordinance of 1201 and the admiralty records of those early times were, however, cited by Selden and others in the Stuart period as proving that the crown had always possessed the sovereignty of the sea. But beyond the protective jurisdiction which I have described, which was doubtless exercised in the Straits of Dover and perhaps in the remainder of the English Channel at times when the coasts of France were in the possession of the English crown, there is little evidence to prove that any such claim was made by the crown prior to the accession of the Stuart kings. Moreover, there were long periods of time when nothing was heard of any English pretension to a special sovereignty of the adjacent sea. Evidence of any appropriation of the sea is lacking. No tribute was levied on foreign ships passing through the Channel or the narrow seas. Nor were the sea fisheries appropriated in those days, the people of all nations being at liberty to fish on the English coast. Bracton and other writers of this early period made no claim of such an exclusive right.†

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* Fulton, *The Sovereignty of the Sea* (1911) p. 7.

† Fulton, *The Sovereignty of the Sea* (1911) pp. 65-66.

An exception to the freedom of fishing was the claim of the crown to certain large fish, including whales, taken in the adjacent seas, which were denominated royal fish. These were claimed by the crown under its prerogative. There is also evidence that the crown early claimed under its prerogative the right to wreck, treasure trove, flotsam, jetsam and lagan, and to derelict or emerged lands. But these crown prerogatives were not based in pre-Stuart times on any claim to the ownership of the seabed. Until the publication in 1569 of a treatise by Thomas Digges,* the latter claim appears never to have been suggested in any contemporary legal literature. Digges' purpose was to establish the right of the crown to the foreshore and to derelict or newly emerged lands. And although he suggested that the crown was entitled to such lands because of its ownership, which he assumed, of the seabed, he also indicated that the crown owned such lands when they arose by virtue of its prerogative right to appropriate ownerless property. I find the latter to have been the prevailing doctrine and it was also the basis for the crown's prerogative right to wreck, treasure trove, flotsam, jetsam and lagan. The crown's prerogative right to royal fish was also based upon its right to ownerless property, not on any concept of territorial jurisdiction. I am unable to find that in the older legal tradition of the pre-Stuart period it was thought that the prerogative of the crown or its sovereignty over the adjacent seas involved any property right to the seabed or to its resources prior to their actual appropriation as ownerless property.

(c) *English law during the Stuart period (1603-1688)*

Upon his accession in 1603 James I, who was king of Scotland, brought with him the Scottish policy which

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* The treatise is set out in Moore, *A History of the Foreshore and the Law Relating Thereto* (1888) pp. 185 et seq. [Me. et al. Ex. 203].

aimed at the monopolization of the fisheries.* In support of this policy there arose the political concept of the "British Seas" and James revived the fading claims of the crown to sovereignty over those seas.† James caused the bays along the English coasts, called the "King's Chambers", to be delimited. These were neutral areas within which hostile acts of belligerents were prohibited. And he laid claim to the exclusive right to the fisheries along the English, Scottish and Irish coasts.‡ This claim involved especially the rich herring fisheries of the North Sea off the east coasts of England and Scotland. These fisheries had long been exploited by the Dutch and the latter resisted the English claims. Between 1652 and 1674 three wars were fought between the English and Dutch, in which the right of fishing was one of the issues involved. The last of these wars ended in 1674 and left the Dutch with access to the fisheries in controversy without further hindrance from England.

During the reign of Charles I (1625-1649) the claims of the English crown to the sovereignty of the seas reached their most extravagant proportions. Charles claimed absolute sovereignty, to the exclusion of all foreign fleets

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* This claim to exclusive fishing rights was in direct opposition to the policy which had prevailed in the older English tradition of freedom for all nations to fish on the English coasts. Fulton, *The Sovereignty of the Sea* (1911) p. 57.

† Smith, *The Law and Custom of the Sea* (3d ed. 1959) p. 59; Brownlie, *Principles of the Public International Law* (1966) p. 208.

‡ This claim was made in the proclamation of James I issued May 6, 1609 which gave notice that no person who was not a British subject would be permitted after July, 1609 to fish upon "any of our Coasts and Seas of Great Britaine, Ireland, and the rest of the Isles adjacent" without having first obtained a royal license to do so [Me. et al. Ex. 221]. This requirement of a license for aliens to fish in the British Seas was renewed by proclamation of Charles I issued May 10, 1636 [Me. et al. Ex. 222].

and men of war, over the high seas clear across to the coasts of the continent. He asserted that these seas were under his protection as Lord of the Seas and all foreign vessels meeting one of the king's ships in his seas were to accord it the right of the flag. These claims were being made in a period of greatly expanding commercial enterprise. The European powers, especially the Dutch, were pushing into every sea for the sake of traffic and gain. The Dutch legal scholar, Hugo Grotius, had written his great work, *Mare Liberum*, in 1609 defending the concept of the freedom of the sea. Charles obviously needed legal support for his far-reaching claims. In 1618 the eminent English scholar, John Selden, had written *Mare Clausum*, a reply to *Mare Liberum*, and a defense of the claims of the English crown to sovereignty of the seas. The work remained unpublished until 1635. In that year, at the request of Charles I, Selden recast, enlarged and published his treatise. It was a work of immense scholarship and although, as later scholars have shown, it was based to a considerable extent on dubious readings of the history and documents of pre-Stuart England, it became perhaps the most authoritative and frequently-cited work on the subject during the remainder of the Stuart era.

Charles I sought to enforce by naval power sovereign jurisdiction over the wider seas which he claimed, using the famous "ship money fleets" for the purpose. During this period the courts of admiralty continued to exercise jurisdiction over English ships and English subjects anywhere on the high seas. In addition to the prevention of piracy and the protection of British subjects and property, jurisdiction was also exercised to exclude unlicensed foreign fisherman from the English seas, to enforce other measures regulating the fisheries and to deal with the failure of foreign vessels to accord the right of the flag to the king's ships. The defendant States assert that this jurisdiction was territorial in nature. I do not find any evidence, however, that the admiralty courts claimed

jurisdiction to try all crimes committed on the English seas such, for example, as the murder of one foreigner by another on board a foreign vessel. Thus their jurisdiction was not territorial in the sense in which the common law courts exercised territorial jurisdiction on land. Moreover, it appears that in the seventeenth century the common law courts were attempting to impose limitations upon the traditional jurisdiction of the admiralty courts. Much of the legal writing of this period was, therefore, in the nature of argument in defense of that jurisdiction. In the case of *The Queen v. Keyn*, [1876-77] L.R. 2 Exch. Div. 63, the English Court for Crown Cases Reserved decided in 1876 that the English courts of admiralty did not have territorial jurisdiction to try a foreigner for a crime committed on a foreign ship on the high seas even though the ship at the time the crime was committed was within what had then become recognized as the three-mile belt of territorial sea. Lord Chief Justice Cockburn in his scholarly opinion in that case demonstrated that the courts of admiralty had never up to that time had such jurisdiction.* I am clear that the evidence offered by the defendant States is not sufficient to rebut the correctness of this decision. I conclude that the jurisdiction of the English courts of admiralty in the seventeenth and eighteenth centuries was not based upon a territorial concept.

In the seventeenth and eighteenth centuries the crown continued to exact the right of the flag from foreign vessels passing the king's ships in the adjacent English seas. This was, of course, in a certain sense an exercise of sovereign power in those seas. But in the treaty

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* In doing so he analyzed [1876-77 L.R. 2 Exch. Div. at pp. 163-167] the eight early cases cited by Hale in 2 *Pleas of the Crown* (1778 ed.) pp. 12-13 [Me. et al. Ex. 467] and demonstrated that they did not support Hale's statement, upon which the defendant States rely, that "the king's bench had usually cognizance of felonies and treasons done upon the narrow seas, tho out of the bodies of counties."

of 1674, which ended the third Dutch war, it was agreed that while the Dutch were to continue to accord the right of the flag it was to be merely as a ceremony of honor and a testimony of respect to the English crown. Thus as time wore on this practice lost its original importance and became merely a matter of form and it was wholly abandoned after the battle of Trafalgar in 1805. At bottom it was based on naval power and not, I believe, upon any claim of the right of ownership of the sea.

The right of the crown to emerged or derelict lands, wreck, treasure trove, flotsam, jetsam and lagan continued to be asserted in the seventeenth and eighteenth centuries. While emerged or derelict lands were still claimed by the crown under the prerogative as ownerless property, under the Stuart kings the claims came more and more to be based also upon the crown's asserted ownership of the seabed of the seas over which it claimed dominion. The defendant States cite a number of English cases and treatises of the period which take this view and which tend to support their contentions that in the seventeenth century it was generally assumed to be established English law that the crown owned the seabed and subsoil of the English seas and the resources thereof. Perhaps the most important of these is John Selden's *Mare Clausum* (published in 1635) to which I have already referred, which was written, in part at least, to justify the claim of the crown to the fisheries of the British seas. In that work Selden was responding to the theory of the freedom of the seas espoused by Grotius in his *Mare Liberum* (1609), and he took the view that the sovereignty of the crown over the English seas involved its ownership of their seabed and the sedentary fisheries, i.e., oysters, pearls, coral and the mineral resources thereof. These rights of ownership he referred to, in conventional terminology, as the crown's royalties or regalia.

Selden's *Mare Clausum* was followed, *circa* 1667, by Sir Matthew Hale's treatise *De Jure Maris* which along

with *Mare Clausum* was one of the most frequently cited works on the English law of the sea of the period of English history with which we are concerned. *Mare Clausum* and *De Jure Maris* were undoubtedly accepted as authoritative by generations of English judges and lawyers and were continually relied upon, at least during the seventeenth century, in support of proclamations, judicial decisions, legal opinions and other public documents dealing with the subject. I think it is correct to say, however, that most of these were concerned with the fisheries, the jurisdiction of the admiralty courts and the right of the flag, none of which directly involved ownership of or rights in the seabed. But there were also some cases involving emerging or relicted lands or newly arisen islands, which did directly involve land which had formerly been in the bed of the sea.

In *De Jure Maris* Hale stated [Hargrave, 1 Law Tracts, Me. et al. Ex. 194, p. 10]:

> "The part of the sea which lies not within the body of a county, is called the main sea or ocean.
>
> "The narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions of the king of England, whether it lie within the body of any county or not.
>
> "This is abundantly proved by that learned treatise of Master Selden called *Mare Clausum*; and therefore I shall say nothing therein, but refer the reader thither.
>
> "In this sea the king of England hath a double right, viz. a right of jurisdiction which he ordinarily exerciseth by his admiral, and a right of propriety or ownership. The latter is that which I shall meddle with."

Hale goes on to say [pp. 11, 12, 14] that the king's right of propriety or ownership in the sea and soil thereof is evidenced principally by two things, the one his right of

fishing in the sea and the other his right to the foreshore and to the increase of land from the sea by alluvion, by reliction and by the arising of islands. The king's right to these increases of land from the sea Hale based upon the fact that the soil of the sea from which they arose belonged to the crown as part of its waste or demesne. I think, therefore, that it must be concluded that by the accepted English law of the seventeenth century the prerogative rights of the crown extended to the ownership of the bed of the narrow seas adjacent to the coasts of Great Britain and Ireland. These rights were based upon the claim that the narrow seas were under the dominion of the British crown and not, as the defendant States urge, upon the theory that they were within the realm of England. For the realm of England was limited to the area within the bodies of the English counties to which the common law was applicable and did not extend beyond low-water mark into the sea, the area with which the admiralty courts dealt.*

The prerogative right to the seabed was limited to those portions of the narrow seas of which the crown was in effective occupation through its naval power. For as Hale goes on to point out [pp. 31-32]:

> "The king of England hath the propriety as well as the jurisdiction of the narrow seas; for he is in a capacity of acquiring the narrow and adjacent sea to his dominion by a kind of possession which is not compatible to a subject; and accordingly regularly the king hath that propriety in the sea: but a subject hath not nor indeed cannot have that property in the sea, through a whole tract of it, that the king hath; because without a regular power he cannot possibly possess it. . . .

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* Finch, *Law, or, a Discourse Thereof*, 1613, (Pickering ed. 1759) pp. 77-78; *The Queen v. Keyn*, [1876-77] L.R. 2 Exch. Div. 63, 197-198.

> "The civilians tell us truly, *nihil praeseribitur nisi quod possidetur*. The king may prescribe the propriety of the narrow seas, because he may possess them by his navies and power. A subject cannot. But a subject may possess a navigable river, or creek or arm of the sea; because these may lie within the extent of his possession and acquest."

In thus limiting the king's prerogative to areas of the sea which he has possessed by his navies and power, Hale was following Selden who in his treatise *Mare Clausum*, entitled in translation *Of the Dominion, or, Ownership of the Sea* [Nedham translation, 1652, Me. et al. Ex. 204, p. 188] says:

> "It is true indeed which an eminent man saith; a *That the Sea hath been enjoyed by Occupation, not for this reason onely, becaus men had so enjoied the Land, nor is the Act or intent of the minde sufficient thereto; but that there is a necessitie of som external Act, from whence this Occupation may bee understood.* Therefore Arguments are not to bee derived altogether from a bare Occupation or Dominion of Countries, whose Shores are washed by the Sea: But from such a private or peculiar use or enjoiment of the Sea, as consist's in a setting forth Ships to Sea, either to defend or make good the Dominion; in prescribing Rules of Navigation to such as pass through it; in receiving such Profits and Commodities as are peculiar to every kinde of Sea-Dominion whatsoever; and, which is the principal, either in admitting or excluding others at pleasure.
>
> "a Hugo Grotius, de Jure Belli ac Pacis, lib. 2.c.3.§II."

In this respect both were in accord with what appears to have been an accepted principle of international law. The English scholar Professor C. H. M. Waldock well states

that principle in *The Legal Basis of Claims to the Continental Shelf*, 36 Grotius Society (1951) 115, 118, as follows:

> "The important point which emerges from the writings of the jurists is that, despite variations in doctrine, they were at one in not recognising any possibility of a legal title to the sea-bed or subsoil under the high seas being vested in a coastal State apart from effective occupation. The same is true of the small amount of state practice which existed in regard to submarine rights. There were a number of specific claims to exclusive rights to particular resources of the sea-bed in limited areas which were based on long enjoyment or at least on actual exploitation. The best known were various pearl, oyster and sponge fisheries. But these exclusive rights to resources on the sea-bed, when recognised as valid in law, were held to belong to the claimant States by reason of their actual enjoyment (generally from time immemorial) in particular areas and under a particular claim to exclusive jurisdiction. Similarly, in a few cases mine-shafts sunk ashore appear to have been driven outwards through the subsoil to points beyond the limit of territorial waters. These shafts were commonly said to constitute an effective occupation of the particular areas mined but no more. It is true that such claims to resources of the sea-bed or subsoil were made only by coastal States but they were justified as acts of occupation, not as the natural rights of coastal States. General or natural rights to adjacent extra-territorial resources were neither recognised nor claimed."

To the same effect are Westlake, I *International Law* (1904) pp. 186-187, and Oppenheim, I *International Law* (8th ed. Lauterpacht 1955) pp. 628-631. If the law of England on this subject were less clear than it appears to

me to be, I think that the principles of international law prevailing at the time, which Waldock describes, could properly serve to clarify it. For the courts refer to and apply settled principles of international law to supplement and support the local law when the latter is uncertain or incomplete.* It would thus appear that it was solely the exercise of British naval power which supported the crown's claim in the seventeenth century to sovereignty and prerogative rights in the narrow seas and their seabed adjacent to the British coasts.† It does not appear, however, that even in the heyday of the Stuart kings' assertion of crown sovereignty over the English seas the crown ever claimed the right, commonly exercised by maritime powers claiming complete sovereignty over their adjacent seas, of excluding peaceful foreign vessels from the English seas or of levying tribute or taxes upon those permitted to pass through them. The British failure to exercise this right of a sovereign in exclusive occupation of its adjacent sea, which, as we have seen, Selden had stated to be the principal indication that the sovereign was actually in occupation of the sea, seems to me to be strong evidence that even in the Stuart days of extravagant claims the right which the crown claimed to the sovereignty of the English seas was much less than complete and exclusive dominion and ownership. Indeed when the unrestrained rhetoric of that period is discounted and

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* *Jones v. United States*, 1890, 137 U.S. 202, 212; *Fong Yue Ting v. United States*, 1893, 149 U.S. 698, 707-711. And see *The Paquete Habana*, 1900, 175 U.S. 677, 700.

† Acceptance of the idea that the occupation of the sea by naval power could support a royal claim to ownership of the seabed was to be of short duration, however. Within a year after the end of the Stuart dynasty its demise was presaged by Sir Philip Medows, who in his *Observations Concerning the Dominion and Sovereignty of the Seas* (1689) [Me. et al. Ex. 202, p. 9] said: "To ride actual Master at Sea with a well Equipp'd Fleet, or to have such a Plenty of Naval Stores in constant readiness, as shall be sufficient to answer all Occasions, is not the Dominion of the Sea; This is Power, not Property, . . ."

the actual practice alone is considered, the rights sought to be exercised by the crown were almost wholly limited to the control of the fisheries, the admiralty jurisdiction and the enforcement of the right of the flag. The defendant States have cited many cases decided during that period involving the ownership of the crown of the foreshore, the beds of English rivers, relicted lands and newly arisen islands, in which the courts assumed crown ownership of the seabed from which the relicted lands or islands had arisen as a basis of decision, citing Selden and Hale. But aside from some underseas mining from the shore and some sedentary fishing for shellfish, pearls and certain minerals I have been referred to no instances in which the seabed itself in the British seas beyond low-water mark was directly involved in litigation.*

It was only during the Stuart era that crown possession of exclusive fishery rights in the sea was asserted as a basis for sustaining its claim to ownership of the sea and seabed. As we have seen, Hale made use of that argument. But the exclusive right to take swimming fish from the sea had no peculiar or necessary relationship to ownership of the seabed, contrary to the case of sedentary fisheries. Indeed while claims to wide expanses of seabed began with the Stuart kings and ended after their departure, intense interest in ocean fisheries goes back into antiquity and continues to the present day. For what is involved is a food resource of great importance to the maritime states and it is the preservation and exploitation of this resource with which they were, and still are, primarily concerned.

It will be observed that Hale in *De Jure Maris* restricted the jurisdiction and ownership of the king to the narrow sea adjoining the coast of England. The actual

* Thus it appears that even in Stuart times the situations in which claims of the crown to sovereignty of the sea were made normally involved only jurisdiction of the surface of the sea or control of the fisheries therein and not actual ownership of the seabed.

width of the narrow sea was never defined in English law. At times it was applied to the Straits of Dover or the English Channel and very commonly in the seventeenth century to the marginal sea along the whole coast or the "British Seas". Widths of 100 miles and 60 miles were sometimes suggested but never consistently followed or applied. By leaving the limits vague and ambiguous British claims to maritime sovereignty could be put forward and used as a political instrument when the navy was strong and occasion offered, and when the navy was weak the claims might fall into the background without affecting national honor.*

(d) *English law after 1688*

Following the end of the Stuart dynasty in 1688 and in the course of the eighteenth century the claim of the crown to the sovereignty of the British seas became more and more an anachronism and it was allowed to die out from practical affairs, surviving, as Fulton says, in *The Sovereignty of the Sea* (1911) pp. 21, 538, "only in the pages of historians, naval writers, and pamphleteers" and "without apparently leaving a single juridical or international right behind it." Grotius' *Mare Liberum* had finally prevailed over Selden's *Mare Clausum*. As Jessup states in *The Law of Territorial Waters and Maritime Jurisdiction* (1927) p. 4: "Selden's own nation repudiated his stand during the eighteenth century. . ."†

Brownlie, in his *Principles of the Public International Law* (1966) pp. 208-209, describes the transition as follows:

> ". . .The seventeenth century marked the hey-day of the *mare clausum* with claims by England, Den-

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* Fulton, *The Sovereignty of the Sea* (1911) pp. 15, 18-21.

† And see Pitman B. Potter, *The Freedom of the Seas in History, Law and Politics* (1924) pp. 89-91.

mark, Spain, Portugal, Genoa, Tuscany, the Papacy, Turkey and Venice.

"In the eighteenth century the position changed completely. Dutch policies had favoured freedom of navigation and fishing in the previous century, and the great publicist Grotius had written against the Portuguese monopoly of navigation and commerce in the East Indies. After the accession of William of Orange to the English throne in 1689 English disputes with Holland over fisheries ceased. However, the sovereignty of the sea was still asserted against France, and in general the formal requirement of the salute to the flag was maintained. By the late eighteenth century the claim to sovereignty was obsolete and the requirement of the flag ceremony was ended in 1805. After 1691 extensive Danish claims were reduced by stages to narrow fixed limits. By the late eighteenth century the cannon-shot rule predominated, and claims to large areas of sea faded away."

As Elihu Root, one of the most eminent of American statesmen, put it in his argument in the North Atlantic Fisheries arbitration, XI *Proceedings*, North Atlantic Fisheries Arbitration, p. 2006 [quoted in Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927) p. 5]:

"These vague and unfounded claims [of the 18th, 17th, and earlier centuries] disappeared entirely, and there was nothing of them left. . . . The sea became, in general, as free internationally as it was under the Roman law. But the new principle of freedom, when it approached the shore, met with another principle, the principle of protection, not a residuum of the old claim, but a new independent basis and reason for modification, near the shore, of the principle of freedom. The sovereign of the land washed by the sea asserted a new right to protect his subjects and

citizens against attack, against invasion, against interference and injury, to protect them against attack threatening their peace, to protect their revenues, to protect their health, to protect their industries. This is the basis and the sole basis on which is established the territorial zone that is recognized in the international law of today. Warships may not pass without consent into this zone, because they threaten. Merchant-ships may pass and repass because they do not threaten."

Thus during the eighteenth century there developed a new principle of protection to be exercised in the marginal waters of a state to the extent that they could be controlled from the shore. This new and more realistic principle that jurisdiction could be claimed only within the belt of marginal sea which was subject to continuous domination from the land replaced the former unrealistic and extravagant idea that the exercise of naval power was sufficient to possess the sea. Within this belt of what has now come to be known as the territorial sea the coastal state was recognized as entitled to enforce its neutrality and exercise other rights. In the case of Great Britain this was a new right of modern origin derived from international law and was not a residuum of the former more extensive claim to sovereignty and ownership of the narrow or English seas. Viscount Haldane, the Lord Chancellor, speaking for the British Privy Council in *Attorney General for British Columbia v. Attorney General for Canada*, [1914] L.R. Appeal Cases 153, said as to this [p. 174]:

"They desire, however, to point out that the three-mile limit is something very different from the 'narrow seas' limit discussed by the older authorities, such as Selden and Hale, a principle which may safely be said to be now obsolete. The doctrine of the zone comprised in the former limit owes its origin to com-

paratively modern authorities on public international law."

The necessary conclusion is that in the eighteenth century the former claim of the crown to ownership of the seabed of the narrow or English seas went the way of the claim to the sovereignty of the sea upon which it was based. This was forcefully pointed out by Lord Chief Justice Cockburn in *The Queen v. Keyn*, [1876-77] L.R. 2 Exch. Div. 63, when he said [p. 196]:

> "But to what, after all, do these ancient authorities amount? Of what avail are they towards establishing that the soil in the three-mile zone is part of the territorial domain of the Crown? These assertions of sovereignty were manifestly based on the doctrine that the narrow seas are part of the realm of England. But that doctrine is now exploded. Who at this day would venture to affirm that the sovereignty thus asserted in those times now exists? What English lawyer is there who would not shrink from maintaining—what foreign jurist who would not deny—what foreign government which would not repel such a pretension? I listened carefully to see whether any such assertion would be made; but none was made. No one has gone the length of suggesting, much less of openly asserting, that the jurisdiction still exists. It seems to me to follow that when the sovereignty and jurisdiction from which the property in the soil of the sea was inferred is gone, the territorial property which was suggested to be consequent upon it must necessarily go with it."

Thereafter, and until the recognition in the nineteenth and early twentieth centuries of the new concept of the full sovereignty of the coastal nation in its territorial sea, claims to the seabed were made only in cases where there had been actual, and usually long-continued, possession and exploitation, such, for example, as in the case of the

sedentary pearl fisheries of the Gulf of Mannar off the coast of Ceylon and of the Persian Gulf off Bahrein.

It is true, as the defendant States point out, that during the seventeenth century and before the new concept of the territorial sea had come to be accepted, England by a number of Acts of Parliament exercised authority over and regulated in various ways fishing in the seas adjacent to the English coast as well as prevented smuggling and enforced neutrality in those waters. However, the latter two activities were carried on in the exercise of a protective jurisdiction which did not involve the, by then, abandoned claim of the crown to the absolute dominion of the sea and seabed. And the same may be said of the fisheries legislation which related to a marine resource of England with which, as we have seen, the crown had been concerned for many centuries before the Stuart kings made their extravagant claims to sovereignty of the sea and ownership of the seabed.

The new principle had its origin primarily in the necessity for maritime states to protect themselves from the operations of belligerents by defining a belt of marginal sea along their coasts in which they would enforce neutrality. Various principles of delimitation were suggested. However, the rule now generally accepted was first propounded in 1703 by a Dutch jurist, Cornelius van Bynkershoek, who in his *De Dominio Maris Dissertatio* and later works advanced the principle that the dominion of a state extended over the adjacent sea as far, and only as far, as it was able to command and control it from the land. This, he suggested, should be as far as projectiles could be fired by cannon from the shore, so that exclusive possession might be taken of the part so commanded. van Bynkershoek's phrasing of this principle in his *Quaestiones Juris Publici* (1737) "*terrae dominium finitur ubi finitur armorum vis*",* has been quoted by a legion of

* "The dominion of the land terminates where the power of arms ends."

later writers. His doctrine was attractive, conformed with the general practice that ships coming in from the sea saluted the coastal forts when within cannon range, and eventually was widely accepted not merely for purposes of neutrality but also ultimately as defining the extent of adjacent sea over which a maritime state might exert its full sovereignty as its territorial sea.

Various suggestions were made by jurists during the eighteenth century as to the distance from shore which should be regarded as the range of cannon shot for the purpose of defining the width of the territorial sea. Among these was the suggestion first advanced by Galiani in 1782,* and which at the time was fairly accurate, that three geographical miles or one marine league was the range of a cannon shot and should, therefore, be adopted as the limit of the territorial sea. It was this three-mile formulation which, largely under the leadership of the United States, was adopted early in the nineteenth century by both Great Britain† and the United States to define

* Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927) p. 6.

† The first recognition by an English court of three miles as the limit of the marginal neutrality belt was by the eminent admiralty judge, Sir William Scott, afterward Lord Stowell, speaking for the High Court of Admiralty in 1800 in *The Twee Gebroeders*, 3 C. Rob. 162, 165 Eng. Repr. 422. In *The "Anna"*, 1805, 5 C. Rob. 373, 165 Eng. Repr. 809, a case in the same court involving the legality of the seizure of an American ship by an English privateer off the delta of the Mississippi River, Sir William Scott said [pp. 385b-385c]

> "The capture was made, it seems, at the mouth of the River Mississippi, and, as it is contended in the claim, within the boundaries of the United States. We all know that the rule of law on this subject is *'terrae dominium finitur, ubi finitur armorum vis,'* and since the introduction of fire arms, that distance has usually been recognised to be about three miles from shore."

See also Smith, *The Law and Custom of the Sea* (3d ed. 1959) p. 24.

more precisely the cannon-shot rule as to the limits of the territorial sea. Although soon outmoded as the actual range of artillery it proved serviceable and has been widely adopted by other maritime nations.

I find that some time before 1776 the earlier English pretensions to sovereignty over the English seas and with them the claim of the crown to the seabed of those seas had been abandoned and were beginning to be replaced by the new concept of a marginal band of sea within cannon shot of the shore, a distance which was later to be equated with three miles, in which the crown could enforce neutrality, control fishing and exercise other sovereign powers. I find no evidence, however, that the idea of sovereignty over the marginal belt of sea, in a territorial sense, was accepted in either English or American law until well into the nineteenth century. Indeed, in *The Queen v. Keyn*, [1876-77] L. R. 2 Exch. Div. 63, the English Court for Crown Cases Reserved held that even as late as the date of that decision the English realm did not include the marginal sea and England did not claim territorial jurisdiction for its courts in that sea. It would appear that the Territorial Waters Jurisdiction Act, 1878, 41 & 42 Vict. c. 73, § 7, which claimed the open sea within one league of the coast as territorial waters, and which was passed shortly after the decision in *The Queen v. Keyn*, was intended to assert jurisdiction over the area which the court held had not theretofore been claimed, not to repudiate or overrule the decision as the defendant States suggest.* The legal posture was quite similar to that involved in the *California* decision of this Court and the subsequently enacted Submerged Lands and Outer Continental Shelf Lands Acts. I find that this Court stated

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* In *Harris v. Owners of the Steamship Franconia*, [1876-77] L.R. 2 Com. Pl. Div. 173, three judges of the Common Pleas Division of the High Court, all of whom had dissented in *The Queen v. Keyn*, held themselves bound to apply the rule laid down by the

the facts with precise accuracy when in the *California* case, 1947, 332 U.S. 19, it said [p. 32]:

> "At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders . . . But when this nation was formed, the idea of a three-mile belt over which a littoral nation could exercise rights of ownership was but a nebulous suggestion."

I conclude that when in 1776 the American colonies achieved independence and when in 1783 the Treaty of Paris was concluded, neither the British crown nor the colonies individually had any right of ownership of the seabed of the sea adjacent to the American coast, except for those limited areas, if any, which they had actually occupied.

3. The American Colonial Charters

It is the contention of the defendant States that the charters granted by the crown for the American colonies created a territorial sea 100 miles in breadth and conveyed to the companies or individual proprietors to whom the colonies were granted sovereignty and dominion over that sea, which included ownership of the seabed and its resources. The language of the charters certainly did not do so expressly. In the case of 10 of the colonies with which we are here concerned the colonial boundaries were vari-

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majority in that case, the Chief Justice of the Division, Lord Coleridge, saying [p. 177]:

> ". . . It seems to me to be quite plain that the decision in *Reg. v. Keyn* . . . is binding upon all the Courts. The ratio decidendi of that judgment is, that, for the purpose of jurisdiction (except where under special circumstances and in special Acts parliament has thought fit to extend it), the territory of England and the sovereignty of the Queen stops at low-water mark."

ously described as "along the Sea Coasts", Maine, 1639 [Me. et al. Ex. 3]; "from Sea to Sea", New England, 1620 [Me. et al. Ex 11]; "along ye Sea coaste", New Hampshire, 1629 [Me. et al. Ex. 13]; "from the Atlantick and Westerne Sea and Ocean on the East Parte, to the South Sea on the West Parte", Massachusetts Bay, 1629 [Me. et al. Ex. 24]; "and bounded on the south by the ocean", Rhode Island, 1663 [Me. et al. Ex. 156]; "and bounded on the east part by the main sea", New Jersey, 1664 [Me. et al. Ex. 69]; "unto the main Ocean on the East", Maryland, 1632 [Me. et al. Ex. 141]; "all along the said Coast", Virginia, first charter, 1606 [Me. et al. Ex. 41]; "all along the Sea Coast . . . up into the Land throughout from Sea to Sea", Virginia, second charter, 1609 [Me. et al. Ex. 42]; "to the Ocean upon the east side", Carolina, 1629 [Me. et al. Ex. 271]; "all along the sea coast", Georgia, 1732 [Me. et al. Ex. 274]. In the case of New York the patent from King Charles II to the Duke of York in 1664 did not mention the ocean boundary but specifically granted Long Island and other islands and the land from the west side of the Connecticut River to the east side of the Delaware Bay [Me. et al. Ex. 67]. A boundary along the Atlantic Ocean was thus clearly implied. The grant of Delaware in 1682 was described as lying "upon Delaware River and Bay" south to Cape Henlopen, therein called Cape Lopen, which was erroneously assumed to be at the mouth of the Delaware Bay [Me. et al. Ex. 102]. Thus no grant of land fronting the sea was intended.

It appears that when the crown intended to grant territorial ownership of portions of the sea and seabed it used language which was clear and appropriate for that purpose. Thus the Newfoundland charter of 1610 specifically granted the "seas and islands lying within ten leagues of any part of the sea coast" [Me. et al. Ex. 179], and the 1621 grant of Nova Scotia conveyed islands or seas lying near or within six leagues from any part of the mainland on the west, north and east sides and to the south all the seas

and islands within 40 leagues of the shore. The boundaries created by the 1662 charter of Nova Scotia extended "30 leagues into the sea" [Me. et al. Ex. 240, p. 101]. And when the crown in its patent for Delaware in 1682 desired to grant to the Duke of York that portion of the River Delaware and its riverbed lying within 12 miles of the town of Newcastle it conveyed in specific terms "the said River and Soyle thereof" within those limits [Me. et al. Ex. 102].

The defendant States argue, however, that the language of the charters, construed in the light of contemporary legal usage, was sufficient to accomplish these ends. The language upon which the defendant States rely and which appeared in one form of words or another in most of the charters was the grant of all jurisdiction, franchises and royalties by sea and land. I agree, however, with the United States that a grant in such general terms is not an indication that the crown claimed and intended to grant sovereignty and ownership of the adjacent seas, let alone a seabelt 100 miles wide. Jurisdiction, franchises and royalties by sea, as used in the seventeenth and early eighteenth centuries, did not necessarily involve any claim to ownership or sovereignty of the adjacent seas and appear, on the contrary, to have comprehended rights which were independent of such a claim. Certainly jurisdiction in the protective sense did not involve any such claim. I believe this is also true with respect to franchises and royalties. The term royalties, as then used, referred to the prerogative rights of the crown. These had been authoritatively described in the document entitled *De Prerogativa Regis** and included in this regard such things as wreck and royal fish. I do not understand that the sovereignty and ownership of the adjacent seas, seabed and subsoil were included, however. Indeed, as we have seen, under the older English legal tradition the concept of crown ownership of the seabed was unknown and, as I

* 17 Edw. II., Stat. 1, c. 11 [Me. et al. Ex. 729, p. 227].

have found, was first authoritatively asserted in the works of Selden and Hale in the middle years of the seventeenth century after most of the colonial charters had been granted. Moreover, it is very doubtful whether such a general grant of royalties would have been sufficient to pass a specific prerogative right not itself enumerated or in some way identified. Thus it was held in an opinion by the Attorney General and Solicitor General of England to the Commissioners of Trade and Plantations in 1723, Chalmers, *Opinions of Eminent Lawyers* (1st Am. ed. 1858) pp. 141-142, that the charters of New Jersey did not grant royal mines even though the granting clauses included the general terms "mines", "minerals" and "royalties". And to the same effect with respect to a royal grant of franchises, without more, is the opinion of the court in *Attorney-General v. Trustees of the British Museum*, [1903] L.R. 2 Ch. Div. 598, 614.

I think that to hold that by the use of the word "royalties" in these colonial charters the crown conveyed full sovereignty and dominion over the adjacent seas and ownership of the seabed and its resources is to load that single word with far more cargo than it can be asked to carry. Moreover, if the charters did actually grant ownership of the adjacent sea it would not have been necessary for them expressly to convey harbors, havens, ports, bays, inlets and creeks of the sea, as well as fisheries, as was done in one form of words or another in most of them.

The defendant States point to the fact that in some cases the charters also granted islands off the coast of the colony. They contend that a grant of islands off the coast was regarded implicitly either as a conveyance of the intervening seas or as a recognition that the intervening seas likewise passed as a necessary appurtenance to the mainland. I cannot agree. On the contrary, Bartolus, upon whom they rely as having enunciated in the fourteenth century the doctrine that a coastal state was entitled to islands within 100 miles of the coast, stated that while the

coastal state might exercise exclusive protective jurisdiction over the intervening seas, it had no right of sovereignty over those seas, its property right involving only the islands, not the seas.* I find nothing in the English writers of the seventeenth and earlier centuries to the contrary. Moreover, this contention loses its force when we consider that the defendant States themselves have not urged in this case that the third Virginia charter, granted in 1612, which conveyed islands within 300 leagues of the Virginia coast, thereby conferred upon the colony ownership of the sea and seabed seaward to that distance. [Me. et al. Ex. 43]. In the second *Louisiana* case, 1960, 363 U.S. 1, 67-70, 81, this Court held that the statehood-enabling acts for Louisiana and Mississippi which included within those prospective States all islands within three and six leagues, respectively, of their shores, did not embrace within their territory all the waters within that distance as well. This case would appear to be controlling on this point.

The defendant States further contend that the colonial charters should in any event be construed as creating territorial seas and granting sovereignty, dominion and seabed ownership of those seas. They urge this conclusion in the light of the contemporaneous claims of the British crown in the English seas and of the fact that the persons who were involved in asserting and defending those claims were largely the same persons as those responsible for chartering and establishing the American colonies. I cannot agree with this conclusion. The claim of the crown in the seventeenth century to sovereignty of the English seas was, as we have seen, quite different from the modern concept of sovereignty of the three-mile belt of territorial sea and was in *no* sense the precursor of the latter. It involved, at bottom, protection and security, matters of

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* Fenn, *The Origin of the Right of Fishery in Territorial Waters* (1926) pp. 101-102.

vital importance to the insular English nation faced, as it was, on at least two sides by nearby nations which were frequently hostile. The English seas had no defined or established limits and were expanded and contracted as the needs of the times changed and as English naval power, which enforced the crown's claimed sovereignty, was greater or less.

The situation off the coasts of the defendant States in colonial times was quite different. Aside from the fisheries off the coasts of Newfoundland and Nova Scotia, which were very rich and had long been exploited by the French, the Spanish and the Portuguese, as well as by the English, England showed little interest in the North American coastal seas. Compared to those fisheries the fisheries in in the areas southwest of Nova Scotia and Newfoundland were relatively unimportant and in the more southern areas insignificant. Hale pointed out in *De Jure Maris* that occupation by the king's navies and power was necessary for the acquisition of sovereignty and dominion over the adjacent seas and this was the then prevailing idea. The narrow seas adjacent to the coasts of the British Isles had been thus occupied by British naval power for centuries. But very little English naval occupation of the seas adjacent to the Atlantic coast of the English colonies in America had taken place except with respect to the rich fishing areas off the coasts of Newfoundland and Nova Scotia. And it does not appear that there had been any significant occupation of the seabed. The symbolic occupation of the adjacent land areas by English explorers was not enough for that purpose under English law, as Selden pointed out in the portion of his treatise *Mare Clausum* (Nedham's translation), which has already been quoted.

While the colonial charters may well have conferred a protective admiralty jurisdiction over the sea adjacent to the colonies, I am satisfied that they did not convey territorial property rights in that sea or its seabed resources. I am supported in this conclusion by decisions of

the highest courts of two members of the British Commonwealth, Canada and Australia. *Reference Re Ownership of Off-shore Mineral Rights of British Columbia*, [1967] Canada L.Rep. 792, 65 D.L.R. (2d) 353, involved rights to the natural resources of the seabed adjacent to the British Columbia coast which were claimed by the province on the basis of its colonial grants and charters. The Supreme Court of Canada held in that case [p. 373] that the territory granted to the province ended at low-water mark and that it had not acquired and did not have ownership or property in the territorial sea but that these were vested in the Dominion government. In *Bonser v. La Macchia*, 1969, 43 Aust. L.J. Rep. 411, the High Court of Australia had to deal with the question whether the territorial limits of the State of New South Wales extended into the waters adjacent to its coast. The court decided that the territory of the colonies, including New South Wales, ended at the low-water line. Chief Justice Barwick, who was with the majority, in his opinion said [p. 414]:

> "I think it is essential to bear in mind that when colonies were formed all that relevantly occurred was that a specified land mass was placed at the outset under governorship, and later, under the control of a legislature. The instruments setting up the colonies did not in terms include as territory and subject to colonial governorship any part of the bed of the sea or the superincumbent waters."

I am also supported in my conclusion by the decision of the English Court for Crown Cases Reserved in *The Queen v. Keyn*, [1876-77] L.R. 2 Exch. Div. 63, in which the court held that the English courts of admiralty did not have the territorial jurisdiction over crimes committed by foreigners on the high seas, even on the marginal sea adjacent to the English coasts, which the common law

courts exercised within the realm. The realm, as Lord Chief Justice Cockburn pointed out in his prevailing opinion, included only the area within the bodies of the counties and ended at low-water mark on the coast.

The defendant States point out that these cases were decided long after 1776 and are, therefore, they say, irrelevant to our problem. I cannot agree. To the extent that they discuss the state of English law prior to American independence with respect to the claims of the crown to sovereignty over the marginal sea they are highly relevant. For the opinions were delivered by eminent English and Commonwealth judges upon a matter of English law. I have, therefore, given these opinions the authority and respect to which I believe them to be entitled.

The defendant States offered in evidence a number of maps made during the colonial period in which the sea off the Atlantic coast of the American colonies was designated as the British sea or the sea of the British Empire, or portions of it as the sea of Carolina, Virginia, Maryland, New York, New England or Nova Scotia. They urge that these maps are evidence of the recognition of a territorial sea off the Atlantic coast in the colonial period. I cannot agree. The evidence indicates, as I have found, that the concept of a territorial sea did not arise until after the colonial period. Certainly the concept of a sea of the British Empire extending across the ocean from the British Isles to the coasts of the American colonies, which was one of the most extravagant of the Stuart claims, did not involve a claim to territorial dominion. Nor did the designation of portions of the Atlantic Ocean by the names of the colonies the shores of which they washed involve such a claim, any more than did the names given on some of the same maps to the Gulf or Sea of Mexico, the Sea of New Spain, and the Sea of California. Being used by English cartographers these seem obviously to have been employed solely as convenient geographical names with no overtones of territorial sovereignty on the part of the Spanish colonies for

which they were named and so, I believe, were the names used on the maps to which the defendant States refer.*

If it be assumed *arguendo* that the English crown in the seventeenth century claimed sovereignty over the seas adjacent to the American colonies including the ownership of the seabed, and if it be further assumed that this sovereignty and ownership somehow passed to the colonies, the ultimate conclusion must be the same. For so long as the colonies bore allegiance to the crown of England they were subject to the English law as it developed with respect to these matters of sovereignty and ownership. And since, as I have found, the pretensions of the crown to sovereignty of the adjacent seas had been abandoned as a principle of English law before 1776, the colonies would have ceased before independence to have the rights in the adjacent sea which the crown no longer claimed.

The United States contends that assuming *arguendo* that property rights to the marginal seas and seabed were conveyed to the colonies by the original grants and charters, those rights, at least in most of the colonies, reverted to the crown when they became crown colonies before independence. However, I do not find it necessary to discuss this contention since, as will be developed later in this report, those rights, if any, would have passed in any event to the federal government either from the crown under the Peace Treaty of 1783 or from the individual states under the Constitution of 1787.

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* In his *Observations Concerning the Dominion and Sovereignty of the Seas* (1689) [Me. et al. Ex. 202, p. 9], Sir Philip Medows said:

> "Much less do such usual Expressions and Words as these, the *British* Seas, the Sea of *England*, *Our Seas*, import any legal Dominion, but only denote a Geographical Description, as *Mare Flandricum*, *Mare Normannicum*, *Mare Aremoricum*, *Mare Aquitanicum*, and a hundred others do. And nothing more usual, than for Seas to receive their Denominations from the Shoars they rowle upon, and *Our Seas* are the Seas which rowle upon our Shoars."

I need only add that in my view the evidence in the present case fully supports the finding of this Court in the *California* case, 1947, 332 U.S. 19, 32-33, that the English charters which were granted to this nation's settlers did not show a purpose to set apart an ocean belt for colonial or state ownership.

Before leaving the subject of the rights alleged to have been received by the colonies from the crown I note that the State of New York in its answer claimed that in its inception as a Dutch colony it received seabed rights from the crown of Holland. However, no evidence of the grant of any such rights was offered and there is nothing in the record to support the allegation of the State of New York in this regard.

4. The Activities of the Colonies in their Adjacent Seas during the Colonial Period.

The principal activity of the colonies in their adjacent seas related to the fisheries. While the great bulk of this activity centered in the areas of the rich fisheries off the coasts of Newfoundland and Nova Scotia, in which the New England colonists actively participated, there was a modest amount of fishing in the seas off the New England colonies themselves and fishing there and in the richer fisheries to the northeast was an important activity in those colonies. In the case of the colonies farther to the south it was minimal. There is evidence that the New England colonies at times sought to establish exclusive rights to the fisheries in both their inland waters and the waters of the sea off their respective coasts. It would appear, however, from orders of the English privy council issued in 1619 and 1620 that no exclusive grant to the colonies of jurisdiction over the fisheries had been intended by the crown. For by those orders the southern and northern colonies were empowered to fish within each other's limits for the sustentation of their people and also to have

freedom of their shores for drying nets and taking and saving fish. *Acts of the Privy Council (Colonial)* [1621] pp. 40-41 [Me. et al. Ex. 237]. Thus it appears that the ultimate control of the fisheries was retained by the crown and not granted to the colonies. Moreover, the sections of the sea involved, ownership of which might be claimed on the basis of occupation, were the areas immediately adjacent to the shore which were undoubtedly within the three-mile belt that is not in controversy in this case. The New England fishing in inland and nearby waters, as distinguished from the fishing in the rich fisheries in the high seas to the northeast, necessarily involved the use of local shore-based facilities to which to bring and cure the fish. It was for the regulation of fishing which involved these shore-based activities that much of the colonial legislation in evidence was directed. I am satisfied that the colonial legislation relating to fisheries was based on the control which the colonies exercised over their own residents or on their control of activities on or close to their shores or in inland waters. Similarly, legislation prohibiting the pollution of coastal waters and regulating local shipping was directed to the health and welfare of the colonial residents and was not based on any claim to ownership of the sea or seabed.

The defendant States also point to the whaling activities of the colonists. In the early colonial period these were confined to "drift whales", dead whales cast or driven on shore or found within a short distance from the shore and brought ashore. That part of this activity which involved the sea was well within the three-mile belt. It was only in the later colonial period that colonists began to take whales at sea. In this later activity they ranged widely over the oceans far from any area which could conceivably be regarded as under colonial jurisdiction. Likewise the colonial legislation regulating whaling appears to have dealt with the conduct by the colonists of this activity wherever it was carried on, not merely in the adjacent

seas. Whales, as has been noted, were considered royal fish. Their taking was regarded as a royal prerogative and was the subject of the colonial legislation to which I have referred. But since the legislation regulated such taking by local residents of whales wherever they were to be found, the prerogative right under which it was enacted could not have been possessed upon any theory of ownership of the coastal seas.

The only activity of the colonists directly related to the seabed was the sedentary fishery involved in the gathering of shell fish. While this took place largely in shallow protected bays and other inland waters, it is doubtless true that some of it took place in the shallow and tidal waters along the seashore. Such activity might possibly support a claim to the areas in question based on actual occupation of them. But in any event such minimal activity in the seabed was clearly within the three-mile sea belt which is not here in litigation and involved no claim whatever to the deeper waters farther offshore on the continental shelf, with which we are concerned. It certainly did not constitute basis for a claim to the ownership of the ocean and its bed for a distance of 100 miles offshore. Nor does the evidence as to derelict or reclaimed lands support such a claim. These, of course, became a part of the territory of the colony when they emerged from the sea, but there is no evidence whatever of any claim by a colony to the seabed from which they arose. Nor is there evidence that a grant of any portion of the bed of the high seas, as distinguished from land under rivers, bays and similar inland waters, was ever made by any colony. Wreck, treasure trove, flotsam, jetsam and lagan are, of course, not natural resources of the sea or seabed. The scanty evidence of colonial activity with respect to these droits of admiralty does not indicate that claims to these chattels were based on sovereignty and ownership of the seas but rather upon their being found upon or brought to land in the colony.

The defendant States urge that the exercise by the

colonies of admiralty jurisdiction was territorial in nature and was based upon the colonial sovereignty and ownership of the adjacent seas. I am not able to find that this was so. As indicated earlier in this report, the English admiralty jurisdiction was based on a protective concept, not on a territorial one. It was exercised with respect to piracy and with respect to English vessels and subjects anywhere on the high seas. Indeed, as was held in *The Queen v. Keyn*, [1876-77] L.R. 2 Exch. Div. 63, the court did not have territorial jurisdiction even in what is now the narrow three-mile belt of territorial sea. The admiralty jurisdiction granted to the colonies was certainly no more territorial than that of England and was not related to any claim of sovereignty or ownership of the adjacent seas. This is highlighted by the fact that the Maine charter of 1639 [Me. et al. Ex. 3] granted admiralty jurisdiction out to 20 leagues although it only included within the territory of the province islands within five leagues of the mainland. Even the earliest exercises of admiralty jurisdiction by the colonies were subject to the ultimate control of crown officials and review by the High Court of Admiralty in England. And after 1696 vice-admiralty courts established by the crown in each colony assumed complete admiralty jurisdiction. This jurisdiction was that of the crown, not the colonies, since these were crown courts over which the colonies had no control and they enforced English navigation laws and entertained maritime controversies as well as cases of piracy, privateering and felonies committed by English subjects on the high seas. In the eighteenth century these royal courts came to enforce the White Pine Act, the Stamp Act, the Tea Act and other English statutes. The expanded jurisdiction of the vice-admiralty courts and the fact that they sat without juries and were not responsible to the colonies were among the grievances leading to the American revolution.

My conclusion is that colonial activities do not support the claim that dominion and control of the seabed and

subsoil of the adjacent sea beyond the three-mile limit seaward for 100 miles or any lesser distance were claimed or exercised by the colonies.

5. The Effect of Independence and the Ratification of the Constitution

The defendant States urge that upon attaining independence in 1776 they individually succeeded to the maritime territorial sovereignty and dominion over the adjacent seas and seabed both of their predecessor colonies and the British crown. As hereinabove indicated, I am unable to find that the colonies had previously acquired territorial sovereignty and dominion over their adjacent seas and seabed. But if *arguendo* we assume that sovereignty and dominion over the seas and seabed off the American coast were still claimed by the crown in later colonial days, they were, I believe, retained by the crown as prerogatives of its sovereignty over the British colonies. The question remains, however, whether such crown sovereignty and dominion, if any, as then existed over the marginal sea and seabed off the Atlantic coast passed at independence and upon the conclusion of peace with Great Britain to the individual states or to the United States as a national sovereign.

I find that upon the establishment of the First Continental Congress in 1774 the United States of America emerged, first as a federation of colonies and after independence in 1776 as a federation of internally independent but united states, to which newly-formed federation the people of the several states delegated those sovereign powers associated with external sovereignty. This Court has heretofore taken such a view, holding that upon achieving independence the powers of external sovereignty which the British crown had theretofore exercised over the American colonies passed to the national government then represented by the Continental Congress and not to the several states. *United States v. Curtiss-Wright Corp.*,

1936, 299 U.S. 304. And see *Respublica v. Sweers*, Sup. Ct. Pa. 1779, 1 Dall. 41, 44; *Chisholm v. Georgia*, 1793, 2 Dall. 419, 470-471; *Penhallow v. Doane*, 1795, 3 Dall. 54, 80-81, 91. In the *Curtiss-Wright* case this Court said [pp. 316-317]:

> "During the colonial period, those [international] powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, 'the Representatives of the United States of America' declared the United [not the several] Colonies to be free and independent states, and as such to have 'full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do.'
>
> "As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency —namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. See *Penhallow v. Doane*, 3 Dall. 54, 80-81. That fact was given practical application almost at once. The treaty of peace, made on September 23, 1783, was concluded between his

> Britannic Majesty and the 'United States of America.' 8 Stat.—European Treaties—80."

The defendant States assert that the *Curtiss-Wright* case was wrongly decided upon a misconception of the historical facts and they make an elaborate argument in support of the thesis that no national government with even limited powers of external sovereignty came into existence until the Constitution was adopted, the several states being meanwhile completely independent and sovereign in the international and every other sense. There is unquestionably a great diversity of opinion on this question among historians and statesmen of the period and the evidence in the present case is sharply conflicting. But there is ample evidence to support the finding, which I make, that the Continental Congress and its successor in 1781, the Congress of the Confederation, carried on the war for independence, raising and supplying the continental army and navy, that each of them, in turn, established diplomatic relations and made treaties with foreign nations, including the treaty of peace with Great Britain, that they exercised appellate jurisdiction in admiralty, and that they exercised other sovereign powers, such as regulating the coinage and providing a general postal service. In my view, the historical facts as to the pre-Confederation period are fairly summarized by Evarts Boutell Greene in *The Foundations of American Nationality* (1922) as follows [pp. 558-559]:

> "Without a formal constitution, Congress managed to organize extensive departments for war, foreign affairs, and finance, as well as a general postal service. It even organized a court for the trial of appeals in prize cases. From this practical point of view, it can hardly be denied that the Continental Congress, with all its obvious limitations, was a *de facto* federal government, acting for a real political entity known to the outside world as the United States of America."

The Articles of Confederation which came into force in 1781 expressly delegated these and other powers to the Congress of the Confederation, and the Constitution adopted in 1787 continued them in the national government in the "more perfect union" which it was its purpose to accomplish. I conclude that there is ample support for the accuracy of the historical facts upon which this Court based its decision in the *Curtiss-Wright* case.

Among the powers acquired by the national government at independence and through the Treaty of Peace were such sovereignty and dominion, if any, over the American coastal seas and seabed as had theretofore been vested in the British sovereign. This Court decided in *Martin v. Waddell*, 1842, 16 Pet. 367, and reaffirmed in *Massachusetts v. New York*, 1926, 271 U.S. 65, that rights to the soil under navigable waters inhere in the sovereign and pass to a new sovereign upon a transfer of sovereignty. While *Martin v. Waddell* involved inland waters in New Jersey and *Massachusetts v. New York* involved waters in Lake Ontario within the boundaries of New York, the principle which they annunciate is equally applicable to the soil under the territorial sea. *United States v. Texas*, 1950, 339 U.S. 707, 717. It necessarily follows that if the British crown, prior to independence, did claim sovereignty and dominion over the sea and seabed off the Atlantic coast beyond the territorial limits of the states that sovereignty and dominion passed after independence to the national government in which the powers of external sovereignty were reposed and not to the defendant States. This result, moreover, is consonant with the doctrine of *United States v. California*, 1947, 332 U.S. 19, and the cases which followed it, that the possession of rights in the adjacent seas and seabed is an incident of that international or external sovereignty which, as I have found, was reposed in the national government from the time of independence.

Following the end of the war for independence the Congress of the Confederation negotiated the Peace Treaty of 1783 with the British government through commissioners which the Congress appointed and instructed. In these negotiations, in addition to the lands west of the Appalachian Mountains, the commissioners were particularly concerned with preserving the common right of Americans to the rich fisheries of the seas off Newfoundland and Nova Scotia. The Treaty secured these fishing rights to all Americans, not merely to the citizens of particular states. The Treaty also granted the United States all islands within 20 leagues of its shores. Since that distance is greater than that specified with respect to coastal islands in the charter grants of most of the colonies, but less than that mentioned in the Virginia charter, it is clear that the commissioners were seeking a uniform island claim for the United States rather than pressing the separate island claims of the individual states. The defendant States assert that this grant of islands included a grant of the intervening sea and seabed which extended the territorial limits of the coastal states out 20 leagues into the sea, but, as this Court said in *United States v. Louisiana*, 1960, 363 U.S. 1, 68, "it is hardly conceivable that this provision of the Treaty was intended to establish United States territorial jurisdiction over all waters lying within 20 leagues (60 miles) of the shore."

The United States contends that if the defendant States did obtain rights to the sea and seabed adjacent to their coasts either through their early charters and grants or from the crown in 1776 when they became independent, neither of which I have found to be the fact, they lost these rights to the United States through their ratification of the Constitution of 1787 and the exercise by the United States of its constitutional authority over foreign affairs. Certain it is that any doubt as to whether after independence the United States under the Continental Congress and under the Congress of the Confederation possessed the

attributes of external sovereignty, including the power to conduct foreign affairs, was resolved and those attributes were confirmed in the federal government by the Constitution of 1787. If we assume, *arguendo*, that the defendant States did acquire seabed rights, as they claim they did, and retained them during the Confederation period, I think that it would have to be concluded that these rights were lost to the United States upon their ratification of the Constitution and that the contention of the United States in this regard would have to be upheld. For, as we have seen, this Court has ruled that such rights belong to the holder of external sovereignty, *United States v. California*, 1947, 332 U.S. 19, 38-39; *United States v. Texas*, 1950, 339 U.S. 707, 718, and pass with the transfer of sovereignty from one holder to another, *Massachusetts v. New York*, 1926, 271 U.S. 65, 89. Moreover, in the *Texas* case this Court held that this is exactly what happened to Texas' claims to seabed rights when it was admitted into the union.

6. THE POST-1787 PERIOD

(a) Recognition of the territorial sea

As I have heretofore indicated, I do not find that either the colonies or the crown made any claim to sovereignty over or ownership of the sea or seabed off the coast of the colonies in the period immediately prior to independence. Accordingly, no such right passed either to the states or to the federal government at independence or under the Treaty of Peace. But as we have seen the concept of a narrow belt of marginal sea within cannon shot of the shore, later equated with three miles, over which the littoral state could exercise jurisdiction to enforce its neutrality and for other purposes had already then begun to be recognized. The United States very early in its national existence took a leading part in advocating and developing this concept as a three-mile belt of territorial sea within which the adjacent state could enforce neutrality and, as

the doctrine developed later on, exercise virtually unlimited jurisdiction and sovereignty, subject to the right of innocent passage by peaceful foreign vessels, and beyond which the high seas were international waters open to all.

It is true that both Great Britain and the United States have asserted by statute the right to exercise jurisdiction over foreign vessels beyond the three-mile limit, usually out to a distance of 12 miles, to prevent smuggling in violation of their customs laws and to enforce sanitary measures. But these statutes which authorized the exercise of jurisdiction for a special protective purpose only, did not extend the territorial sovereignty of the maritime state to that distance.* It is also true that not all maritime states have limited their own territorial sea to a belt of three miles. Great Britain, the United States and most other maritime nations have adhered to the three-mile limit, however. And it is the fact that during the nineteenth and twentieth centuries the comparatively narrow belt of marginal sea which I have been discussing came to be generally recognized by the nations and in international law as a territorial sea belonging to the adjacent state and in which it could exercise as full sovereignty and dominion as in its upland territory, subject to the right of free passage by peaceful foreign vessels, but beyond which the high seas were common and free to all.† And since under our federal system the United States is the holder of external sovereignty, it was the federal government rather than the states which acquired paramount rights in the newly-recognized territorial sea and full dominion over the

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* The difference between the exercise on the seas of absolute jurisdiction within its territory and of the power to protect itself from injury beyond its territorial limits was early recognized. Marshall, C. J., in *Church v. Hubbart*, 1804, 2 Cranch 187, 234.

† *Convention on the Territorial Sea and the Contiguous Zone Part I*, in force September 10, 1964, 15 U.S.T. Pt. 2 pp. 1606. 1608 et seq.

resources of the seabed under it. *United States v. California*, 1947, 332 U.S. 19, 38-39.

There is in this record evidence of a number of instances in which one or another of the defendant States have asserted rights to the seabed of the marginal sea within the three-mile territorial limit, most of them adjacent to the shore. The defendant States point out that upon various occasions prior to 1947 one or another of them had executed deeds of portions of the seabed of the marginal sea to the United States at the request of officers of the federal government. But, as this Court held in *United States v. California*, 1947, 332 U.S. 19, 39-40, in the absence of a congressional surrender of title such action by its agents could not preclude the United States from asserting its legal rights. Moreover, as the Court pointed out in that case, it was not until the California oil issue began to be pressed in the 1930s that either the states or the federal government had any reason to focus on the question which of them had paramount rights in the three-mile belt. In any event the right to exploit this area, having been confirmed to the defendant States by the Submerged Lands Act, is not involved in the present case. Moreover, the exercise by those states of rights in the three-mile marginal belt defined by the United States and generally recognized as the territorial sea certainly does not imply a claim to an indefinite area seaward of the territorial sea. And I have been referred to no instance in which a defendant State, prior to the discovery of oil and gas under the bed of the continental shelf, made any claims to, let alone occupied, the seabed beyond the three-mile limit. Indeed, it is an admitted fact that from the foundation of the union until very recent times there was no discovery or indication of any exploitable resources in the Atlantic continental shelf more than three miles from the coasts of the defendant States which might have been the basis for such a claim.

It is clear that the extent and limits of the territorial sea were indefinite in the beginning, just as had been the limits of the earlier concept of the narrow seas. Since the territorial sea is physically a part of the high seas, an area in which all maritime nations have always been particularly interested, the maintenance of sovereignty over it has always involved the foreign relations and defense activities of the maritime state in a very special sense. Its extent and limits have been dependent upon the successful conduct by that state of its foreign relations and defense. Accordingly, even if we assume *arguendo* that the defendant States did acquire in some manner and continued to have jurisdiction and sovereignty over the marginal seas, the geographical extent and limits of that jurisdiction were necessarily subject to the actions of the federal government in defining the extent of the American territorial sea in the course of exercising the foreign relations and defense powers which the states had entrusted to it. As we have seen, the federal government did define those limits as three miles seaward of the coast and secured very general international acceptance of that definition. I am satisfied that by this action the federal government effectively limited to the three-mile belt any possible claim of the defendant States to the resources of the seabed adjacent to their coasts. The defendant States argue, however, that in so doing the federal government took part of their territory, which it had no constitutional power to do. But defining in the exercise of its constitutional powers an indefinite and previously undefined limit of the claim of a state of the union in the sea is a very different thing from detaching from that state a tract of upland which is clearly within its previously recognized and established boundaries.

(b) The new continental shelf doctrine

President Truman's Proclamation of September 28, 1945, 59 Stat. 884, first claimed for the United States jurisdiction and control over the natural resources of the

subsoil and seabed of the continental shelf contiguous to the coasts of the United States. It opened a new chapter in the international law applicable to this area. For it, and the Convention on the Continental Shelf, in force June 10, 1964, 15 U.S.T. Pt. 1, p. 471, which followed it, assured to each coastal nation the exclusive right to explore and exploit the resources of the seabed and subsoil of the adjacent continental shelf beyond the territorial sea regardless of whether or not the nation had actually occupied or exploited the seabed and subsoil, the resources of which it claimed. Within the limits of the territorial sea that right had come to be generally recognized. But prior to the Truman Proclamation, it was the accepted doctrine of international law, as we have seen, that to be recognized as valid, claims to exclusive rights to the resources of the seabed at least beyond the territorial sea must be based on long enjoyment (prescription) or on actual exploitation (occupation). The state of international law on this subject prior to 1945 is fairly and accurately summed up by Professor Waldock in *The Legal Basis of Claims to the Continental Shelf*, 36 Grotius Society (1951) 115, 118, from which I have already quoted.

The arbitral decision in the *Matter of an Arbitration Between Petroleum Development (Trucial Coast) Ltd., and the Sheikh of Abu Dhabi*, 1 International and Comparative Law Quarterly (1952) 247, appears to be the only judicial precedent relating to the right of a coastal state to seabed resources outside its territorial limits which had been decided before the Convention on the Continental Shelf came into effect. The case involved a claim by Petroleum Development (Trucial Coast) Ltd. to petroleum resources of the seabed beyond the territorial waters of Abu Dhabi under a concession granted in 1939 by the ruler of that sheikhdom. In that case it was argued that the Truman Proclamation and the similar proclamations by a number of other nations were the expressions of principles which were already a part of international law and should, there-

fore, be applied to uphold the exclusive rights of the Sheikh to the seabed of the continental shelf adjacent to the territorial waters of his sheikhdom. It was also argued that the established rule of international law was set out in draft articles on the subject which had been prepared by the International Law Association and the International Law Commission for the consideration of the then impending United Nations Conference on the Law of the Sea. The umpire, Lord Asquith of Bishopstone, rejected these contentions, holding that the proclamations and draft articles thus relied on were merely tentative and exploratory and that the proposition that the coastal state has exclusive rights in the bed of the continental shelf had not yet assumed the definitive status of an established rule of international law. Lord Asquith accordingly held that under the then existing rule of international law the Sheikh of Abu Dhabi did not have exclusive rights in 1939 to the resources of the subsoil of the Continental Shelf beyond his territorial sea which could have passed in that year under his concession to Petroleum Development (Trucial Coast) Ltd. The defendant States argue that since this proceeding was merely an arbitration and not a judicial proceeding it is not evidence of the pre-1945 international law on the subject. I cannot agree. On the contrary, I am satisfied that international arbitrations such as this are properly held to be evidence of the existence of the rules of international law which they apply. As such they have been relied on frequently by the courts. Thus the Abu Dhabi arbitration itself was cited by the Supreme Court of Canada in *Reference Re Ownership of Off-shore Mineral Rights of British Columbia*, [1967] Canada L.Rep. 792, 65 D.L.R. (2d) 353, 376, for the proposition that in 1939 the rule that coastal states had exclusive rights to the bed of the continental shelf did not exist as a legal doctrine, the very proposition with which we are here concerned.

The defendant States urge that even if they had no rights in the seabed of the continental shelf prior to 1945 and the exclusive rights thereto claimed by the Truman Proclamation sprang into existence for the first time upon its promulgation, as I find that these rights did, they should nonetheless prevail, under our constitutional system, in view of their sovereignty over the adjacent coast. In the light of the Ninth and Tenth Amendments and more basically in view of the nature of our federal system, they argue, the federal government has only such powers, sovereignty and territory as have been granted to it by the states, all residual powers, sovereignty and territory being retained by the states. This proposition must, of course, be conceded. The real question, however, is whether the powers, sovereignty and territory granted to the federal government included these newly claimed rights in the seabed of the continental shelf. But this Court in *United States v. California*, 1947, 332 U.S. 19, 34-35, has held that the rights to the seabed of the territorial sea belong to the federal government under the Constitution rather than to the states, and in *United States v. Louisiana*, 1950, 339 U.S. 699, 705, that *a fortiori* the ocean beyond the three-mile belt of territorial sea is in the domain of the nation rather than that of the separate states. The defendant States concede that in order to sustain their position in this regard this Court must overrule those cases, which they urge were wrongly decided. However, if this is to be done it must be done by the Court itself, not by its special master. Unless and until these cases are overruled I regard myself as bound by the rule of law which they enunciate. I, therefore, cannot accept this contention of the defendant States.

(c) Validity of the Submerged Lands Act

The defendant States further argue that they are, at the very least, constitutionally entitled to seabed rights within their recognized historic boundaries out to three

leagues from the shore. They base this argument upon the fact that under the Submerged Lands Act such rights, upon proof of historic boundaries, were granted to the states bordering the Gulf of Mexico and that to deny the Atlantic states a similar right to the resources of the continental shelf within historic boundaries out to three leagues is to discriminate against them without a rational basis and thus to deny them their constitutional right to an equal status in the union with the Gulf states. With respect to this contention, it is sufficient to point out that the "equal footing" doctrine applies only to political rights, not to property rights. The seabed rights which the defendant States claim are clearly property rights which are subject to such disposition as the Congress of the United States in the exercise of its unreviewable discretion sees fit to make of them. It was expressly so held by this Court in *Alabama v. Texas*, 1954, 347 U.S. 272. That case is conclusive on this point, unless overruled, as the defendant States urge that it should be. But here again this is for the Court itself, and not for its special master, to decide. Moreover, in any event the defendant States have made no showing that they ever expressly claimed seaward boundaries of three leagues or more. The most that can be said in this regard is that some of them at various times since 1789 have enacted statutes establishing a three-mile boundary in the marginal sea* the same boundary which the Submerged Lands Act confirmed to all of them in 1953.

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* *Massachusetts* 1859 (Stat. 1859, ch. 289, as amended, Mass. Gen. Laws Ann. ch. 1, § 3); *Rhode Island* 1872 (R.I. Gen. Stat. 1872, Tit. I, ch. 1, § 1); *New Hampshire* 1901 (N. H. Laws 1901, c. 115); *New Jersey* 1906 (N. J. Stat. Ann. Tit. 40, § 18-5); *Georgia* 1916 (Acts 1916, p. 29, Ga. Code Ann. § 15-101). See *United States v. Louisiana*, 1960, 363 U.S. 1, 21 fn. 22. See also North Carolina 1947 Sess. L., c. 1031, N. C. Gen. Stat. § 141-6.

7. The Individual Defenses of Rhode Island and North Carolina

These two defendant States urge, as do the others, that they became wholly independent states in 1776 and, as such, entitled to the seabed rights they claim. With this contention I have already dealt. In the cases of Rhode Island and North Carolina, however, there is an additional factor. Neither of these two States had ratified the Constitution by March 4, 1789 when the government which it established became operative. In fact North Carolina did not ratify the Constitution until November 21, 1789 and Rhode Island not until May 29, 1790. The point urged is that, in any event, during those intervening periods of time each of these States was wholly independent, both internally and externally, since the confederation of which they had been members had ceased to exist and they had not yet joined the new union. I do not think that this contention is valid. There is no evidence that either Rhode Island or North Carolina had withdrawn from the union of states formed by the Articles of Confederation of which it was a member, or that the union had been dissolved by the Constitution which was designed not to dissolve but to perfect it. The Congress during this period recognized North Carolina and Rhode Island as a part of the United States and in its legislation distinguished them from foreign states, kingdoms and countries. Act of July 31, 1789, 1 Stat. 48 §§ 38, 39; Act of September 16, 1789, 1 Stat. 69, §§ 2, 3. There is no evidence that Rhode Island or North Carolina were recognized as externally sovereign States by foreign nations then or at any later time. Moreover, even if Rhode Island and North Carolina, like Texas, had possessed external sovereignty which included seabed rights, those rights would have passed to the United States when those States ratified the Constitution, just as happended in the case of unquestionably independent Texas. *United States v. Texas*, 1950, 339 U.S. 707.

8. The Individual Defense of Georgia

Georgia asserts as an individual defense that it is entitled to the resources of the seabed beyond three miles under its boundary settlement agreement of 1802 with the United States by which it ceded its western lands to the United States and the United States in turn ceded to Georgia its title to any lands within the United States lying east of those western lands and south of the southern borders of Tennessee, North Carolina and South Carolina. I have fully discussed this defense earlier in this report in connection with my consideration of the pending motion of the United States for judgment and need not repeat that discussion here. Suffice it to say at this point that I find no merit in this contention.

9. Request for Accounting

In the complaint the United States alleges that the State of Maine has purported to grant exclusive oil and gas exploration and exploitation rights in submerged lands in the Atlantic Ocean in the area in controversy and it asks for an accounting for all money derived therefrom. In its answer the State of Maine admits that it has granted to a private corporation a conditional license to explore for minerals, oil and gas in, and to take the same from, certain submerged lands in the Atlantic Ocean some portion of which may lie more than three miles seaward from the coast line. It does not appear, however, that the corporation to which the State of Maine granted this license has actually engaged in any exploration or exploitation under it or made any payments under it to the State. Nor has the United States at the hearing or in its briefs pressed its request for an accounting. It would, therefore, appear that no accounting need be ordered at this time.

D. CONCLUSIONS

Throughout the preceding discussion I have stated my findings with respect to what appear to be the pertinent facts involved in the proceeding. I shall, therefore, not restate these findings at this point, but merely state the conclusions to which I have been led by my consideration of the facts and the relevant principles of law involved.

1. English law prior to the accession of the Stuart dynasty in 1603 did not recognize ownership by the crown of the seabed and subsoil of the narrow or English seas.

2. The sovereignty claimed by the crown prior to 1603 in the English seas was protective and not territorial in nature.

3. In the seventeenth century under the Stuart dynasty the crown not only claimed sovereign jurisdiction but also a right of property in the English seas and their seabed and these claims were recognized at that time in English law.

4. Claims of the crown to exclusive fishery rights in the English seas did not, except during the Stuart era, involve claims to the ownership of the seabed of those seas.

5. The jurisdiction in admiralty claimed and exercised by the English crown on the high seas in the centuries prior to 1776 and the right of the flag enforced by it were of a protective nature and were not exercised territorially in the so-called English or narrow seas.

6. The rights of the crown to emerged or relicted lands and to royal fish, wreck, treasure trove, flotsam, jetsam and lagan were based, during the centuries preceding 1776, on its claim, under its prerogative, to ownerless property, although, during the Stuart period, some of these rights were also based on the claim of the crown to ownership of the seabed.

7. Following the end of the Stuart dynasty in 1688 and in the course of the eighteenth century, the right of the crown to the sovereignty of the English seas became more and more an anachronism and it was allowed to die out from practical affairs, so that before 1776 it had become obsolete and had been abandoned as a principle of English law. With it disappeared the earlier claim of the crown to ownership of the seabed of the English seas.

8. In the eighteenth century there arose a wholly new concept of a comparatively narrow belt of marginal sea lying within the range of cannon shot from the shore in which a coastal state might exercise sovereignty to enforce its neutrality and for other purposes. By 1776 this concept was beginning to be recognized in English law.

9. Early in the nineteenth century the width of this marginal or territorial sea, as it came to be called, was defined by the United States, Great Britain and many other maritime nations as three geographical miles and within it the sovereignty of the coastal nation is now recognized as supreme, subject to the right of innocent passage by peaceful foreign vessels.

10. Except for the extravagant claims of the Stuart kings to ownership of the entire seabed of the English seas, claims which died with the end of their dynasty, the law of England prior to 1783, in conformity with international law, recognized claims to the ownership of the seabed only on the basis of prescription or actual occupation by the claimant.

11. During the nineteenth and twentieth centuries ownership of the bed of the territorial sea came to be generally recognized without regard to prescription or actual occupation.

12. The charters given to the companies and individuals who were the proprietors and founders of the colonies which later became the defendant States granted

territory on the mainland bounded by the Atlantic Ocean but did not grant maritime sovereignty or dominion over a territorial sea, a concept then unknown, or property rights in the seabed or its resources.

13. The colonial activities in their marginal seas prior to 1776 were almost entirely limited to fishing in waters close to shore involving the use of shore-based facilities and to the regulation of these and other activities as carried on by the colonists therein. They did not involve any claim to ownership of the seabed.

14. The admiralty jurisdiction exercised by colonial admiralty courts prior to 1696 and by royal courts of admiralty sitting in the colonies after that date was not territorial in nature.

15. Colonial law and practice prior to 1776 do not support the claim that property rights to the seabed of the marginal sea seaward for 100 miles or any lesser distance had been granted to the colonies or that such rights were exercised by them except in a few cases where portions of the seabed within the three-mile limit were actually occupied.

16. When in 1776 the American colonies achieved independence and when in 1783 the Treaty of Peace was concluded neither the crown nor the colonies individually had any right of ownership of the seabed of the sea adjacent to the American coast, except for those limited areas, if any, which they had actually occupied.

17. From and after July 4, 1776, the date of independence, the United States of America, under the Continental Congress, under the Articles of Confederation and under the Constitution, constituted a union of internally independent states with a national government to which were delegated certain powers including the powers associated with external sovereignty such as the conduct of foreign relations, of defense and of foreign commerce.

18. If the English crown in 1776 had any remaining rights to sovereignty of the marginal seas and ownership of the seabed off the coasts of the colonies, which I do not find that it did have, those rights would have passed at independence and under the Treaty of Peace of 1783 to the national government as the holder of the external sovereignty of the United States and not to the several states.

19. If the states in 1789 had any rights to sovereignty of the marginal sea and ownership of the seabed off their coasts which they had received in any manner, which I do not find that they did have, those rights would have been lost to the national government upon their ratification of the Constitution.

20. Sovereign jurisdiction of the three-mile belt of territorial sea and ownership of its seabed became vested in the United States, rather than in the states, when, after 1776, the concept of the territorial sea was recognized and its extent defined by the national government.

21. The preponderance of the evidence in the present proceeding confirms the accuracy of the following statements of historical fact made by this Court in *United States v. California*, 1947, 332 U.S. 19, 31-33:

> "It would unduly prolong our opinion to discuss in detail the multitude of references to which the able briefs of the parties have cited us with reference to the evolution of powers over marginal seas exercised by adjacent countries. From all the wealth of material supplied, however, we cannot say that the thirteen original colonies separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it. *Cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316.

"At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders. Some countries, notably England, Spain, and Portugal, had, from time to time, made sweeping claims to a right of dominion over wide expanses of ocean. And controversies had arisen among nations about rights to fish in prescribed areas. But when this nation was formed, the idea of a three-mile belt over which a littoral nation could exercise rights of ownership was but a nebulous suggestion. Neither the English charters granted to this nation's settlers, nor the treaty of peace with England, nor any other document to which we have been referred, showed a purpose to set apart a three-mile ocean belt for colonial or state ownership. Those who settled this country were interested in lands upon which to live, and waters upon which to fish and sail. There is no substantial support in history for the idea that they wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of its wealth.

"It did happen that shortly after we became a nation our statesmen became interested in establishing national dominion over a definite marginal zone to protect our neutrality. Largely as a result of their efforts, the idea of a definite three-mile belt in which an adjacent nation can, if it chooses, exercise broad, if not complete dominion, has apparently at last been generally accepted throughout the world, although as late as 1876 there was still considerable doubt in England about its scope and even its existence. See *The Queen v. Keyn*, 2 Ex. D. 63. . . ."

22. Prior to the Proclamation of September 28, 1945 by President Truman, 59 Stat. 884, rights to the resources of the seabed beyond territorial waters could be obtained only

on the basis of prescription or actual occupation and neither the United States nor the defendant States had made any such claim.

23. The Truman Proclamation of 1945 for the first time claimed for the United States jurisdiction and control over the natural resources of the subsoil and seabed of the continental shelf beyond the three-mile limit of the territorial sea off the coasts of the United States. The Proclamation initiated a new rule of international law in this regard.

24. This claim was validly made by and on behalf of the United States under its powers of external sovereignty and did not inure to the individual benefit of any of the Atlantic coastal states.

25. By the Submerged Lands Act of May 22, 1953, 67 Stat. 29, the United States confirmed to and vested in the defendant States the seabed and the resources of the territorial sea within three geographical miles of their respective coastlines. The right to the resources of the seabed in these areas being now vested in the defendant States, claims with respect thereto are not involved in this proceeding.

26. The Submerged Lands Act of 1953 validly limited to a width of three geographical miles the marginal band of sea the seabed of which it confirmed and vested in the defendant States, even though the Act granted to the states situated on the Gulf of Mexico seabed rights within their recognized historic boundaries out to three marine leagues.

27. Under the Truman Proclamation, the Outer Continental Shelf Lands Act of 1953, and the Convention on the Continental Shelf of 1964, the United States has the right, as against the defendant States, to the resources of the seabed and subsoil of the continental shelf beyond the three-mile limit of territorial sea off the Atlantic coast.

28. The States of Rhode Island and North Carolina were not wholly independent nations and did not have external sovereignty during the period between the operative date of the federal government under the Constitution and the subsequent dates when they, respectively, ratified the Constitution.

29. The State of Georgia did not acquire the resources of the seabed under its boundary settlement of 1802 with the United States.

30. Since it does not appear that any exploration or exploitation of the bed of the continental shelf has been carried on by the licensee of the State of Maine or that any payments have been made by it to that State, an accounting by that State to the United States in that regard is not now required.

31. The United States is entitled to judgment in this proceeding.

32. The costs of suit, including the expenses of the special master, should be borne by the twelve defendant States in equal shares.

E. RECOMMENDED DECREE

In accordance with my findings and conclusions I recommend the entry of a decree in the following form:

It is now Ordered, Adjudged and Decreed as follows:

1. The United States is entitled as against the defendant States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia to that portion of the seabed and subsoil, and the natural resources thereof, underlying the Atlantic Ocean and lying more than three geographical miles seaward from the coast line, that is, the line of ordinary low-water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, out to the edge of the continental shelf.

2. The costs of this suit, including the expenses of the special master, shall be borne by the twelve defendant States in equal shares.

The foregoing report is respectfully submitted.

ALBERT B. MARIS
Special Master

Philadelphia, Pa.
August 27, 1974

F. APPENDIX

1. Consolidated and Revised Procedural Order as Amended

The special master having entered prehearing orders on July 28, 1970, October 27, 1970, and January 8, 1971 and an order on May 24, 1971 amending the order of July 28, 1970 in the above entitled case, and the Supreme Court having on June 28, 1971 severed the State of Florida from the case for all purposes so that that state is no longer a party, it is appropriate to revise the said orders to reflect the severance of the State of Florida from the case and to consolidate them into a single procedural order. To that end It Is Ordered:

Testimony of Expert Witnesses; Preparation

1. The testimony in chief of expert witnesses, including their statements of their training, experience and qualifications, shall be reduced to writing, preferably in question and answer form, and copies thereof shall be furnished to the special master and to counsel for the other parties not less than four weeks prior to the commencement of the hearing at which the witnesses are to be called upon to testify. All parties entitled to cross-examine a witness shall have the right to defer his cross-examination for a reasonable period of time, to be determined in each instance by the special master, in order to afford such parties an opportunity to study the testimony of the witness and to prepare for his cross-examination, except where such an opportunity is manifestly not required. All parties entitled to cross-examine a witness shall notify the proponent and the special master not later than one week prior to the commencement of the hearing at which his testimony is to be given whether they expect to cross-examine the witness at the conclusion of his direct testimony or to defer his cross-examination until a later session.

Exhibits; Documents; Distribution

2. Copies of exhibits proposed to be offered in evidence by a party or parties shall be furnished to counsel for the other parties at least four weeks prior to the commencement of the hearing at which the exhibits are to be offered in evidence. An exhibit comprising a handwritten document shall be accompanied by a typewritten or printed copy and an exhibit comprising a document written in a language other than English shall be accompanied by an English translation, certified in each instance by the custodian or translator, if practicable. In the case of exhibits which can readily be reproduced the United States shall furnish one copy to counsel for each of the states and the states shall furnish two copies to counsel for the United States and one copy to counsel for each of the other states. In the case of an exhibit which cannot be reproduced in numbers without undue expense, a single copy may be furnished to opposing counsel (in the case of the states to Covington and Burling, Esquires, common counsel for nine of the states, who have been designated by all of the states to receive such exhibits on their behalf), provided it is so furnished at least one month prior to the commencement of the hearing at which the exhibit is to be offered in evidence. All parties offering exhibits, other than those referred to in the fourth sentence of this paragraph, shall furnish one copy to the special master in addition to the original exhibit.

3. The States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland and Virginia having retained Covington and Burling, Esquires, of Washington, D. C., as common counsel in this suit, prepared testimony, proposed exhibits and other documents and papers required to be furnished to counsel for other parties shall be furnished to Covington and Burling, Esquires, as well as to the Attorneys General of the nine states which they represent.

4. Except with respect to an exhibit referred to in the fourth sentence of paragraph 2, at the time an exhibit or other document is submitted to the special master by any party or parties, the party or parties submitting it shall furnish a copy to counsel for each other party (two copies to counsel for the United States), unless copies thereof have been furnished to counsel previously as provided by this order.

5. All copies of exhibits or other documents furnished to counsel for other parties under the provisions of this order shall be of the same kind and quality as the exhibits or documents which are submitted to the special master.

Designation of Exhibits

6. Exhibits shall be numbered by the parties for identification prior to being furnished to opposing counsel and offered in evidence. Exhibits offered in evidence by the United States shall be so designated and shall be numbered consecutively thus: "United States Exhibit No. ". Exhibits offered in evidence by the parties shall be designated with the name of the party and shall be numbered consecutively for each party thus: "Maine Exhibit No. ", or as the case may be. Exhibits offered in evidence by Covington and Burling, Esquires, as common counsel for nine of the parties shall be designated thus: "Maine et al Exhibit No. ", and shall be numbered consecutively.

Authentication of Exhibits; Effect; Objections

7. Copies of documents may be offered for introduction into evidence in lieu of originals. The authenticity of a document or the accuracy of a copy need not be proved if copies of the document have been submitted to all counsel for the parties as provided in paragraph 2 and if no party, at least two weeks prior to the commencement of the hearing at which the document is to be offered in

evidence requests the proponent to prove the authenticity of the document or the accuracy of the copy. Any party may, however, controvert by evidence the authenticity of such a document or the accuracy of a copy of it at any time.

8. An exhibit offered in evidence by a state or states shall be regarded as offered on behalf of all the states unless in the case of a particular exhibit a state notifies counsel for all the other parties and the special master that it does not rely upon the exhibit.

9. An objection made by one party to the testimony of a witness or to the admission of an exhibit shall be available to all other parties on the same side of the case without specific reference to them or reservation by them of the right to rely thereon. The special master will ordinarily rule upon objections to evidence or exhibits at the time the objections are made with leave to the objecting party, in case an objection is overruled, and if so advised, to make a motion to strike the testimony or exhibit after the examination and cross-examination with respect thereto have been completed.

Judicial Notice

10. A party proposing to ask the special master to take judicial notice of a document or other fact shall notify counsel for the other parties of such intention at least two weeks prior to the commencement of the hearing at which the request is to be made. If judicial notice of a document is involved, the notification to counsel for the other parties shall be accompanied by a copy of the document, if practicable.

11. All documents that are subject to judicial notice, copies of which are furnished to the special master and to counsel for convenience, shall be designated in the same manner as documents which the parties seek to offer for

introduction into evidence. The designation as exhibits of documents that are subject to judicial notice will in no way enhance their probative effect, however.

Reporter; Transcript of hearings

12. The parties have agreed to employ a competent reporter to report the special master's hearings. The parties will make their own arrangements with the reporter for the number of copies of the transcript, daily or otherwise, which each of them desires for its own use. In addition, the parties will arrange with the reporter to provide one copy of the transcript for the use of the special master in addition to the original provided for ultimate filing in the Supreme Court. The parties have agreed that Bruce C. Rashkow, Esq., and Elias Abelson, Esq., shall serve as a committee to supervise the work of the reporter and to provide for making necessary corrections in the preliminary transcript. All proposed corrections of the preliminary transcript shall be submitted to the committee within such time as may be directed by the committee or ordered by the special master.

Business Committee

13. The parties have agreed that physical arrangements, necessary personnel, financial arrangements and other administrative matters involved in the conduct of the hearings in these cases shall be dealt with on their behalf by a business committee consisting of Bruce C. Rashkow, Esq. for the United States, Robert G. Fuller, Jr., Esq. for the State of Maine, David H. Souter, Esq. for the State of New Hampshire, Kevin P. Curry, Esq. for the State of Massachusetts, W. Slater Allen, Jr., Esq. for the State of Rhode Island, Julius L. Sackman, Esq. for the State of New York, Elias Abelson, Esq. for the State of New Jersey, Jerome O. Herlihy, Esq. for the State of Delaware, Henry R. Lord, Esq. for the State of Maryland, Gerald L. Baliles,

Esq. for the State of Virginia, Jean A. Benoy, Esq. for the State of North Carolina, Edward B. Latimer, Esq. for the State of South Carolina, and Alfred L. Evans, Jr., Esq. for the State of Georgia. Robert G. Fuller, Jr., Esq. has been appointed chairman and Bruce C. Rashkow, Esq. co-chairman of the committee. It has been further agreed that the special master may confer from time to time with respect to any such matters with the chairman or co-chairman of the committee who will take them up with the committee for action.

Requests for Findings and Conclusions
[as amended March 7, 1974]

14. At times hereafter to be fixed by the special master following the close of the hearings, the parties shall submit to the special master their requests for findings of fact and conclusions of law and the special master before filing his report with the Court may submit a draft of his proposed findings of fact to counsel for all parties for the purpose of receiving their suggestions with respect thereto.

Prior orders rescinded

15. The prehearing order of July 28, 1970, as amended by the order of May 24, 1971, the second prehearing order of October 27, 1970, and the third prehearing order of January 8, 1971 are rescinded.

ALBERT B. MARIS
Special Master

August 27, 1971

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE, *et al.*,

Defendants.

EXCEPTIONS AND BRIEF OF THE COMMON COUNSEL STATES

INTRODUCTION

This Brief is submitted on behalf of the defendant States of Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Virginia ("the Common Counsel States").[1]

The issue in this case is whether it is the United States or the defendant States which possess the exclusive right to explore and to exploit the natural resources of the seabed and subsoil underlying the Atlantic Ocean, extending seaward more than three miles from the ordinary low-water mark and from the outer limit of inland waters on the coast to the outer edge of the continental shelf.

[1] The other defendant States, North Carolina, South Carolina and Georgia, are separately represented. Throughout this Brief the term "State" is capitalized when it refers to a State of the United States, and not otherwise.

Plaintiff raised this issue by its complaint of April 1969 against all the Atlantic coastal States,[2] asserting an exclusive right on behalf of the federal government. The States each answered, claiming interests in the area in question, denying plaintiff's alleged exclusive right, and asserting exclusive rights to explore and to exploit on behalf of themselves.

The plaintiff thereupon moved for judgment on the ground that the States' claims were foreclosed by this Court's decision in *United States v. California*, 332 U.S. 19 (1947), and subsequent cases. The States opposed that motion and moved for reference of the case to a special master for the introduction of evidence bearing on the title and interest which they claimed. On June 8, 1970, the Court granted the States' motions and designated the Honorable Albert B. Maris as Special Master.

Extensive evidentiary proceedings were held before the Master. A total of 1,257 exhibits were introduced by all parties, comprising many thousands of pages.[3] The parties presented a total of ten expert witnesses on English, colonial and international law and legal history and other relevant subjects; the transcript comprises 2,800 pages. Extensive cross-examination of these witnesses was con-

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[2] The State of Florida moved for and obtained severance of the action against it on the ground that its situation raised distinct issues. Florida's case was tried separately and is now also before this Court, Original No. 52. The defendants in this action are thus the Atlantic coastal States other than Florida.

[3] A list of the 827 Exhibits introduced by the Common Counsel States appears at Appendix (App.) 559-640. In this Brief, Exhibits of the Common Counsel States will be cited to the Appendix if they are reproduced therein, and otherwise cited as "Exhibit ____." Exhibits of other parties are identified by the name of the party. Portions of the Transcript not reproduced in the Appendix are cited as "Tr. ____." In quotations and in the Appendix, footnotes are normally omitted.

ducted. The record herein represents the first and only evidentiary record ever amassed on the basic issue of State versus federal title in any of the continental-shelf litigation from the *California* case onwards.

The Master issued his Report on August 27, 1974. He concluded that, notwithstanding this Court's reference to him, he was bound by the Court's decision in *California* to decide in favor of the plaintiff by granting plaintiff's outstanding motion for judgment. The Master also concluded that the evidentiary record did not compel a departure from the *California* doctrines as he understood them so as to warrant a recommended decision in favor of the States.

The Common Counsel States' Exceptions to the Master's Report are stated immediately below, and their Brief on the merits follows. The Brief is, of necessity, lengthy. This litigation involves issues unusually large in number, broad in scope and momentous in their consequences. The record covers complex developments of history and legal history spanning several centuries.

For the assistance of the Court we also file a Supplemental Brief ("S.B."), consisting essentially of our Post-Trial Brief to the Master, in which arguments are developed and the record is analyzed more fully than is possible in this Brief. In general, in this Brief we refrain from detailed discussion of and citations to the historical evidence, but rather refer the Court to the portions of the Supplemental Brief where the full discussion and references are set forth. The Appendix, in turn, consists of a bare minimum of selections from the record, giving only an indication by way of sample of the types of material contained in the original record which, in our submission, establishes the States' claims.

EXCEPTIONS

The Common Counsel States except to the following findings and conclusions in the Master's Report:

1. The United States' motion for judgment should be granted on the basis of *United States v. California* and subsequent cases (Report, pp. 8-21).

2. As a matter of law, ownership of the continental shelf is an appendant of "external sovereignty" and is thus vested in the United States (pp. 22-24, 78 §§ 18, 19).

3. All new rights created in and after 1945 in the continental shelf arose on behalf of the federal government, not the States (pp. 68-71, 80 §§ 24, 26, 27).

4. Historical evidence demonstrating the assertion and exercise of English, colonial and state sovereignty and dominion over the three-mile belt is irrelevant to the issues in this litigation (pp. 24-25, 58, 80 § 25).

5. The sovereignty and dominion over the English seas which formed part of English law before 1603 was "protective" only, not involving territorial sovereignty, property rights, admiralty jurisdiction over foreigners or control of fisheries (pp. 27-29, 75 §§ 1, 2, 6).

6. The English seas were not, as a matter of English law, within the realm of England in the 17th century (p. 35).

7. The admiralty jurisdiction in the English seas in the 17th century was not a "territorial" jurisdiction (pp. 31-33, 75 § 5).

8. English and international law in the 17th century limited sea and seabed ownership to what was occupied in fact at any given time by the navy of the state asserting ownership, and there were no recognized boundaries to the seas which were subject to crown ownership (pp. 35-40).

9. Between 1688 and 1776 crown ownership of the seabed disappeared from English law and ceased to be countenanced by international law (pp. 39-47, 75-76 §§ 4, 6-8, 10).

10. The American colonial charters did not convey sovereignty and dominion in the marginal seas and seabed (pp. 47-56, 76-79 §§ 12, 21).

11. The crown and the American colonies did not claim or exercise rights of sovereignty and dominion in the marginal seas and seabed during the colonial period (pp. 56-60, 77 §§ 13-16, 78-79 § 21).

12. At some time—either at independence, by the Articles of Confederation, by the Peace of Paris, or by ratification of the Constitution—the States intended to surrender, and did surrender, any rights of sovereignty and dominion in their marginal seas and seabed which they posessed to the federal government (pp. 60-65, 77-79 §§ 17-21, 81 § 28).

13. After the disappearance of 17th-century claims international law recognized no territorial or property rights in the seabed of the marginal sea beyond three miles except in a few isolated cases where rights were based on strict occupation; and the formulation of the continental-shelf doctrine in and after 1945 created wholly new rights out of nothing (pp. 42-43, 46, 53-54, 65-71, 76 §§ 9, 11, 78-80 §§ 21-23).

14. The Submerged Lands Act, construed as limiting the Common Counsel States to a three-mile belt of ownership while permitting the Gulf States to establish ownership out to ten miles, is constitutional (pp. 71-72, 80 § 26).

15. The plaintiff is entitled to judgment (p. 81 § 29).

SUMMARY OF ARGUMENT

1. This Court has not heretofore determined whether the Atlantic coastal States or the federal government possess the right to develop the mineral resources of the continental shelf. Nevertheless, the Master ruled that *United States v. California*, 332 U.S. 19 (1947), required judgment for the federal government, since he read that decision to make ownership rights a necessary adjunct to federal foreign-affairs and defense powers. This ruling misreads *California*. Its premise is patently unsound since the express federal powers over foreign affairs and defense are ample to secure federal interests in the continental shelf, just as on land, without any need for the property itself to be federally owned. Any such "inseparability" concept was repudiated by Congress in the Submerged Lands Act and by this Court in *United States v. Louisiana*, 363 U.S. 1 (1960).

The plaintiff seeks judgment as a matter of law on the different but equally unsound ground that *California* found as a historical fact that the Atlantic States did not own the resources of the seabed along their coasts. On the contrary, *California*—because of the nature of the equal-footing claims advanced by the State—focused on whether there existed a uniform three-mile belt in the 18th century, and the States' claims here rest on no such premise. Also, the ruling in *California* derived from a lack of evidence, not a definitive historical finding, and the States have here produced massive evidence in support of their historic claims.

The States' historic claims in this case are, moreover, supported by a presumption of validity. Under the Constitution, the States are residual owners of property. The common understanding for a century and a half was that the States owned the submerged lands adjacent to their coasts. Extensive practice, including State grants of sub-

merged lands to the federal government, confirmed this understanding. State ownership will merely compensate for the expenses which development imposes on the coastal States.

2. The States' title traces back to colonial charter grants and is reinforced by the historical background and context of those grants. Extensive evidence shows that English law and practice prior to and during the 17th century, in which the grants were made, recognized the sovereignty and ownership by the crown of the English seas and their resources. International law in this period had not established any consensus inconsistent with such claims to ownership of the resources of the sea. Against this background it would be astonishing if similar rights had not been granted and established in the American colonies, and the evidence shows that they were.

Colonial charters, in the most explicit terms, conveyed to the colonies extensive rights to the resources of the sea and seabed for wide distances in the Atlantic, generally to 100 miles. This reading of the charters accords with contemporaneous usage, with the objectives of the crown in chartering the colonies, and with prevailing English law and practice. It is confirmed, in addition, by contemporaneous documents construing the charters, by contemporaneous maps, and by extensive colonial practice involving the exploitation of ocean resources. This evidence, referred to below and elaborately documented in the Supplemental Brief and Appendix, is overwhelming.

The Master's disagreements with the States' evidence are, on individual examination, without merit. Further, his own assertions are vitiated by repeated reliance on selected secondary sources representing minority views inconsistent with the copious primary sources supporting the States' position, and by his misreading of *California* to render irrelevant the extensive historical evidence relating to law

and practice within the three-mile belt. The Master's reliance on several British and dominion decisions is demonstrably infirm when the actual opinions in those cases are examined.

3. At the Revolution the colonies became independent sovereign States and succeeded to all rights granted under the colonial charters, including rights to sea and seabed resources. In addition, the States inherited, as successors to the English crown, any residual interest of the crown in the sea and the seabed not previously granted, so that the States' ownership claims are established no matter how the earlier charters may be construed. Even if, contrary to historical fact, the States are not deemed to have been independent sovereigns, they unquestionably inherited colonial and crown rights to property, including seabed resources. State ownership of the sea and its resources is confirmed by the Peace of Paris and related maps and documents.

The Master is mistaken in his conclusion that any ownership rights of the States to the seabed were transferred to the federal government on ratification of the Constitution in 1789. Any such implied transfer is squarely inconsistent with Article IV, Section 3, of the Constitution, which prevents, and was expressly intended to prevent, any implied transfer of State property interests to the federal government. This Court rejected a comparable claim of implied transfer based on the admiralty jurisdiction (*United States v. Bevans*, 16 U.S. (3 Wheat.) 336 (1818)), and its own subsequent decisions confirmed that the States are residuary owners of property including the lands lying below navigable waters. *E.g., Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).

4. The Master ruled that the emergence of the three-mile limit in the period between 1789 and 1945 worked a contraction of any existing States' rights to the submerged lands,

and that the rights to the shelf now recognized under international law arose after 1945 on behalf of the federal government. The States, no less than the federal government, are entitled to have their rights measured by international law as it exists today, a position this Court itself adopted in *United States v. Louisiana, supra,* 363 U.S. at 33-34. In any event, an overwhelming preponderance of authority, including leading experts in international law, confirms that the three-mile limit related fundamentally to surface navigation and related rights; and its basic rationale could not affect the historic claims of the States to develop the mineral resources of the seabed.

5. Even if exclusive rights to the shelf are deemed to have arisen in 1945 for the first time, the States would be entitled to those rights. The States are unquestionably the residual owners of property within their land territories to which the continental-shelf rights are an "inherent" appurtenance. Alternatively, at the very least, the Atlantic States are entitled to prove their historic boundaries out to three leagues under the Submerged Lands Act, which would be unconstitutional if construed to deny them this right. Similarly, if the Act is read—contrary to Congress' recognized purpose—to deny the States property rights which they possess by historic title or otherwise, that statute would be *pro tanto* unconstitutional.

I.

NEITHER PRIOR DECISIONS OF THIS COURT NOR ANY PRINCIPLE OF CONSTITUTIONAL LAW FORECLOSES THE ATLANTIC STATES' RIGHT TO SEABED RESOURCES; AND STATE OWNERSHIP IS CONSISTENT WITH THE CONSTITUTION, THE HISTORIC UNDERSTANDING AND PRUDENTIAL CONSIDERATIONS.

A. *CALIFORNIA* AND SUBSEQUENT DECISIONS OF THIS COURT DID NOT ADJUDICATE THE RIGHTS OF THE ATLANTIC STATES AND DO NOT JUSTIFY A GRANT OF SUMMARY JUDGMENT AGAINST THEM.

It has been the position of the plaintiff from the outset that this case is controlled by *United States v. California*, 332 U.S. 19 (1947), and its progeny so that this Court and the Master were obliged to decide this case in its favor on the basis of statements made in these earlier decisions.[4] The Master accepted this argument and held that as a matter of law the plaintiff was entitled to summary judgment on its motion made originally in this Court and renewed before the Master (Report, p. 21).

The plaintiff's position has been that the decision of this Court in *California* rested on reasoning that "required" the Court to decide whether the Atlantic States had any rights in the seabed or resources beyond the low-water mark (Pl. Br., p. 10). Primarily, the plaintiff argued that *California* determined as a matter of historical fact that the Atlantic colonies and States never acquired ownership of the submerged lands or natural resources of the seabed seaward of the low-water mark (*id.* at 19). Plaintiff concluded that, as a result of *California*, the Supreme Court has "already resolved" adversely to the Atlantic States their contentions that they own the resources of the Atlantic seabed beyond territorial waters (*id.* at 10, 28).

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[4] See Motion of the United States for Judgment and Brief in Support of Motion, pp. 21-24, 28-30; Post-Trial Brief for the United States Before the Special Master, pp. 8-16 (hereafter "Pl. Br.").

Taking a different route to the same destination, the Master agreed that judgment for the plaintiff should be granted as a matter of law based on *California*, but he adopted a somewhat different reading to sustain that view. He concluded that, primarily, *California* held as a matter of law that the seabed and its resources seaward of the low-water mark were affected by a "national concern for defense, international relations and foreign commerce" that made ownership of the resources attributes of federal external sovereignty rather than of State sovereignty (Report, pp. 12, 14, 21). Taking *California* to establish a rule of law, he declared it to be binding upon him, unless and until it was modified by the Court (*id.* at 10, 21).

Contrary to the arguments of the plaintiff and the conclusion of the Master, the issues in this case are in no way foreclosed by *California* or any other prior decision of this Court. First, it is common ground that this Court has never previously adjudicated the rights of the Atlantic States to the Atlantic seabed or its resources seaward of the low-water mark. This is in substance conceded both by the defendant (Pl. Br., p. 10) and by the Master (Report, p. 21). With exceptions not here relevant, it is well settled that a stranger to litigation is not concluded by its resolution of either factual or legal issues.[5] None of the Common Counsel States was a party to *California*.[6]

Second, the constitutional doctrine that the Master imputes to *California* has clearly been undermined, disap-

[5] Durkee v. Duke, 375 U.S. 106, 115-16 (1963); Sam Fox Publishing Co. v. United States, 366 U.S. 683, 690 (1961); Restatement, Judgments, §§ 68, 70, 93-1-1 (1942).

[6] In this connection, it should be noted that Massachusetts sought leave to intervene in the *California* case and the plaintiff, in successfully opposing that intervention, stated to the Court that "Massachusetts cannot be affected by any judgment which may be entered in that suit." Memorandum in Opposition to Motion of Massachusetts for Leave To Intervene, p. 1.

proved, and repudiated by subsequent developments that cannot be ignored. On the Master's view the seabed and seabed resources of the continental shelf were held in *California* to be so inextricably related to the plaintiff's constitutional functions of defense, foreign affairs and foreign commerce that federal ownership of the resources was a necessary attribute of those powers. We shall show below that both the Congress and this Court subsequently acknowledged that there is no such inseparable relationship, since the Submerged Lands Act, 43 U.S.C. § 1301, *et seq.*, sustained by this Court in *United States v. Louisiana*, 363 U.S. 1, 10 (1960), established the feasibility of separating federal constitutional powers from such ownership rights. See, *e.g.*, Section 6(a), 43 U.S.C. § 1314(a).

Even apart from these developments, we shall show that it cannot be plausibly maintained that the existence or exercise of federal constitutional powers requires federal ownership of seabed resources. Federal regulatory power is fully adequate to secure federal interests and no more requires plenary federal ownership of submerged lands than it requires that all property within the continental United States be owned by the federal government. If a contrary view is attributed to *California*, then reexamination of that view would certainly be warranted in light of the evidence adduced in this case. In point of fact, subsequent decisions of this Court clearly indicate that the Master's reading of *California*, as requiring federal ownership as a necessary attribute of federal power, is moot.

Third, apparently recognizing the weakness of such a constitutional argument, the plaintiff has chosen to read *California* as resting largely or exclusively upon a historical determination that the Atlantic States lacked property rights in the seabed or its resources seaward of the low-water mark on the Atlantic coast.[7] However, the Court's

[7] In its reply brief to the Master, the defendant went so far as to assert that *California* was "grounded in historical analysis" and that

analysis in *California* did not purport to make any definite determination that the Atlantic States lacked ownership rights in the seabed resources; it stated that on the materials available to it "we cannot say" that the thirteen original colonies "acquired ownership to the three-mile belt" and that neither charters, treaties "nor any other document to which we have been referred showed a purpose to set apart a three-mile ocean belt for colonial or state ownership." 332 U.S. 31-32. Since any historical judgment made by the Court in that case was specifically grounded on a lack of evidence, certainly *California* cannot be read to predetermine the result of a new inquiry made on the basis of a quite different record.[8] The Atlantic coastal States, which clearly are in the best position to supply evidence relating to their historic title, presented no evidence in *California* since they were not parties.

Moreover, as the statements quoted from *California* show, the historical issue posed by *California* in that case was entirely different from the historical issues posed here. California's "equal footing" argument led it to seek to establish that during the colonial and federal period the Atlantic coastal States were possessed of a uniform three-mile belt in the ocean along their respective coasts. Conversely, in rejecting the argument this Court emphasized the lack of uniformity in ocean-related claims in that period and the assertion of different types of American and foreign

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the Court had not even suggested that the external sovereignty of the federal government was inseparable from seabed ownership (pp. 5, 148, 149).

[8] The plaintiff has asserted that certain of the documents introduced by the States in this case were also made available to the Court in *California*, but we believe that an examination of the testimony and evidentiary materials contained in the Appendix of the Common Counsel States will readily demonstrate that the evidentiary record made here goes far beyond the collection of references or documents supplied in *California*. It was precisely in order to compile such an evidentiary record that the States here, unlike California, sought a reference to a Master.

jurisdictional claims extending well beyond the three-mile limit. 332 U.S. at 32 & n.15. The Common Counsel States in this case have never claimed any such uniform three-mile belt as a matter of historic right; they agree that no such fixed, uniform belt existed in colonial times; and their claims derive from historical sources that have no relation to any supposed three-mile belt.

Finally, the assertion that *California* forecloses further consideration of the present case is inconsistent with this Court's own reference of this case to a Master. In its motion for judgment prior to the reference, the plaintiff made essentially the same arguments for foreclosure that it repeated to the Master in renewing its motion for judgment as a matter of law. The Common Counsel States argued in this Court, in opposition to granting the plaintiff's motion and in support of their own motion for reference to the Master, that the plaintiff's claim was invalid on the several grounds just described. We respectfully submit that this Court's reference of the case to the Master, leading to extensive evidentiary proceedings over several years, was not intended as an idle gesture or prelude to a grant of the plaintiff's motion but represented a rejection of the plaintiff's motion for judgment as a matter of law.

The Master, as his Report shows, regarded himself as bound by *California* to grant the plaintiff's motion for judgment, and his historical analysis was made with the explanation that it should be available in the event that the Court might decide to reconsider the rule of law assertedly established in the *California* case (Report, p. 21). Although for the reasons already stated we believe that the Master erred in believing himself controlled by *California*, there can be no dispute about his further observation: this Court is always free to reconsider its prior decisions, especially where great interests and constitutional principles are involved. Thus, even if the Master were right in his assumption that *California* dictated his result, the doctrine of that

case would be open to scrutiny here since there has been no prior adjudication of the claims of the Atlantic coastal States.

The Master's view that he was controlled by *California* is, however, not irrelevant in considering assertions made by him in subsequent portions of his Report. The Master readily concedes that he felt himself obliged to decide the case in favor of plaintiff whatever might be his own view of the situation (Report, pp. 9-10). With great respect we submit that this appraisal, which in our view is entirely mistaken, permeates the Master's Report. In particular, it makes it appropriate for this Court to give special attention to the actual record evidence in this case which is presented for its consideration. Thus, here, even more than in the usual original-jurisdiction case referred to a Master, "this Court has the duty of making an independent examination of the evidence." *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 470 (1945) (Stone, C.J., dissenting).

B. OWNERSHIP OF THE SEABED AND ITS RESOURCES IS NOT AN APPURTENANCE OF "EXTERNAL SOVEREIGNTY" NECESSARILY VESTED IN THE UNITED STATES.

The Master concluded in this case that "the most fundamental ground of the rule" in *California* was that federal power required federal ownership of the seabed and its resources. He described this "fundamental ground" as follows:

> "[T] he territorial sea is primarily affected by national concern for defense, international relations and foreign commerce, all of them being aspects of external sovereignty, the 'protection and control of which has been and is the function of national external sovereignty' [332 U.S. at p. 34], which in our federal union and under our Constitution is vested in the federal government to the exclusion of the states, and . . . an incident

> to that sovereignty is full dominion over the resources of the soil under the water of the territorial sea" (Report, p. 14).

Plaintiff has, as noted, sought to minimize or eclipse this asserted ground of decision; it prefers to read *California* as having rejected State claims on historical grounds and to have referred to federal powers merely to establish a federal title arising subsequent to the colonial period (*e.g.*, Pl. Br., p. 5). Like the plaintiff, the Common Counsel States believe that the references to federal powers and sovereign authority were not regarded as an independent ground for the Court's rejection of California's position, let alone the primary or fundamental ground gleaned by the Master.

If foreign-policy or defense considerations overrode an otherwise sound State title to seabed resources, the reasoning subsequently employed by the Court in *United States v. Texas*, 339 U.S. 707 (1950),[9] would be inexplicable. In that case, the Court held that Texas's claims were defeated by "equal footing" principles. If the Court had intended in *California* that foreign-policy or defense powers of the federal government necessarily required federal ownership of the submerged lands, then resort to equal-footing principles would have been quite unnecessary.

Nevertheless, the Master's reading of *California*, as well as certain oblique statements in that decision,[10] make it necessary to address at the outset and refute the

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[9] Similarly, if federal sovereignty required federal ownership the Court could not subsequently have sustained the grants under the Submerged Lands Act of such resources to the States as it did in United States v. Louisiana, 363 U.S. 1, 10 (1960). See pp. 19-21, *infra*.

[10] The Court in *California* made reference to the necessity that "a government next to a sea must be able to protect itself from the dangers incident to its location"; it referred to the governmental interests in revenues, health, and neutrality; it took note of the possibility of international disputes and settlements concerning the resources of the

proposition that federal power granted by the Constitution makes necessary and inseparable federal ownership of seabed resources. With great respect, we submit that such a proposition cannot withstand rational examination. In addition, it cannot be squared either with the congressional judgment underlying the Submerged Lands Act or with this Court's action in sustaining that statute.

In substance, the Master reads *California* to say that because resources-development activity on the continental shelf may affect the military, diplomatic and commercial posture of the United States, it follows that the United States rather than the States must own the resources to be developed. The obvious and fatal difficulty with this view is that under this Court's decisions the federal government has preemptive regulatory power to regulate all activities — whether of States, corporations or individuals — to the full extent necessary to carry out its express responsibilities under the Constitution.[11]

Thus, the federal foreign-relations power overrides any State action that would create international problems, interfere with foreign policy or cause international embarassment; the defense power, properly executed by the federal government, gives the national government authority to control the deployment of all natural resources, wherever located, to insure the national defense; the treaty power allows the United States to make international

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seabed, including "the very oil about which the state and nation here contend"; and the Court emphasized, as no one denies, that it is the federal government rather than the States that is entrusted with power over defense and foreign affairs. 332 U.S. at 35-36.

[11] *E.g.*, Tennessee v. Davis, 100 U.S. 257 (1879); Case v. Bowles, 327 U.S. 92 (1946); Sperry v. Florida ex rel. Florida Bar, 373 U.S. 379 (1963).

agreements which supersede state law.[12] These and similar federal powers give the federal government full power to secure federal interests by treaties, legislation and regulation, including all legitimate interests affecting or affected by the development of submerged lands.

Such federal interests do not suggest, let alone require, federal *ownership* of submerged lands any more than they make it necessary for the federal government to own all property within the United States. Wars may be fought on land as well as by sea, and the resources of the land are no less vital to defense than those of the sea. Activities and property on land, no less than the resources of the seabed, may be and often are the subject of international dispute and settlement. No one has ever suggested, however, that federal ownership of all property within the United States was necessary for the national government to fulfill its defense, foreign-affairs, or commercial functions. "The power of the United States is plenary over these undersea lands precisely as it is over every river, farm, mine, and factory of the nation." *United States v. California*, 332 U.S. 19, 42-43 (1947) (Reed, J., dissenting).

Before the Master the plaintiff argued that there are "legal and factual differences" between the land and sea which render the comparison inapt (*e.g.*, Pl. Br. 150). It has, however, never identified any difference that remotely qualifies or draws in question the power of the federal government to regulate, so far as is necessary to secure federal interests, any and all development activities undertaken by the States or State licensees in the submerged lands.[13] So long as this power exists, it is impossible to

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[12] *E.g.*, Zschernig v. Miller, 389 U.S. 429 (1968); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Missouri v. Holland, 252 U.S. 416 (1920).

[13] The only difference even adverted to by the plaintiff's reply brief is the extensive power enjoyed by the federal government over resident

conclude that State ownership can frustrate any legitimate interest of the federal government in defense policy, foreign affairs, or any other matter.

Our position that the existence and exercise of the federal government's powers over foreign policy, defense and commerce does not require ownership of the seabed and its resources has been accepted in substance by both Congress and this Court. In 1953, Congress enacted the Submerged Lands Act, by which it "recognized, confirmed, established, and vested in and assigned to" the coastal States the submerged lands and resources within a three-mile belt around the United States or, where a statutory historical test could be met by the Gulf States, a three-league belt in the Gulf. Sections 2, 4, 43 U.S.C. §§ 1301, 1311. The Act simultaneously reserved to the federal government a variety of rights including sovereign authority for purposes of commerce, navigation, national defense and international affairs. See, *e.g.*, Section 6(a), 43 U.S.C. §1314(a). Plainly, Congress saw no difficulty in separating federal sovereign powers from proprietary interests in the submerged lands.[14]

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aliens within the United States and the more limited jurisdiction exercised over such persons beyond the territorial sea (Pl. Reply Br. 150). How this difference can have any bearing on the question of federal versus State ownership is not, and cannot be, explained.

[14] Plaintiff's witness Professor Henkin conceded that no international problems or foreign-relations embarrassment have arisen from State ownership of the three-mile and three-league belts since 1953. Tr. 2647.

The plaintiff seeks to derive some comfort from the Submerged Lands Act by arguing that, at the very least, the companion Outer Continental Shelf Lands Act confirmed the claims of the United States to land lying beyond the three-mile/three-league limit (Pl. Br., pp. 16-18). See Sections 3-4, 43 U.S.C. §§ 1332-33. In fact, the Submerged Lands Act proceeded on the premise that the States' historic claims to adjacent submerged lands should be respected, and there is no expressed intent to cut off such claims as might extend beyond the three-mile/three-league limit. See pp. 136-37, *infra*. Congress also provided

Thereafter, in *Alabama v. Texas*, 347 U.S. 272 (1954), this Court sustained the validity of the Submerged Lands Act so far as it recognized State ownership of, and relinquished federal claims to, the three-mile/three-league belt, and the Court subsequently confirmed the claims of Florida and Texas to three leagues in the Gulf under the historical standard established by the Act. *United States v. Louisiana*, 363 U.S. 1 (1960); *United States v. Florida*, 363 U.S. 121 (1960). If, as the Master supposed, the *California* decision required federal ownership of the submerged lands as a necessary attribute of federal powers, then the Submerged Lands Act would not have been sustained by the Court and claims of Texas and Florida to the three leagues could not have been confirmed.[15] Consequently, either *California* did not rest on any ground of necessary federal ownership of the submerged lands or that that ground of *California* has been reconsidered and rejected *sub silentio*. In either event, the Master erred in concluding that there now exists any rule of law requiring, as a matter of constitutional principle, that the federal government own the resources of the seabed.

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in the Act that a provision approving and confirming a three-mile boundary for the original coastal States was without prejudice to the States' claim if any of their boundaries extend beyond that line. Section 4, 43 U.S.C. § 1312.

[15] The view that a majority of the Court did not read *California* as resting on any constitutional principle of necessary ownership is underlined by Mr. Justice Black's separate opinion in Alabama v. Texas. Mr. Justice Black—the author of the *California* decision—dissented from the Court's per curiam validation of the Submerged Lands Act, asserting that the case raised difficult and serious questions respecting Congress' right to relinquish "elements of national sovereignty" over the ocean. 347 U.S. at 279. Thereafter, in a separate opinion in the *Louisiana* case, Mr. Justice Black resolved his own doubts by expressly rejecting the federal government's argument that "the State's interest in the marginal seas must be determined in accord with the national policy of foreign relations." He stated that "[e]verything in the very extended congressional hearings and reports refutes any such idea." 363 U.S. at 90.

Testimony before Congress in enacting the Submerged Lands Act not only confirms that State ownership is compatible with federal power, but underlines the fact that Congress explicitly made this judgment in framing the Act. A striking example, noted by the Court in its own *Louisiana* opinion, involved the contention that the federal government might be embarrassed in its diplomatic relations by permitting States to exercise rights in submerged lands beyond three miles, as the Act clearly contemplated in the case of Gulf States meeting the Act's historical test. Mr. Justice Harlan's opinion for the Court explained:

> "The first objection was laid to rest by the testimony of Jack B. Tate, Deputy Legal Advisor to the State Department. Mr. Tate stated that exploitation of submerged lands involved a jurisdiction of a very special and limited character, and he assured the Committee that assertion of such a jurisdiction beyond three miles would not conflict with international law or the traditional United States position on the extent of territorial waters. He concluded that since the United States had already asserted exclusive rights in the Continental Shelf as against the world, the question to what extent those rights were to be exercised by the Federal Government and to what extent by the States was one of wholly domestic concern within the power of Congress to resolve." 363 U.S. at 30-31.

Other testimony similarly confirmed that there was no inconsistency between State ownership and any of the federal powers referred to in the *California* case.[16]

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[16] For example, the Secretary of the Navy, Robert B. Anderson, made it clear that it was not necessary in relation to federal defense

At the hearing before the Master, the Common Counsel States introduced the testimony of a highly qualified expert witness—Lyman B. Kirkpatrick, Jr.[17]—to confirm that the functions of the federal government in defense, foreign relations, and allied fields do not require federal ownership of the submerged lands. Mr. Kirkpatrick reviewed the history of this country's claims over the continental shelf vis-a-vis foreign nations and the distinction repeatedly drawn by the federal government itself between that question and the separate question of federal versus State ownership. He explained in detail how the foreign-relations and defense powers of the federal government were adequate to protect its legitimate interests regardless of State ownership of the submerged lands (App. 4-10).

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policy for the United States rather than the States to own petroleum resources of the seabed. He testified:

> "Senator Long: Do you see any impediment to obtaining oil in time of national emergency by virtue of private or State ownership of some of that land on which the oil is located?
>
> "Secretary Anderson: No, sir.
>
> "Senator Long: Is private industry going to produce oil regardless of whether the oil is under State ownership or privately owned lands or federally owned lands?
>
> "Secretary Anderson: I certainly assume it would, Senator."

Hearings Before the Senate Committee on Interior and Insular Affairs on S.J. Res. 13 and Other Bills, 83d Cong., 1st Sess. 560 (1953).

[17] Mr. Kirkpatrick, currently a University Professor at Brown University specializing in political science, has been connected with foreign relations and defense policy throughout his professional life. He assisted in the formation of the Central Intelligence Agency and served both as its ranking official responsible for intelligence and as its Inspector General. He has written on military affairs and lectured regularly to the State Department's Foreign Service Institute and the Army War College. App. 1-4.

In addition, Mr. Kirkpatrick noted that petroleum exploration will almost certainly be carried on by private parties whether they are licensed by the federal government or the States (App. 10). To be sure, disputes may arise with foreign countries concerning the continental shelf and treaties may be made between this country and others on this subject. However, he noted that such disputes are scarcely more remarkable than those that arise regularly "respecting American vessels in foreign ports, American property in foreign countries, and property subject to contract between Americans and foreign nationals" (App. 9). Similarly, State ownership cannot block any proper treaty the federal government may promote or adopt to govern the seabed (App. 10-11).[18]

Against this background, it is unnecessary to argue at greater length that State claims to ownership of submerged lands are compatible with the existence and exercise of federal constitutional powers. This compatibility has been acknowledged explicitly by Congress in the Submerged Lands Act and, at least implicitly, by this Court's subsequent decisions sustaining and applying the statute. The plaintiff in this very case appears to renounce any reliance on a supposed inseparability of federal power and ownership of the submerged lands (*e.g.*, Pl. Post-Hearing Reply Br. 148-49). So far as the Master has relied upon a contrary reading of *California*, his Report errs and must be disaffirmed.

Certainly there can be no suggestion that, as a matter of constitutional law or policy, State ownership is permissible

[18] Mr. Kirkpatrick gave similar testimony relating to military aspects of the sea, seabed, and development of seabed resources (App. 15-18). He noted that ownership of the three-mile belt immediately adjacent to the coasts has been confirmed in the States even though it is "the area of the sea frontier traditionally regarded as most critical to the defense of the United States" (App. 17).

within a three-mile belt but not beyond. Both Texas and Florida have already been allowed greater distances. In any event, the significance of the Submerged Lands Act is not the precise distance it fixes, but rather its recognition that federal powers over defense, foreign relations, and commerce can be distinguished from any question of ownership and amply exercised even though ownership be confirmed in the States. As a matter of reason, the same rationale must apply fully beyond the three-mile/three-league limit.

C. STATE OWNERSHIP OF THE SUBMERGED LANDS IS CONSISTENT WITH THE CONSTITUTIONAL FRAMEWORK, COMMON UNDERSTANDING DURING MOST OF OUR HISTORY, AND COMPELLING STATE ECONOMIC AND REGULATORY INTERESTS.

Federal ownership of the seabed and its resources is not only unnecessary under the Constitution but is contrary to the spirit and approach of the Constitution which makes the States the residuary owners of public lands otherwise unallocated. State ownership of the submerged lands is reinforced both by the common understanding from the outset of our history as a nation and by the regulatory and economic interests of the coastal States in relation to submerged lands. In short, the constitutional presumption strongly supports the States' claims in the present case.

A basic constitutional principle of the union is that the federal government is one of granted or delegated powers, while the States and their citizens are the residuary possessors of all sovereign powers and rights not ceded to the federal government. This proposition respecting the allocation of powers is so well settled that extensive citation is unnecessary.[19] The proposition is no less true with respect to property.

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[19] See U.S. Const., Xth Amend.; United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Knapp v. Schweitzer, 357 U.S. 371 (1958).

The caution of the framers of the Constitution in reserving property to the States and limiting federal acquisitions is striking. Article I, Section 8 gives Congress power over a federal district for the seat of government and over all places purchased for forts, dock yards, magazines, arsenals, and other buildings, but requires that all such property be obtained only with the consent of the legislatures of the States in question. Article IV, Section 3 provides that no State shall be formed by Congress within the jurisdiction of any other State or States without the consent of the States involved. The second clause of the article also states that nothing in the Constitution "shall be so construed as to Prejudice any Claims of the United States, or of any particular State" to any property or territory, a clear attempt to negate the possibility of any implied transfer.

Thus, the very capital of the nation and the locations of its military facilities were to be lands possessed by the States and transferred only with their consents. Grants of land were, in fact, made by individual States during our early history in order to foster national interests. See *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 221-23 (1845). Obviously the framers did not conceive that it was "necessary" to the exercise of granted federal powers that the federal government possess by implied transfer any property then belonging to the States. More important, the framers assumed that the States would continue after the Constitution to possess the public properties which had previously been theirs.

The decisions of this Court were, throughout the nineteenth century, consistent with the view that the States retained ownership of, and regulatory authority over, their lands and resources, whether or not the lands were submerged. In *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842), submerged lands exploited for oyster fisheries were held to have been inherited by the State involved. In the *Pollard*

case, the Court confirmed the rights of the States, rather than the federal government, to ownership of submerged lands lying below navigable waters. In *Manchester v. Massachusetts*, 139 U.S. 240, 264 (1891), the Court sustained the right of Massachusetts to regulate fishing in connection with its "territorial jurisdiction . . . over the sea adjacent to its coast . . ."

Throughout this country's history, at least down to the *California* decision in 1945, the evidence shows that it has invariably been understood and assumed that the States were the residuary owners of property within their historical boundaries, beneath their waters, or adjacent to their coasts. This view conformed to the historical origins of State title and boundary claims, since the original colonial charters conveyed rights in the broadest possible terms; for example, the New England charter of 1620, discussed below at pp. 69-71, conveyed gold, silver and other "mine and Minerals" both within the designated "Tract of Land" and also "within said Islands and Seas adjoining." Maps during the colonial period confirmed the maritime territory granted to the governments which ultimately became our States.

It cannot reasonably be questioned that at the time of *California* it was widely and emphatically believed that the States owned the submerged coastal lands. This Court itself conceded in the *California* decision that its earlier cases indicated that "the Court then believed that states not only owned tidelands and soils under all navigable waters within their territorial jurisdiction, whether inland or not." 332 U.S. at 36. The basic rule that the States owned land under navigable waters was framed, understood and applied without any suggestion that a distinction was to be drawn between inland waters and the sea, and such a distinction would have been without any legal or historical foundation. See pp. 104-12, *infra*.

It should be emphasized that, as the legislative history shows, Congress regarded itself as restoring the status quo ante when in 1953 it passed the Submerged Lands Act and reconfirmed the States' ownership within the three-mile/three-league belt. For example, in one of the pertinent legislative reports (H.R. Rep. No. 1778, 80th Cong., 2d Sess. 1-2 (1948), the legislation that evolved into the Submerged Lands Act was explained as follows:

> "[T]he aforementioned bills [were] introduced in the Congress to preserve the status quo as it was thought to be prior to the California decision . . . to confirm and establish the rights and claims of the 48 States, long asserted and enjoyed with the approval of the Federal Government, to the lands and resources beneath navigable waters within their boundaries. . . . The repeated assertions by our highest Court for a period of more than a century of the doctrine of State ownership of all navigable waters, whether inland or not, and the universal belief that such was the settled law, have for all practical purposes established a principle which the committee believes should as a matter of policy be recognized and confirmed by Congress as a rule of property law."

Another report referred not only to Supreme Court decisions but to the understanding of the legal profession, the authors of leading treatises, and the belief of the lower federal court and State-supreme-court jurists "as reflected in more than 200 opinions." S. Rep. No. 1592, 80th Cong., 2d Sess. 17-18 (1948).

The long-standing exercise of State regulatory powers over the adjacent sea and its resources reinforces the presumption in favor of the States' claims in this litigation. Such regulation, extending back to colonial times, involved

extensive regulation of fishing, including sedentary fisheries in the marginal sea, the seabed resource most amenable to exploitation in the period before the advanced technology of the industrial revolution. Indeed, in *Louisiana v. Mississippi*, 202 U.S. 1, 52 (1906), this Court made reference to "the sway of the riparian States" over "the maritime belts" which allows the States to "reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber or other products of the sea."[20]

State regulation has not only subsisted for many years but has been recognized and endorsed by this Court. The cases include older ones, of course, such as *Louisiana v. Mississippi, supra*, and *Manchester v. Massachusetts, supra;* but they also include comparatively recent ones such as *Skiriotes v. Florida*, 313 U.S. 69 (1941), affirming Florida's right to regulate sponge fishing in the Gulf, and *Askew v. American Waterways Operators*, 411 U.S. 325 (1973), sustaining Florida legislation concerning off-shore oil pollution.

State activity in the marginal sea was not limited to economic regulation. The States leased sedentary fisheries in the marginal sea (S.B. 379-80); they enacted statutes affecting title to the seabed; and they repeatedly executed deeds of portions of the seabed to the federal government, grants which the federal government accepted after receiving formal opinions from federal and State counsel confirming the State's title (S.B. 380). Extensive improvements, such as wharves and other fixed facilities, were of course regularly made by the States or under their auspices on the assumption that the States had title to the seabed (*ibid.*).

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[20] The evidence of State regulation of fishing and other marginal-sea activity is supported by evidence so extensive that we assume it will not be challenged by the plaintiff.

Whereas the interests of the United States in the continental shelf are discrete ones involving specific, defined federal powers, the regulatory interests of the States are broad ranging and comprehensive; they include any matter that might touch upon the ordinary and historic police powers of the State. Congress endorsed this view in the Outer Continental Shelf Lands Act when it adopted the civil and criminal laws of each adjacent state, so long as not inconsistent with any federal statute or regulation, to govern the submerged lands of the outer continental shelf lying beyond the three-mile/three-league line. See Section 4(a)(2), 43 U.S.C. § 1333 (2)(2). See also *United States v. Louisiana*, 339 U.S. 699, 740 (1950).

Equally important, the coastal States' interests are intimately linked to resource development and its economic burdens and benefits in a way that the interests of the federal government can never be. For example, when an extensive offshore drilling for petroleum or natural gas occurs, it is the adjacent coastal State that bears the economic burdens of population shifts into the affected coastal regions and the enormous costs of increased policy, roadbuilding, schools and other social improvements. *Cf.* Council on Environmental Quality, *OCS Oil and Gas—An Environmental Assessment* (April 1974), pp. 7-31. It is, of course, State revenues that must be raised to pay for such activities and projects.

Similarly, the environmental impact of off-shore resource development is a matter of critical importance to the adjacent States and their economies. Oil spills, for instance, have their immediate economic impact on recreation, fishing, tourism, and related industries that may be important or vital to the affected State. See generally *Askew v. American Waterways Operators*, *su-*

pra, 411 U.S. at 333-34.[21] The same economic burden will be felt by the State whether its beaches or fisheries are imperiled by an oil well accident occurring two miles from shore or ten miles. It is, correspondingly, the State to which the direct revenues from off-shore production are essential both to provide the infrastructure that makes such development possible and to compensate for the inevitable losses that development must cause to the other economic activities on which the State's citizens depend.

II.

UNDER ENGLISH AND INTERNATIONAL LAW AND PRACTICE PRIOR TO 1776, THE MARGINAL SEAS WERE SUBJECT TO THE SOVEREIGNTY OF THE ENGLISH CROWN, AND THE RESOURCES OF THE SEAS AND SEABED BELONGED TO THE CROWN IN PROPERTY.

A. ENGLISH LAW AND PRACTICE PRIOR TO THE 17TH CENTURY RECOGNIZED THE SOVEREIGNTY AND OWNERSHIP BY THE CROWN OF THE ENGLISH SEAS AND THE RESOURCES THEREOF.

The Master found that prior to 1603 the only crown right recognized by English law in the adjacent seas was the right

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[21] In *Askew*, the Court quoted one expert as follows:

> "Perhaps the most noticeable damage caused by oil pollution is the fouling of recreational beaches and shorefront property. One-half million tons of oil are washed ashore each year, rendering beaches unfit for swimming and filling the air with unpleasant odors . . . . It is estimated, for example, that a serious oil spill off Long Island during the summer months would cost resort and beach operators thirty million dollars. Oil spills also create navigational and fire hazards in harbors, ports and marinas."

to protect navigation against piracy, and that English law did not recognize either territorial sovereignty or rights of ownership in those seas (Report, pp. 27-29, 75 §§ 1, 2, 6). The record is to the contrary.

1. The Record Massively Supports the States' Position.

The evidence is conclusive that long prior to 1603 the four seas surrounding England[22] were consistently regarded as part of the realm of England, under the full territorial sovereignty and jurisdiction of the crown (S.B. 8-18). One of plaintiff's own witnesses admitted that this was the necessary meaning of a 14th-century statute referring to "the sea or elsewhere within the realm" (S.B. 11; App. 545). The same conclusion follows from another statute which, as properly translated, excluded the admiralty jurisdiction from "anything done within the realm, except things done upon the sea" (S.B. 14-18). Plentiful additional evidence requires the same conclusion. English maritime sovereignty during this early period is evidenced both by "a great body of state practice" and "some considerable comment on it by observers" (App. 698; see also App. 650-55, 658-59).

It followed from English maritime sovereignty that England had jurisdiction, legislative and administrative as well as judicial, to regulate navigation through and conduct in the English seas, both by nationals and by foreigners (S.B. 8-9, 25-31, 39). The best authorities recognize that this jurisdiction was far from limited to protection from pirates, as the Master concluded; rather the English rights of sovereignty and dominion in the sea were regarded as entailing the duty of protection as a corollary (S.B. 9-10). The admiralty jurisdiction was squarely founded on the "sovereign lordship of the Kings of England" over the "sea

[22] The entire North Sea to the east, the entire English Channel and Bay of Biscay to the south, and portions of the ocean to the north and west generally defined as extending 100 miles from the coast. See, *e.g.*, App. 824-27; pp. 47-49, 56-57, *infra*.

of England" and was exclusive within those waters (S.B. 25); the sea was "a district of the Kingdom" (S.B. 27).[23] As a recognition of English sovereignty in the English seas, foreign ships were required when in those seas to strike their sails to English ships (the "flag salute"), and the failure to do so was punished as a criminal offense (S.B. 8, 13, 30).

The English maritime jurisdiction, both asserted in law and habitually exercised in fact, encompassed not only the punishment of piracy but also the making and enforcement of substantive law of every type and the control and disposition of property rights, including the grant of exclusive fisheries, both surface and sedentary; the exclusion, taxing or licensing of foreign navigation and fishing, and regulation of the time, manner and extent of fishing for conservation and other purposes (S.B. 18-25, 28-31). Plaintiff's witness on mediaeval law conceded that the crown asserted and exercised the right to grant exclusive fisheries in the English seas (App. 545).[24] The crown's rights to royal fish, flotsam, jetsam and lagan were squarely based on maritime territorial sovereignty and were deemed coextensive with the seas which were part of the realm (S.B. 10-12).

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[23] The admiralty jurisdiction included both the definition and the punishment of criminal offenses on the English seas, by foreigners as well as by English subjects, with no distinction between piracy and other crimes (S.B. 25-31).

[24] While the Master relies heavily on the fact that at some periods the English crown permitted fishing by certain classes of foreigners without charge in the English seas, such permission is in no way inconsistent with the assertion of sovereign rights which included the prohibition or taxing of such fishing if and when the crown so chose (S.B. 23-24). England asserted and frequently exercised the right to exclude or to tax foreign fishermen when it wished (S.B. 23-25), as plaintiff's witness on mediaeval law conceded (App. 544).

The record demonstrates, also, that English law prior to 1603 fully recognized crown ownership of the seabed under the marginal seas and the resources thereof (S.B. 31-33). This is evidenced by, among other things, royal grants of title to sedentary fisheries and of title to surface fisheries which depended on the exclusive right to use the seabed for weirs or other devices (*ibid.*). In the reign of Edward III it was declared "that not only the dominion of the sea, but the very soil, belongeth unto the King," and many early decided cases are founded on that ownership (S.B. 32). English law, contrary to Roman law, held that a new island rising in the English sea belongs to the crown, and that doctrine was based on the principle that the crown had owned the land while still covered with water (S.B. 13; Tr. 325).

When during the reign of Elizabeth I Thomas Diggs formulated a systematic theory of crown ownership of the foreshore, he took crown ownership of the sea and seabed as well established and noncontroversial (S.B. 36-37). The record is clear, and plaintiff's witness conceded, that Queen Elizabeth's government fully subscribed to and implemented Diggs' doctrines (S.B. 38; App. 28-29). Other Elizabethan writers of great eminence and influence, including Gentili and Dee, described a fully developed law of territorial waters, 100 miles wide at a minimum, in which full maritime sovereignty and dominion were exercised (App. 804-05, 812-13; S.B. 35-36).

The Master relied heavily (Report, pp. 26-27) on a statement by Queen Elizabeth in 1580 that the ocean is free to all. Elizabeth was rebutting the Spanish claim (S.B. 267) that all the oceans of the world had been divided between Spain and Portugal,[25] and that even innocent passage of foreign ships through those oceans was solely at Spain's

[25] The statement was made in response to a complaint by the Spanish ambassador against Sir Francis Drake's navigating through the Pacific Ocean. 1 Oppenheim, International Law 584 (8th ed. Lauterpacht 1955).

sufferance. She was plainly referring to open or high seas far from any coast, not to the more limited areas, such as the English seas as traditionally defined, which overlie the continental shelf. Many actions by Elizabeth and her governments demonstrate adherence to and enforcement of the traditional English doctrine of maritime sovereignty and dominion, including the flag salute and the requirement that anyone wishing to navigate through the English seas first secure her permission (S.B. 8, 34; see generally S.B. 33-45).

Indeed it is during Elizabeth's reign that we find the first evidence that the marginal seas in North America were, like the English seas, to be regarded as subject to English sovereignty, dominion and exclusive fishing. In accordance with the law of monopolies which was developed during Elizabeth's reign (S.B. 39-43),[26] the earliest letters patent for American colonization conveyed monopolies of fishing and other maritime "royalties" in the seas of the areas to be discovered and settled (S.B. 41-43). These patents were promptly implemented, foreign fishermen being excluded from the rich American fisheries as soon as the English were in possession of the adjacent land (S.B. 43-45; App. 832-33). Thus the full development in the 17th century of English maritime sovereignty and dominion was no new and ephemeral creation resulting from the Stuart succession and dying with it. Indeed, the extension of that English law and practice to the marginal seas of the new English discoveries and settlements in North America was both implicit and explicit from the very beginning of that enterprise, before the first Stuart came to the throne.

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[26] The rule, formulated by Sir Edward Coke when Attorney General, was that a royally created monopoly was valid if it involved a new discovery, venture or economic opportunity, in the seas or on land, but not if it attempted to exclude Englishmen from particular economic activities in places where they had previously engaged in them. S.B. 39-43.

2. The Master's Erroneous Methodology Undermines His Determination.

A principal reason for the Master's error on this as well as other points involves an astonishingly unsound approach to historical methodology which pervades his discussion of English law and practice both before and after 1603. The Master paid an extraordinary deference to one of the many secondary sources which have figured largely in this litigation: T.W. Fulton's book *The Sovereignty of the Sea* (1911). The Master goes so far as to say he has "tested the evidence and exhibits" (including innumerable primary sources) by whether they coincide with Fulton's views (Report, p. 25). Obviously, the opposite approach is the correct one; secondary sources must be tested by the primary evidence.

Fulton is a significant source, and in many respects supports the States' case here. The controversial aspects of the Master's reliance on Fulton relate mainly to two points: the claim that English law prior to 1603 failed to recognize maritime sovereignty and dominion, and the claim that the admitted 17-century legal recognition thereof vanished after 1688.

On these two points, Fulton is sharply at variance both with the evidence introduced herein, including the primary authorities, and with the weight of scholarship in all periods. Fulton's was a frankly revisionist book, designed to refute what all earlier writers had believed about the traditional, and continuing, English law and practice (App. 104-05). It was, moreover, written at the height of popularity of freedom-of-the-seas doctrine with respect to navigation, a doctrine of which Fulton was a zealous advocate. Any random excursion through Fulton's pages will make it apparent to an impartial mind that Fulton's tone and argument are distinctly partisan. Fulton was not a lawyer—his book refers to him as "lecturer on the scientific

study of fishery problems, University of Aberdeen"—and had no comprehension of the legal significance of many of the historical events which he treats. His study is not a law book, but a political history with an axe to grind.

Moreover, later and better-qualified writers have not accepted Fulton's controversial theories. Elder, Potter, Fenn, O'Connell and many others have found the traditional view of English law respecting maritime sovereignty and dominion far more historically accurate than Fulton's attempted revision. (See S.B. 8-10, 71, 124, 265-66; App. 105, 658-59, 695-701.) Fenn, for example, is immeasurably more sophisticated and knowledgeable in analyzing mediaeval law and practice, and arrives at conclusions sharply opposed to Fulton's (S.B. 272; App. 791-818). Similarly, O'Connell has made a far more careful analysis of post-1688 law and practice, and again vigorously disputes Fulton's views (pp. 56, 60, *infra*). Plainly it is unsound scholarship to take one rather dated secondary source as gospel on points where he is refuted by later and better authority, not to speak of the massive primary-source documentation which has been introduced herein.

Even aside from Fulton, the Master relies almost entirely on other secondary sources to establish English and international law of the 17th and 18th centuries, notwithstanding the fact that the record makes the relevant primary sources fully available. Where secondary sources are refuted by the primary evidence, reliance on the former is plain error. The Master's report is replete with unwillingness to accept the obvious proposition that the best evidence for the law of a particular historical period is what the courts, other law-giving authorities and commentators of that period said it was.

3. The Master's Misconception of the Issues Led Him To Ignore Much of the Relevant Evidence.

Another error infecting the Master's discussion of pre-17th century practice—and pervading the Master's historical analysis throughout the entire Report—is that he discounted as irrelevant all the evidence in the record demonstrating the assertion and exercise by the English, colonial and State governments of sovereignty and dominion in the marginal seas and seabed close to the shore, on the ground that the areas in question were or may have been within three miles of the coast. The Master's theory was that the three-mile belt is not at issue in this litigation, since because of the "gift" by Congress in the Submerged Lands Act it is conceded that the States own that belt (Report, pp. 24-25, 56, 80 § 25). The Master's approach is demonstrably unsound in several critical respects.

California focused upon a lack of evidence in the record in that case to establish a uniform three-mile belt in colonial times; see pp. 13-14, *supra*. The Common Counsel States in this case do not assert that any such uniform belt arose prior to the 18th century; they show instead that, when it did arise, it represented a curtailment of a broader right of sovereignty and dominion previously recognized in English and international law; see pp. 58-60, 113-16, *infra*. Even more important, a fundamental question presented in this case is the soundness of *California's* historical holding so far as it may be read to negate any offshore colonial or State ownership claims in the 17th and 18th centuries. Any evidence logically pertinent to this inquiry must be weighed on its merits and not discounted in advance.

Given the state of technology prior to recent times, it is natural that much—though by no means all—of the historical evidence showing the assertion and exercise of maritime sovereignty and dominion relates to areas fairly

close to shore, where exploitation was feasible. Prior to, at the earliest, the very end of the 18th century, neither English nor international law made any legal distinction between a three-mile belt and the adjacent seas beyond three miles; no one had ever heard of a three-mile limit. Thus evidence regarding maritime sovereignty and dominion prior to the formation of the union, to whatever distance offshore, is highly relevant in refuting any assumption imputed to *California* that prior to acceptance of the three-mile limit maritime sovereignty and dominion stopped at the low-water mark.[27]

No balanced and impartial scrutiny of the evidence can escape the conclusion that, long prior to 1603, English law and practice consistently recognized extensive rights of sovereignty and dominion in the marginal seas which included the right here at issue: the exclusive right to exploit seabed resources. The state of the law both with respect to areas where seabed exploitation was then feasible and on analogous subjects, such as surface fisheries, islands rising in the sea and derelict lands, made it wholly clear that exploitable resources anywhere on the bed of the English seas would have been claimed by the crown instantly upon their discovery and that the claim would have been legally sustained.

B. ENGLISH LAW AND PRACTICE DURING THE 17TH CENTURY, THE PERIOD OF THE COLONIAL CHARTERS, FULLY RECOGNIZED THE CROWN'S SOVEREIGNTY AND DOMINION IN THE ENGLISH SEAS AND SEABED; AND NOTHING IN INTERNATIONAL LAW WAS TO THE CONTRARY.

During the reign of James I (1603-25) and thereafter,

[27] Likewise, post-1787 evidence of State assertion and exercise of sovereignty and dominion within the three-mile belt is relevant in refuting *California's* alleged holding that since the formation of the union whatever rights of sovereignty and dominion have existed in the marginal seas belong to the federal government.

English law and practice unequivocally affirmed the rights of sovereignty and property of the crown in the adjoining seas. The English seas were regarded as part of the realm, just as much as the land, and therefore subject to the legislative, executive and judicial power of the state. The crown possessed and exercised the right to exclude or to license foreign fishermen and the right of admiralty jurisdiction, both civil and criminal, including criminal jurisdiction over foreigners for crimes committed in the English seas.

The English seas were regarded on historical grounds as extending all the way across both the North Sea and the English Channel, and for considerable distances into the Atlantic. Except where special circumstances operated (as in the English Channel, all of which was claimed on the basis of the English kings' claim to the French throne), the usual doctrine was that English sovereignty extended for 100 miles. Within the English seas, the right to the fisheries was exclusive, and the crown had and constantly exercised full rights of regulation, control and licensing of the fisheries. The admiralty jurisdiction was territorial in the English seas, and the flag salute was required for foreign ships in those seas. As to the seabed and subsoil, the law of England was that the crown owned them and the resources thereof.

The overwhelming body of evidence supporting these conclusions is summarized at S.B. 47-124. The facts were largely conceded by plaintiff's witnesses and by the Master. To the extent the Master disagreed, he is refuted by the record.

1. The English Seas Were Within the Realm of England.

The Master denies (Report, p. 35) that English law deemed the English seas to be part of the realm of England

or under the territorial sovereignty of the English crown (though he concedes that they were under the crown's "dominion," *ibid.*). For that proposition the Master relies on a single unofficial authority—Sir Henry Finch in 1613—whose brief discussion of the matter is quoted in full at S.B. 69. Even Finch does not support the Master's conclusion.

Finch identified the term "realm" with the bodies of counties, which end at low-water mark. But he plainly did not believe that the territorial sovereignty of the English crown was limited to the "realm" in that narrow sense, since in the same sentence he declares that Scotland, Wales and Ireland are not within the realm either. Finch's sole concern in the passage in question was the territorial extent of the jurisdiction of the English common-law courts, not a definition of those areas over which the crown held territorial sovereignty.

Finch, moreover, is the *only* 17th-century authority who is even faintly ambiguous on this score. The massive evidence summarized at S.B. 48-73, and excerpted at App. 31-40, 46-48, 91, 93, 647-50, 655-56, 667-68, 674-77, 697, 712-15, 721, 726, 731, 739-40, 777-83, 854, 897-98, demonstrates the overwhelming consensus throughout the 17th century that the crown possessed territorial sovereignty over the English seas as full and complete as over the land of England itself. The evidence includes judicial decisions, notably the famous *Ship Money Case* in 1637 (S.B. 49-54). Acts of Parliament (S.B. 55-56), several official opinions of the law officers of the crown (S.B. 56-58), and other official pronouncements and governmental acts having legal force (S.B. 58-60) were unambiguously to the same effect. This English maritime sovereignty was recognized on a number of occasions by foreign nations, by treaty and otherwise (S.B. 72-73). The same principle was unequivocally expounded by every 17th-century English legal commentator we have found who discussed the issue except Finch—at

least 13 of them (S.B. 61-69), including the three most influential, Coke, Selden and Hale.[28]

2. The 17th-Century English Admiralty Jurisdiction in the English Seas Was a Territorial Jurisdiction.

The Master disputes (pp. 31-33, 75 § 5) the unanimous opinion of every 17th-century English legal authority that the admiralty jurisdiction in the English seas was a territorial, not a personal, jurisdiction. We rely on the territorial nature of the jurisdiction because it confirms the crown's territorial sovereignty in the seas and because the jurisdiction encompassed the exclusion of foreigners from unlicensed exploitation of maritime resources.

The evidence showing the unanimous agreement of 17th-century courts, officials and legal authorities that the admiralty jurisdiction in the English seas was founded on the crown's sovereignty in those seas is summarized at S.B. 92-98 and, with respect to the insistence on the flag salute as an attribute of sovereignty, at S.B. 117-20. Among the clearest evidence are the charges of the famous admiralty judge Jenkins to admiralty juries, App. 894-903. Jenkins squarely based the admiralty jurisdiction upon, and deemed it coextensive with, the "sovereignty of our kings in the British ocean" (App. 895). No distinction is made between English subjects and foreigners with respect to the activities in the English seas which are to be investigated. Foreigners are singled out for special scrutiny and prosecution with respect to the crimes of fishing in the English seas without license and refusal to give the flag

[28] Merely as one example, Coke declared that "if a man be upon the sea of England, he is within the kingdom or realm of England and within the legeance of the King of England, as of his crown of England" (App. 655; S.B. 65). Every modern commentator, including Fulton, is to the same effect (S.B. 70-72; App. 810).

salute (App. 896). A clear distinction is made between the territorial jurisdiction of the admiralty in the four English seas, which is exclusive, and the non-territorial jurisdiction over piracy anywhere in the world, which is non-exclusive (App. 897-99; see also App. 675). The admiralty enforced the various statutes and ordinances regulating exploitation of maritime resources, both surface and seabed (App. 903).

Further, conclusive evidence at App. 721-38 shows the indictment, trial and conviction of a number of foreigners for crimes other than piracy (*i.e.*, failure to give the flag salute) committed in the English seas. The indictments flatly recited that the British seas are "within the sovereignty and of the dominion of the kings of England . . . as a parcel of the Kingdom of England" (App. 721, 731). Since these indictments were found legally sufficient and resulted in convictions, they are unimpeachable authority.

The Master appears to contend that the admiralty jurisdiction, even if territorial, was somewhat more limited than English jurisdiction on land, in that it did not include such crimes as the murder of one foreigner by another on board a foreign vessel (Report, pp. 31-32). But for the purpose of this litigation that question is academic: no one familiar with the evidence can doubt, and the Master nowhere denies, that the jurisdiction would have been instantly applied to a foreigner seeking to extract mineral from the seabed of the English seas. That is wholly sufficient to sustain the States' claim here. The States need not show historical precedents for sovereignty or dominion over the sea going beyond the rights at issue here.[29]

[29] As to the irrelevant question of jurisdiction over internal affairs of a foreign ship, with no English persons or interests involved, it is hardly surprising that such incidents are not found; the English authorities would probably not even know of such a crime. Moreover, during this period the right of innocent passage of foreign ships was generally recognized as a qualification on full maritime territorial sovereignty

The Master relied on Justice Cockburn's 19th-century opinion in *Queen v. Keyn* for the proposition that 17th-century English admiralty courts had no jurisdiction over foreigners. While Justice Cockburn's treatment of the admiralty cases he did treat was highly questionable (App. 53-58), the conclusive refutation to Cockburn is found in the cases at App. 721-38, of which he was apparently unaware. See also App. 56-57. In any event, there cannot be the slightest doubt that every 17th-century authority, judicial, official and unofficial, regarded the admiralty jurisdiction as territorial and as extending to foreigners at least whenever foreign activity in the English seas impinged on English interests, as any attempt to exploit seabed resources would obviously have done.[30]

Finally, the Master claims that in the treaty of 1674 it was agreed that the Dutch would accord the flag salute "merely as a ceremony of honor and a testimony of respect

(S.B. 120-21; App. 815-16, 850), just as it is today. That right entails immunity of a foreign ship from the jurisdiction of the territorial state so long as the acts in question have no effect outside the ship; the ship is regarded as part of the territory of the sovereign of its flag, and carries its own territoriality with it—again so long as no effects outside the ship are produced. *E.g.*, 4 Whiteman (U.S. Dept. of State), Digest of International Law, 11, 387, 400-01 (1965); 6 *id.* at 93 (1968); 9 *id.* at 67-71 (1968). No one questions that, for these reasons, United States courts today have no jurisdiction over a murder on board a foreign ship even in territorial waters, let alone in the waters overlying the continental shelf. Yet no one contends that that limitation means that the three-mile belt is not territorial or that continental-shelf resources are not subject to the exclusive right of national exploitation.

[30] While the Master may believe (Report, p. 32 n.) that the 17th-century statement to this effect by Lord Hale (Chief Justice of England and the leading authority on maritime law) was not supported by the evidence from even earlier centuries which Hale cited, that surely is not the point: the Master is not expounding 17th-century law, but quarreling with it. Hale, Selden, and others, plus the primary legal evidence mentioned above, simply leave no doubt as to what that law was.

to the English crown" (Report, p. 23). The treaty acknowledges "the right" of the English king "to have honour paid to his flag . . . in the same manner, and with the like testimony of respect, as has usually been paid" in the seas whose boundaries were specified, and declares that the Dutch were "justly acknowledging" that right (13 Parry, *Consolidated Treaty Series* 133, 134-35). It is quite true that the Dutch never admitted English territorial sovereignty in the English seas or that the flag salute was a corollary of it; the question here is what the law of England was, and there can be no question that English law regarded it as such a corollary (S.B. 117-20; App. 828, 851-52).

3. The Crown Possessed the Legal Right To Exclude or To License Foreign Fishermen in the English Seas and the Right To Create Monopolies of Newly Discovered Fisheries; and All Fisheries in English Waters Were Subject to Regulation.

The law of England with respect to fishing rights in the English seas throughout the 17th century may be simply and categorically stated. *Prima facie*, the crown owned the sea fisheries as one of its principal *regalia* or royalties. That ownership was full and unabated with respect to the royal or great fish. As to lesser fish, English subjects had a common right to take them, except in areas of the sea where that right had been superseded by a royal grant of an exclusive fishery. Any newly discovered or developed fishery was a proper subject for an exclusive right or monopoly created by the crown.

Foreigners had no right recognized by English law to fish within the seas of England; the crown could allow them, exclude them or license them at its pleasure, and its decisions were enforced by the admirals and in the admiralty courts. Both as to English and as to foreign fishermen (to the extent they were permitted at all), England possessed law-making authority in the English seas; that is, England could and did regulate the times, places and manner of

fishing. This body of English regulatory law of sea fishing was policed by the the navy and enforced judicially in the admiralty courts.

At S.B. 75-92 we discuss a wealth of court cases, acts of Parliament, legal opinions, royal proclamations, other official pronouncements and acts of state, legal treatises, modern commentators and treaties, spanning the entire century from beginning to end, which both declared and implemented crown ownership of the fisheries throughout the English seas.[31] While the Master habitually refers to the English position as "claims," it is certain beyond question, and indeed the Master never denies, that the "claims" were fully incorporated into the positive law of England. Plaintiff's witness admitted this (App. 546-51).

The legal foundation of the crown ownership of the fisheries was uniformly declared and held to be the territorial sovereignty of the crown over the waters in which the fisheries were located. No distinction was made between surface fisheries and sedentary fisheries or mineral resources; the same sovereignty that embraced the one would equally embrace the other. This view is confirmed by the actual law and practice as to seabed and seabed-resource ownership.

4. The Crown Owned the Seabed and Subsoil of the English Seas and the Resources Thereof.

As previously seen (p. 30, *supra*), crown ownership of the seabed of the English seas was declared and recognized

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[31] For example, in the Case of the Royal Fishery of the Banne in 1610, the Privy Council, the highest court of England, held that a salmon fishery in a navigable river belonged to the crown as part of its prerogative. The *ratio decidendi* was that navigable rivers participate of the nature of the sea, and since the king owns the fisheries in the English seas he owns those in navigable rivers also (S.B. 98-100; Exhibit 157). The crown right to fisheries the court called a "royalty." *Id.* at 41.

during the mediaeval period and was taken by Diggs in Elizabeth's reign as the basic premise on which he erected his new doctrine of crown ownership of the foreshore. In the 17th century the doctrine remained unchanged and was frequently reaffirmed from beginning to end of the century. In the *Case of the Royal Fishery of the Banne* in 1610, p 45, *supra*, n. 31, England's highest court held that the "sea is . . . under the dominion of the king," and was plainly referring to the bed as well as the surface ("therefore the king shall have the land which is gained out of the sea") (S.B. 99). Later cases explicitly applied the doctrine to the bed of navigable waters (S.B. 100-05). Plaintiff's witness Professor Thorne conceded that the crown's property rights in the English seas extended both to sedentary fisheries and to subsoil mineral resources (App. 551-54).

Theory was confirmed by practice. Throughout the century the crown exercised ownership of lands reclaimed from the sea, exclusive oyster fisheries in the sea, and islands rising in the sea (S.B. 106-07; App. 92-98). Legal treatises, both 17th century and modern, uniformly recognize crown ownership of the seabed and its resources (S.B. 107-17). Among the earlier 17th-century writers, Callis in 1622 affirmed the crown ownership in detail and at length (S.B. 107-09; App. 777-83).

The Master, after discussing the writings of Selden and Hale which also unequivocally affirmed crown ownership of the seabed, correctly concluded that "by the accepted English law of the seventeenth century the prerogative rights of the crown extended to the ownership of the bed of the narrow seas adjacent to the coasts of Great Britain and Ireland" (Report, p. 35). Later, when he dealt with the colonial charters, the Master assumed that it was *only* the writings of Selden and Hale which first established seabed ownership, as a new doctrine, and therefore that the

colonial charters issued before the publication of Selden's *Mare Clausum* in 1635 conveyed no seabed rights. For the reasons given above and at pp. 63-66, *infra*, this assumption is wholly without merit.

5. Under English and International Law in the Seventeenth Century, Maritime Sovereignty and Dominion Were Not Limited to Areas Effectively Occupied; a Uniform Belt of at Least 100 Miles Was Recognized, Subject to Adjustment in Cases of Special Historical Circumstances.

The Master held that in 17th-century law, both English and international, maritime sovereignty and dominion were limited to areas of sea physically and continuously occupied by a navy (Report, pp. 35-38), and hence that the English seas had no permanent boundaries, expanding or contracting as the navy was more or less powerful (pp. 39-40). For international law the Master relies on secondary sources alone; for English law, he purports to rely on Hale and Selden.

Neither the Master nor plaintiff has cited any English authority which held that the English seas subject to English jurisdiction expanded and contracted depending on England's relative naval power; and we have encountered none. Every English authority cited in the record gave the same definition of the English seas: the entire English Channel and Bay of Biscay as far as Cape Finisterre, the North Sea up to the latitude of Cape Van Staten in Norway, and to the north and west of England to a distance which was sometimes unspecified but was defined by every writer who addressed the subject as 100 miles (S.B. 35, 47, 58, 61, 67, 68, 126, 128, 131, 212-213, 276-278). This definition was regarded as fixed and constant, and remained so through the 18th century and into the 19th century (pp. 55-58, *infra;* S.B. 126-29, 465-68).

The passage from Hale quoted by the Master (Report, pp. 35-36) does not say that physical occupation was necessary for ownership; it speaks in terms of the *capacity* for occupation, not the physical fact of occupation. The quoted passage from Selden (Report, p. 36) declares that maritime sovereignty does not arise "*altogether*" from ownership of the adjacent land, but *also* is based on "use or enjoyment of the sea," such as having a navy, prescribing rules of navigation, engaging in maritime commerce and in "admitting or excluding others at pleasure." [32]

Selden, moreover, made it plain with specific reference to English maritime sovereignty in North American waters, in a passage quoted in full at S.B. 172-174, that physical occupation of the American marginal seas was not at all necessary to affirm the English title to them. In that passage Selden based the English right to the North American marginal seas on the conventional grounds of the English discovery and settlement of the adjacent coasts, and on the performance of symbolic acts of sovereignty on

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[32] From this the Master deduces (p. 38) that even in the Stuart period England did not meet Selden's test, since it did not attempt to exclude or to tax peaceful foreign vessels traveling through the English seas. Plainly, the Master is misunderstanding Selden, since Selden unquestionably believed that England possessed full sovereignty in the English seas. Selden's view, like that of most other writers of the period (S.B. 120-21), was that the right of innocent passage should as a general matter be permitted without question. Mare Clausum, pp. 123-26. But Selden makes it clear that innocent passage was not inconsistent with maritime sovereignty and dominion:

"[T]he Offices of Humanitie require, that entertainment bee given to Strangers, and that inoffensive passage bee not denied them. . . . But what is this to the Dominion of that thing, through which both Merchants and Strangers are to pass? Such a freedom of Passage would no more derogate from it . . . than the allowing of an open waie for the driving of Cattel, or Cart, or passing through upon a journie, or any other Service of that nature, through another man's Field, could prejudice the Ownership thereof." *Id.* at 123-24.

those coasts. He expressly states that seas "that were never taken into possession" might become subject to a valid title on the basis of such settlement of the adjacent coast plus a claim to the seas "in hope of using and enjoying." Other English authorities likewise denied that occupation was necessary (S.B. 61; App. 663-64, 673-74).

Every English legal writer before and during the 17th and 18th centuries who stated a limit for maritime sovereignty in the absence of special factors stated the same limit: 100 miles (S.B. references at p. 47, *supra*). The 100-mile limit was asserted during the period of the earliest colonial charters both by the Prime Minister of England, speaking officially (S.B. 58), and by the leading international law authority residing in England at the time (S.B. 35, 171; App. 804-06). As we shall see (pp. 81-84, *infra*), the 100-mile limit was incorporated in the colonial charters as well.

The relevant international law of the 17th and surrounding centuries is discussed in detail at S.B. 261-83. The nature of international law is such that a national claim or practice violates it only if there is a generally recognized and accepted consensus of international doctrine and practice forbidding that conduct[33]—a consensus which, as to the 17th century, must be deduced from, in the first instance, state practice and, as a "subsidiary means" (App. 110), the writings of learned commentators *of that period*.

No one contends or could contend that in the 17th or

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[33] S.B. 263; App. 108-11; Case of the S.S. Lotus, [1927] P.C.I.J., ser. A, no. 10, at 4, 19. Even apart from the state of international law in that period, it must be remembered that national courts do not use international law as a device for rebutting the claims of their own sovereigns (S.B. 261-62, 404-05), and that it is inconceivable that an English court in the period under discussion would have regarded the maritime sovereignty which existed in English law as impeachable on international-law grounds.

preceding centuries a consensus existed either in state practice or in doctrine which outlawed England's claims to maritime sovereignty and dominion. Similar claims were made and exercised by the overwhelming majority of nations bordering on the sea; and international law, so far from forbidding such sovereignty and dominion, affirmatively countenanced it (*e.g.*, App. 803-18). There was no consensus by the 17th century limiting the extent to which such maritime rights could be claimed and exercised, except that the claim of Spain and Portugal to all the oceans of the world had been rejected. Among international-law writers who proposed some limit to maritime claims, the overwhelming majority proposed either 100 miles or 30 leagues, which is virtually identical (S.B. 271-78; App. 804-06). Sixty miles was the narrowest limit proposed by anyone (S.B. 277); it is undisputed that by the end of the 17th century no one had proposed any narrow-limit rule such as cannon shot or the three-mile limit.

For his contention that occupation was necessary under 17th-century international law the Master relies (Report, pp. 36-38) on Waldock, Oppenheim and Westlake. But none of these writers purported, in the passages relied on, to speak of any period earlier than the 20th century. For example, Waldock expressly states that the purpose of the part of his article on which the Master relies was "to set out the legal position broadly as it obtained at the outbreak of the Second World War," "The Legal Basis of Claims to the Continental Shelf," 36 *Grotius Society* 115 (1951); and there is not a word in the entire article which deals with pre-20th century law or practice.[34]

[34] Likewise the passage from Oppenheim relied on by the Master deals solely with 20th-century law. Elsewhere, Oppenheim recognizes that the earlier law contained no requirement of effective occupation. 1 Oppenheim, International Law 558-59 (8th ed. Lauterpacht 1955).

It has been conclusively established in the authoritative Keller, Lissitzyn and Mann, *Creation of Rights of Sovereignty Through Symbolic Acts, 1400-1800* (1938), cited with approval by Oppenheim himself,[35] that "effective occupation" was not necessary for the establishment of sovereignty in the 17th century:

> "Next, it may be asserted on the basis of the facts that the formal ceremony of taking possession, the symbolic act, was generally regarded as being wholly sufficient *per se* to establish immediately a right of sovereignty over, or a valid title to, areas so claimed and did not require to be supplemented by the performance of other acts, such as, for example, 'effective occupation.' A right or title so acquired and established was deemed good against all subsequent claims set up in opposition thereto unless, perhaps, transferred by conquest or treaty, relinquished, abandoned, or successfully opposed by continued occupation on the part of some other state." App. 822; S.B. 162-64.

This passage is a summary of the entire book, which exhaustively analyzes the evidence and the law. Plaintiff's witness Professor Thorne conceded that "a claim made in the name of the King," without effective occupation, was sufficient to establish title to newly discovered territory in the 17th century (App. 546). This Court has repeatedly recognized that during the colonial period discovery, without "effective occupation," was adequate to establish English sovereignty.[36]

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[35] *Loc. cit.* p. 50, *supra*, n. 34.

[36] Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573 (1823) (Marshall, C.J.); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Massachusetts v. New York, 271 U.S. 65, 85 (1926). *Accord*, 1 Story, Commentaries on the Constitution §§ 2-38, pp. 6-18 (5th ed. 1905).

The criteria for sovereignty in the sea and seabed have always been substantially *less* stringent than as to land areas. In the 17th century sovereignty over the adjacent land territory, plus claims to maritime sovereignty and a minimum of maritime activity in portions of the marginal sea, were deemed wholly sufficient to establish title to the entire marginal sea out to at least 100 miles. Nor did subsequent law impose any requirement of prior effective occupation as to the exclusive right to exploit seabed resources; see pp. 120-29, *infra*. The English title to the North American seas and fisheries was habitually justified, not only by writers but by the British government, on the ground of English first discovery and performance of symbolic acts of sovereignty on the adjacent land areas (S.B. 164, 172-74, 231-32). The Master's attempt to import into the law of the colonial period a requirement of effective occupation for the establishment of sovereignty is wholly unhistorical, as this Court has several times held.

In 1909 the Permanent Court of Arbitration, an international tribunal applying international law, recognized that full territorial maritime sovereignty and dominion, without any "occupation" requirement, existed in the 17th century. The court referred to

> "the fundamental principles of the law of nations, *both ancient and modern*, in accordance with which, the maritime territory is an *essential appurtenance of land territory*, whence it follows that at the time when, in 1658, the land territory called the Bohuslan was ceded to Sweden, the radius of maritime territory constituting an inseparable appurtenance of this land territory must have automatically formed a part of this cession." The Grisbadarna Case (Norway v. Sweden), Scott, *Hague Court Reports* 121, 127 (1916). (Emphasis added.)

Even if there had been an "occupation" requirement, which there was not, it was fully satisfied with respect to the marginal seas of the Common Counsel States. In the 17th and 18th centuries the capability of ships, especially their capacities with respect to provisions and their lack of space for drying fish once they were caught, was such as to make it wholly impractical for a nation to challenge the maritime supremacy of another state in the latter's adjacent waters unless the challenging nation had bases close by. Thus the Dutch could mount real contests against the British claims to sovereignty and dominion in the North Sea, for the fisheries of those waters were no farther from the Dutch ports than they were from England itself. Likewise in Canada there could be and were sharp contests between England and France over the fisheries so long as the Canadian coastline and islands were divided among those two empires. But in the adjacent waters of the Common Counsel States, far from any French bases or ports and hopelessly far from those of any other European power, possession of the coast gave England and its colonists as a practical matter complete control over the marginal seas (S.B. 224, 233-34; App. 791, 830-31).[37] The only exception proves the rule: in the waters of Maine, as in Canada, the French and English bitterly fought for a monopoly of the fisheries, and the English were successful (App. 838-46).

Plaintiff and the Master contend that the relative paucity of evidence regarding conflicts in, or exclusions of foreigners from, colonial waters means that no maritime sovereignty

[37] Plaintiff expressly conceded this point: in the marginal seas of the colonies south of Canada, "for all practical purposes control of the land meant control of the fisheries." Post-Trial Brief for the United States. 143; see also Tr. 1632.

and dominion were claimed. On the contrary, the evidence shows the colonial maritime sovereignty was unchallenged. Throughout the colonial period, England and its colonies enjoyed the exclusive use of the colonies' marginal seas.

Plaintiff and the Master have referred to no evidence whatever that foreign states or their nationals even attempted any use of the marginal seas of the Common Counsel States during the colonial period. And we can be certain from the absence of evidence that south of Maine few if any such attempts were made, simply because of the sharp and bitter conflicts that arose in areas—*e.g.*, the North Sea and Canadian and Maine waters—where such challenges were physically possible (S.B. 79-86, 222-36). Plaintiff's own witnesses conceded that if the French or other foreigners had attempted to exploit our marginal seas for fishing or otherwise, such attempts would have been resisted as they were elsewhere (App. 536, 541-42, 555).

Neither law nor practice in the 17th century or later required that, to establish exclusive title to seabed resources, a coastal state "occupy" an area of the sea or seabed *before* exploitable resources were discovered. The whole history of seabed exploitation shows that, as improved technology has made exploitation of larger areas or new resources feasible, the coastal state has automatically exercised the exclusive right to control exploitation and occupation has followed. Exploitable resources on the North American continental shelf in the 17th century thus clearly would have been claimed by the sovereign of the adjacent state, and foreigners would have been excluded. This view is consistent with, and supported by, the evidence of charters and governmental practice central to the States' claim of title int his case. See pp. 63-89, *infra*.[38]

[38] Although the Common Counsel States believe that the primary sources and commentators themselves established the 17th-century law

C. ENGLISH SOVEREIGNTY AND DOMINION IN THE ENGLISH SEAS WERE NOT ABANDONED OR REPUDIATED EITHER BY ENGLISH LAW OR BY INTERNATIONAL LAW IN THE PERIOD 1688-1776.

The Master found that between 1688 and 1776—"sometime before 1776" (Report, p. 46) — the English law of the preceding century with respect to maritime sovereignty and dominion was "allowed to die out from practical affairs," surviving " 'only in the pages of historians, naval writers, and pamphleteers' " (p. 40), and that no maritime sovereignty and dominion then existed either in English or international law until wholly new, more limited rules (cannon shot; eventually the three-mile limit) arose (pp. 39-47, 75-76 §§ 4, 6-8, 10).

The Master's reliance for these propositions is *solely* on Fulton and on other 20th-century secondary sources, plus two English cases decided in 1876 and 1914 respectively. Not only did the Master ignore the primary, contemporary sources which are obviously the best evidence for 18th-century law and practice; the authorities on which he did rely do not support his conclusions as to the period under discussion. While Fulton does make the statement quoted by the Master at Report, p. 40, evidence Fulton himself

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and practice beyond reasonable dispute, they introduced before the Master the testimony of Philip C. Jessup, former Judge of the International Court of Justice, an eminent former diplomat and State Department official, and the leading scholarly expert in this country—probably in the world—on the law of the oceans (App. 106-08). Judge Jessup's testimony, in particular, demolished the claim that occupation was necessary and affirmed that coastal states had in the 17th century, and ever since have had, the exclusive right to exploit the resources of the adjacent seabed (pp. 116-29, *infra*).

elsewhere brings forward helps, as we shall see in a moment, to demonstrate the falseness of that statement.[39]

As to the Master's other authorities, the Master has drawn conclusions from them with respect to a period about which they do not even purport to speak, as the Master's own quotations make clear. For example, Brownlie (Report, pp. 40-41) says a change in the law in favor of the cannon-shot rule had taken place by the "late 18th century"; but no authority we have encountered claims that this had occurred by 1776, no one has claimed that a cannon-shot or three-mile rule was heard of in English law before 1800, and Brownlie was speaking of surface waters, not the seabed.[40] Not only do the Master's own authorities provide no support whatever for his position; that position is false in fact.

The relevant 18th century English law and practice is analyzed at S.B. 124-39 on the basis of primary, contemporaneous sources. These show that the doctrine, as it existed prior to 1688, that the English seas is historically

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[39] O'Connell has recently demonstrated that Fulton's statement quoted by the Master was wrong. O'Connell, "The Jurisdictional Nature of the Territorial Sea," 45 Brit. Y.B. Int'l L. 303, 316-19 (1971). Even Fulton acknowledged that the cannon-shot rule and the three-mile limit were "unknown to English law prior to 1800." Fulton, *op. cit.* at 579-80.

[40] Similarly, Potter observes merely that the claim to entire closed seas had been abandoned by the middle of the 19th century. Potter, The Freedom of the Seas 90 (1924). Elihu Root (Report, pp. 41-42) was likewise talking about a 19th-century development. The Privy Council's opinion in Attorney General for British Columbia v. Attorney General for Canada (Report, p. 42), written in 1914, merely says that the doctrine of the narrow seas is "*now* obsolete." (Emphasis added.) Similarly, Cockburn's opinion in Queen v. Keyn (Report, p. 43) says merely that as of 1876, the time of writing, the narrow-seas doctrine "is *now* exploded." (Emphasis added.) All these authorities, moreover, were dealing with claims to territorial sovereignty over the surface waters of entire seas, not with rights to the seabed resources of the continental shelf.

defined were within the realm of England and were subject to crown sovereignty and dominion, together with the historic definition of the extent of those seas, remained constant and unanimously accepted in the legal literature of the period. Fulton's passage relied on by the Master (Report, p. 40) calls these authorities "historians, naval writers, and pamphleteers". In point of fact, they included practical diplomats like Lediard (S.B. 128; App. 824-28); the most authoritative general legal writers of the period, like Blackstone, Viner and Bacon (S.B. 128-29; App. 649); judges like Comyn, Hedges and Penrice (S.B. 126-128, App. 657, 665, 693-94, 741-44); high officials in charge of the precise subject matter at issue, like Burchett (S.B. 128; App. 771-75), and the leading authorities, like Justice and the anonymous writer of 1746 (S.B. 127, 129), on the law of admiralty, which of course was the branch of law which governed English rights and jurisdiction in the seas. At least two English treaties made during the period with foreign states likewise recognized that the English seas "appertain[ed] to his majesty's dominions" (S.B. 127). The definition and exercise of the admiralty jurisdiction remained unchanged from the preceding centuries (S.B. 132-33), and the flag salute as a recognition of English maritime sovereignty was insisted upon just as before and enforced on the relatively rare occasions when it was refused (S.B. 135-36).

Nor was the British claim to regulate fishing in the English seas and to exclude unlicensed foreign fishing given up. Fulton himself recognizes that the English navy continued to enforce the exclusion of Dutch fishing, and that the British efforts, together with French depredations during the Franco-Dutch wars, were successful in destroying the Dutch fishery, replacing it by an English fishery, and thereby solving "the part of the pretention to the sovereignty of the sea which related to the fisheries along the British coasts." Fulton, *op. cit.* at 534; S.B. 129-30. British legal authority throughout the century remained

wholly consistent with these British governmental actions (S.B. 130-32). Acts of Parliament regulated the manner of fishing in the English seas, and recognized the exclusive ownership of sedentary fisheries where those had been granted by the crown (S.B. 130). And the English courts continued to rely on 17th-century authorities such as Hale for the law of maritime sovereignty and dominion (S.B. 131-32).

Crown ownership of the seabed and subsoil and the resources thereof likewise continued to be fully recognized in law. The doctrine of crown ownership of the seabed and foreshore "has been stated in varying language by judge after judge from that time [the time of Hale] to the present day [1888]." Exhibit 728, p. xxxii-iii. Blackstone is only the best known of the many 18th-century legal writers and court cases which reaffirmed and applied the unchanged 17th-century doctrine of crown ownership of the seabed of the English seas (S.B. 133-35; App. 648-49). In the face of all this evidence of record, the Master's exclusive reliance on a few non-contemporaneous secondary sources which do not even support his inferences is incomprehensible.

When the 19th- and 20th-century writers exclusively relied on by the Master describe 17th-century English claims as anachronistic or absurd, they are primarily if not entirely referring to the 17th-century claim to the whole North Sea, English Channel and Bay of Biscay as closed English seas, right up to low-water mark on the continent. It is this overreaching, quite clearly, that has given the English claim a bad name among some later commentators—although, we must repeat, the attitudes of such commentators get us precisely nowhere in understanding what the actual law of the 17th and 18th centuries was. Not subject to any such criticism is the principle that always underlay the English claim and defined it except where special historic circumstances were alleged; that is, that an

coastal state is entitled to maritime sovereignty and dominion out to 100 miles or to the median line between its coasts and those of the opposite state.

International, like English, law in the 18th century emphasized this underlying, wholly sensible recognition of legitimate, exclusive national interests in territorial waters approximating 100 miles in width. Our detailed analysis of international law at S.B. 263-83 demonstrates that there was no consensus whatever by 1776, either in state practice or in doctrine, on any restriction of maritime sovereignty to limits narrower than 100 miles. That measure remained the dominant view throughout the century, and was still distinctly in the majority as late as 1795 (S.B. 276-78). The only other view to command any appreciable support favored 60 miles (S.B. 277).

To the limited extent that more narrow limits were tentatively articulated in the 18th century—line of sight, three leagues, two leagues, cannon shot and finally three miles[41] —those rules were proposed almost entirely for neutrality purposes, that is, to define the distance into the sea where the coastal nation had the right and the duty to protect belligerent ships from one another. As we demonstrate in detail at S.B. 121-24, 278-80, England and other nations could and did establish far more modest limits for this "neutrality" purpose than for other aspects of sovereignty and dominion. Moreover, powerful maritime nations had a strong interest in limiting the extent of neutral waters, in order to minimize those areas of the sea where their weaker enemies could find sanctuary in time of war. The Master's

[41] The Master concedes that the first identification in history of cannon shot with three miles was not made (by Galiani) until 1782 (Report, p. 45). The Master erroneously deduces that Galiani proposed three miles for "the limit of the territorial sea." In fact Galiani held that the limit, for neutrality purposes, should be two leagues, or twice the range of cannon. S.B. 308; Fulton, *op. cit.* at 563.

apparent assumption that any proposed limit of maritime sovereignty must have been proposed for all purposes is wholly contrary to the evidence of record.

The Master's position rests on a highly artificial theory of a hiatus in the law: that the 17th-century claims to whole seas vanished without a trace after 1688, leaving coastal nations with no rights of any kind out beyond low-water mark, and then after some undefined period of time territorial waters limited to cannon shot or three miles arose *ex nihilo*. Such a hiatus defies historical probability and common sense. It could not and did not happen, as O'Connell has recently shown. *Op. cit.* at 316-19. What happened, instead, was a gradual retrenchment from earlier claims to the extent they interfered with the free navigation desired by the more powerful maritime states, including England. The process of retrenchment was not far enough advanced by 1776, or even 1800, that a new rule could be regarded as having acquired the status of obligatory international law, which as we have seen requires a consensus.

But the crucial point is that the retrenchment never affected sovereign rights to exclusive exploitation of seabed resources, because the reason for the retrenchment had nothing whatever to do with that right. No 18th-century instance has been found of any authority who denied the right of a coastal state to the exclusive ownership and use of the resources of the seabed and subsoil under its marginal sea. To the contrary, those writers who addressed the question, including Puffendorf and Vattel, fully recognized that the considerations militating towards freedom of the seas—the desirability of free navigation, the natural capacity of the sea to be used by nations in common, and the inexhaustability of at least some of the fisheries—had no application to the resources of the seabed and subsoil, and thus that there was no reason for any doctrine of *res com-*

munis to be applied there.[42] Vattel's classic 18th-century question, "Who can doubt that the pearl fisheries of Bahrein and Ceylon may lawfully become property?" (App. 173-74, 225-26), has represented the law as well as the common sense of the matter whenever and wherever the presence of exploitable seabed resources has drawn attention to the question.[43]

Even the Master has some qualms about his "hiatus" theory, since he qualifies his conclusion (Report, p. 47) that in 1776 "neither the British crown nor the colonies individually had any right of ownership of the seabed of the sea adjacent to the American coast," by excepting "those limited areas, if any, which they had actually occupied," But as we show at pp. 120-29, *infra*, even those writers who at times have suggested an "occupation" test have set its standards so low as to require no more than a bare claim. They also concede tacitly or otherwise, as state practice clearly establishes, that it is the coastal state which has the exclusive right to *make* an occupation; and they have not advanced the proposition that the occupation must be effectuated *before* an exploitable resource is discovered. And in every sense in which occupation was practically possible or could reasonably be required, Britain and its colonies were in occupation of the marginal sea and seabed of the Common Counsel States during the 18th century, and their

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[42] S.B. 281-83; Crocker (U.S. Dept. of State), The Extent of the Marginal Sea 68, 413, 457 (1919); Colombos, The International Law of the Sea 69 (6th rev'd ed.); 1 Oppenheim, International Law 629-30 (8th ed. Lauterpacht 1955).

[43] The view that retrenchment in the limits of full territorial maritime sovereignty in the interests of free navigation entailed no such retrenchment from the prior law with respect to seabed and subsoil resources is directly supported by Judge Jessup's testimony in this proceeding. Indeed plaintiff's witness Professor Henkin substantially conceded it (App. 541).

exclusive rights were unchallenged. Moreover, the Master's apparent concession that areas close to the coast may have been "occupied," and therefore owned, requires a significant retreat from the alleged *California* doctrine that nothing was owned below low-water mark.

III.

THE AMERICAN COLONIAL CHARTERS CONVEYED THE EXCLUSIVE RIGHT TO EXPLOIT THE SEABED RESOURCES OF THE MARGINAL SEAS OF THE COLONIES.

Our detailed demonstration that the American colonial charters conveyed to their grantees the exclusive right to exploit the resources of the seabed of the marginal seas of the new English colonies is set forth at S.B. 156-231. We summarize that demonstration below.

At the outset it must be noted that here, as elsewhere, the Master embraces an "all or nothing" approach: he believes that, if it cannot be established that the charters conveyed "full sovereignty and dominion" (Report, p. 50) over the adjacent seas and seabed, then the States' case wholly falls. As elsewhere, the short answer is that the *only* issue in this proceeding is the exclusive right to explore and to exploit seabed resources; every other question and piece of evidence is relevant only insofar as it bears, either directly or by implication, on that question. The right here at issue can exist (as it concededly does today) without full territorial sovereignty or ownership of superjacent waters.[44]

A. GIVEN THE LEGAL AND POLITICAL CLIMATE IN WHICH THE CHARTERS WERE ISSUED, IT WOULD HAVE BEEN INCREDIBLE IF THE COLONIES THEY CREATED HAD NOT BEEN GRANTED SEA AND SEABED RIGHTS.

In view of the claims England was making in European waters in the 17th century and the state of English law at that time with respect to maritime sovereignty and dominion (see pp. 38-49, *supra*), it stands to reason that

[44] In the same paragraph from which we have just quoted, the Master seems to concede that the colonial charters granted the exclusive right to sea fisheries, as they surely did.

similar claims would have been made on this side of the Atlantic. Especially is this so when it is understood how closely the European developments coincided chronologically with the American colonization (S.B. 142-48) and how the same persons responsible for the chartering and establishment of the American colonies were intimately and intensely involved in vindication of the English law of maritime sovereignty and dominion in home waters (S.B. 148-62). The Master's reply is that "the concept of crown ownership of the seabed . . . was first authoritatively asserted in the works of Selden and Hale in the middle years of the 17th century after most of the colonial charters had been granted" (Report, pp. 49-50).

We have already shown that the Master was wrong in concluding that pre-1603 English law failed to recognize crown sovereignty and dominion; in particular we have relied on a much older legal tradition of seabed ownership and on Diggs' explicit assertion of crown ownership of the seabed in Elizabeth's reign and the enthusiastic implementation of his doctrines by the government at that time (p. 33, *supra*). Within the 17th century itself, the Master is wholly wrong in his assertion that English law failed to recognize crown ownership of the seabed until the writings of Selden and Hale were published. To demonstrate the contrary we rely particularly on the *Case of the Royal Fishery of the Banne*, decided in 1610 by England's highest court, the Privy Council (S.B. 49, 74, 98-100); on the Exchequer's decision in *Attorney General v. Philpott* in 1632 (S.B. 100-01); on the extremely influential treatise of Robert Callis in 1622 (S.B. 107-08); and on the official governmental treatise of Sir John Boroughs in 1633 (S.B. 64-65, 109). In addition, while Selden's treatise was not published until 1635, it was written in 1618 and was fully familiar to the king and the government from that date (S.B. 62).

Pertinent in addition are the many other early 17th-century authorities which, without specifically addressing

the question of seabed ownership, unambiguously affirmed English territorial sovereignty in the English seas, the right to exclude foreign fishermen therefrom, and English legislative, regulatory and judicial jurisdiction over activities in those seas. It never occurred to any one at this period to deny that the territorial sovereign owned all ungranted soil within the realm, to distinguish with respect to ownership or exclusive control between surface fisheries and sedentary fisheries or other seabed resources, or to regard any activities within the English seas as beyond the power of England to regulate. (See, *e.g.*, App. 807.) Thus the Master is refuted by all the early 17th-century evidence discussed at S.B. 47-124, including in particular James I's Fishing Proclamation of 1609 and the legal opinions preceding it (S.B. 56, 58; App. 675-77) (the proclamation had been in contemplation since the beginning of the reign in 1603, S.B. 142); [45] the Prime Minister's official affirmation of the 100-mile rule about 1610 (S.B. 58); Sir Julius Caesar's official legal opinions of 1610 and 1617 (S.B. 56-57; App. 712-15); James I's grant of a monopoly of whale fishing in 1613 (S.B. 85), and the writings of Welwood in 1613 (S.B. 61, 86), Coke in his *First Institute* of 1628 (S.B. 65), and Malynes in 1622 (S.B. 67, 89).

The record is conclusive that from the very beginning of the 17th century, and indeed prior thereto, English law and practice with respect to maritime sovereignty and dominion were so fully developed that it is incredible that England would have defined its new possessions in America as stopping at low-water mark.

Even if the Master were right as to the chronology — which he very plainly is not — and seabed ownership had dropped *ex nihilo* into English law in 1635, such a new

[45] Plaintiff's witness Professor Thorne admitted that acts of the King in Council, such as the proclamations of 1609 and 1635, were fully authoritative as establishing the law of England. App. 548.

principle of the common law would have been applied on this side of the Atlantic as fully as in England unless there had been some reason for it not to be so applied. Plaintiff's witnesses agreed that no such reason existed (see below), and the Master suggests none. Moreover, most of the Common Counsel States have charters dating from the period 1635-1691, when the Master admits the principle of seabed ownership was fully established.

B. THE OBJECTIVES OF BRITISH COLONIZATION REQUIRED THAT MARITIME SOVEREIGNTY AND DOMINION BE CLAIMED IN COLONIAL WATERS; AND IT WAS CLAIMED.

The Master argues (Report, pp. 51-52) that 17th-century English maritime claims "involved, at bottom, protection and security," determined by the need to defend the British Isles against hostile nearby nations; that these factors had no application to the new world; and that therefore England showed "little interest in the North American coastal seas" and failed to claim or to "occupy" them. These contentions are belied by massive evidence of record.

Even plaintiff, or at least plaintiff's witnesses, have not dared to take so extreme a position as the Master does on this point; they flatly disagreed with the Master's theory. Every one of plaintiff's four witnesses who testified as to the American colonial development—Professor Morris (S.B. 166; App. 538), Professor Thorne (S.B. 168; App. 555), Professor Henkin (S.B. 169; App. 540-41) and Dr. Kavenagh (S.B. 195; App. 537)—conceded that English law with respect to maritime sovereignty and dominion was carried to this side of the Atlantic, and that there is every reason to believe that the colonial charters would have granted and that the colonies would have claimed everything that England was claiming in European waters.

It is also wholly clear from the record that economic con-

siderations, not merely "protection and security," were dominant in English legal and political attitudes toward maritime rights, both in European waters and in those of the American discoveries. The cause which precipitated maritime issues to the forefront of consciousness and concern in 17th-century England was "at bottom" economic, not military: the matter of the fisheries (S.B. 167-70; App. 784-91, 830-46, 881-89). Likewise, economic aggrandizement through the acquisition and monopolization of newly discovered and valuable resources — conspicuously including fisheries, sedentary fisheries and minerals — was at the heart of the whole expansion of European civilization of which the North American colonization was a part. This was true from the beginning of the process in Elizabeth's reign (S.B. 41-45), and continued unabated and intensified from the beginning of the 17th century (*e.g.*, S.B. 80-86). The exploitation of fisheries and other marine resources was of paramount importance as an objective of North American colonization.

Evidence that, so far from taking no interest in the North American seas, the English authorities from the beginning applied to those seas the full panoply of English legal rights in European waters is collected at S.B. 170-78. Throughout the 17th and 18th centuries, government officials like Sir John Coke, Burchett, Lediard, the admiralty commissioners and the law officers of the crown (S.B. 171, 174, 177-78), international-law authorities like Gentili (S.B. 171), officially sponsored government writers like Boroughs and Selden (S.B. 172-74), unofficial writers like Codrington (S.B. 175), and British treaties with France and Spain (S.B. 175-76) all recognized that the sovereignty and dominion which England claimed in its own waters were fully applicable to the marginal seas of the North American colonies. And these views were fully implemented in practice (*e.g.*, App. 784-91).

C. THE CHARTERS EXPLICITLY CONVEYED THE EXCLUSIVE RIGHT TO EXPLOIT SEA AND SEABED RESOURCES.

For simplicity we confine our discussion to the language of two of the earliest charters, the second Virginia charter of 1609 and the New England charter of 1620. No one has denied that these charters are entirely typical of the others and that corresponding provisions appear in every other charter. The relevant provisions of all the charters are set forth and analyzed at length at App. 250-331.

The pertinent granting provisions of the second Virginia charter read as follows:

> "all those Lands, Countries, and Territories, situate, lying, and being in that Part of America, called Virginia, from the Point of Land, called Cape or Point Comfort, all along the Sea Coast to the Northward, two hundred miles, and from the said Point of Cape Comfort, all along the Sea Coast to the Southward, two hundred Miles, and all that Space and Circuit of Land, lying from the Sea Coast of the Precinct aforesaid, up into the Land throughout from Sea to Sea, West and North-west; *And also all the Islands lying within one hundred Miles along the Coast of both Seas of the Precinct aforesaid;* Together with all the *Soils, Grounds, Havens, and Ports, Mines, as well Royal Mines of Gold and Silver, as other Minerals, Pearls, and precious Stones, Quarries,* Woods, *Rivers, Waters, Fishings, Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preeminences within the said Territories, and Precincts thereof, whatsoever, and thereto and thereabouts both by Sea and Land, being, or in any sort belonging or appertaining, and which*

> *We, by our Letters Patents, may or can grant*, in as ample Manner and Sort, as We, or any our noble Progenitors, have heretofore granted to any Company, Body Politic or Corporate, or to any Adventurer or Adventurers, Undertaker or Undertakers of any Discoveries, Plantations, or Traffic, of, in, or into any Foreign Parts whatsoever, and in as large and ample Manner, as if the same were herein particularly mentioned and expressed; . . . ." S.B. 179; App. 263-64. (Emphasis added.)

Also granted was the right

> "to dig and to search for all manner of Mines of Gold, Silver, Copper, Iron, Lead, Tin, and all sorts of Minerals, as well within the precinct aforesaid, as within and[any] part of the mainland not formerly granted to any other." S.B. 180; App. 264.

The letters patent further provided

> "that in all Questions and Doubts that shall arise upon any difficulty of Construction or Interpretation of any Thing contained either in this, or in our said former Letters-patents, the same shall be taken and interpreted in most ample and beneficial Manner for the said Treasurer and Company, and their Successors, and every Member thereof." S.B. 180; App. 264.

The boundaries of the New England colony were stated in its charter of 1620 as follows:

> "that all that Circuit, Continent, Precincts, and Limits in America, lying and being in Breadth from Forty Degrees of Northerly Latitude, from the Equinoctial Line, to Forty eight Degrees of the said Northerly Latitude, and in length by all the Breadth aforesaid throughout the Main Land,

> from Sea to Sea, with *all the Seas*, Rivers, *Islands*, Creeks, Inlets, Ports and Havens, within the Degrees, Precincts, and Limits of the said Latitude and Longitude, shall be the Limits, and Bounds, and Precincts of the second Colony: . . . ." S.B. 186; App. 270. (Emphasis added.)

The granting language was as follows:

> "all the aforesaid Lands, and Grounds, Continent, Precinct, Place, Places and Territories, viz, the aforesaid Part of America, lying and being in Breadth from forty Degrees of Northerly Latitude from the Equinoctial Line, to forty-eight Degrees of the said Northerly Latitude inclusively, and in Length of, and within all the Breadth aforesaid, throughout the Main Land from Sea to Sea, together also with the . . . *Fishings*, *Mines*, and *Minerals as well Royal Mines of Gold and Silver, as other Mine and Minerals, precious Stones*, Quarries, and *all, and singular other Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preeminences, both within the same Tract of Land upon the Maine, and also within the said Islands and Seas adjoining:* . . . to have and to hold, possess and enjoy, all, and singular, the aforesaid Continent, Lands Territories, *Islands*, Hereditaments, and *Precincts, Sea Waters, Fishings*, with all, and all Manner their *Commodities, Royalties, Liberties, Preeminences, and Profits*, that shall arise from thence, with all and singular their *Appurtenances*, and every Part and Parcel thereof, and of them. . . ." S.B. 187; App. 270-71. (Emphasis added.)

The favorable-construction clause also was included:

> "And further our will and Pleasure is, that in all Questions and Doubts, that shall arise upon any Difficulty or Instruction or Interpretation of any Thing contained in these our Letters-patents, the same shall be taken and Interpreted in most ample and beneficial Manner, for the said Council and their Successors, and every Member thereof." S.B. 187; App. 271.

Here, in addition to the same formulas as appeared in the second Virginia charter, we have express statements that "all the seas" specified are within the boundaries of the colony, that "sea waters" are among the properties conveyed, and that the royalties and other benefits include those "within the said islands and seas adjoining." The charter language was construed in several contemporaneous authoritative documents as conveying "the seas and islands lying within 100 miles of any port or the said coast." (See p. 81, *infra*.)

The Master hardly refers to the above language, but dwells on other language which does not bear on the question at issue (Report, pp. 47-48).[46] He then finds that the charters are not "explicit" enough to convey sovereignty and dominion in the colonial seas (pp. 48-49). The decisive words of our charters are explicit as could be desired with respect to the only right at issue here: the ex-

[46] The Master is in error in alleging that in 1682 Delaware was regarded as stopping at the mouth of Delaware Bay and therefore as not including any land fronting the sea. The Cape Henlopen identified in the 1682 charters was not the present cape of that name, which *is* at the mouth of Delaware Bay, but the point where the present Delaware-Maryland boundary meets the sea. Tr. 2195-96; U.S. Geol. Surv. Bull. 1212, Boundaries of the United States and the Several States 132 (1964); Powell, "Fight of a Century Between the Penns and Calverts", 1, 3, 8, 10 (1932); Bayliff, Maryland's Boundary Controversies 9 (1950). It was recognized from the beginning that Delaware was bounded not only by the "River and Bay of Delaware" but also by the "Eastern Sea." U.S. Exhibit 137, p. 238.

clusive right to exploit seabed and subsoil resources. Even apart from its use of legal terms such as royalties (pp. 73-75, *infra*), the Virginia charter granted *in haec verba* all the soils, mines, pearls and previous stones, waters and fisheries within both the land territory of the colony and the precincts[47] thereof both by sea and land. If possible even more explicitly, the New England charter granted all fisheries, mines and minerals both on the mainland "and also within the said islands and seas adjoining." What more could possibly be needed? If it be objected that no fixed limit is set to the "precincts" or "seas adjoining," we address the question of what the limit was at pp. 81-84, *infra*. But the Master's contention that the charters created exclusive rights of exploitation in *no* adjacent seabed, within any limit whatever, is palpably in conflict with the express words of the charters.

The Master seeks to contrast the language of the colonial charters with other English charters of 1610, 1621, and 1662. Noting that these latter documents conveyed "the seas" out to stated limits offshore, the Master asserts that this is proof that the crown used such language whenever the conveyance of adjacent waters and seabed was desired (Report, pp. 47-48). In view of the explicit charter language quoted above, the differences in phrasing between the charters of the Common Counsel States and other charters relied on by the Master cannot warrant a conclusion that

[47] There is no question that the term *precincts* referred not only to the area within boundaries previously described, but also to the environs or surroundings thereof. See, *e.g.*, The Oxford Universal Dictionary on Historical Principles 1564 (1955 ed.); 3 Oxford English Dictionary 1247 (1933).

The use of *appurtenances*, p. 70, *supra*, is likewise significant. Under the rule of the *Grisbadarna* case, p. 52, *supra*, during the period the marginal seas would have "automatically" passed as an "inseparable appurtenance" of the land territory without any explicit reference at all. Under modern international practice, likewise, territorial-sea and continental-shelf rights are not specified in acts of independence or cession; they pass automatically with the land. Thus the charters are far more explicit than was necessary or would be customary today.

our charters conveyed nothing in the adjoining seas and the others conveyed everything. And the Master's own comparison certainly undermines his own earlier contention that 17th-century law did not include maritime territorial sovereignty and that seabed ownership was not recognized in English law until the middle of the century.

D. THE CONVEYANCE OF JURISDICTION, FRANCHISES AND ROYALTIES CONFIRMS THAT THE CHARTERS INCLUDED SEABED EXPLOITATION RIGHTS.

The Master rejects (Report, pp. 49-50) our contention that rights in the colonial seas which included the exclusive right to exploit sea and seabed resources were conveyed as part of the jurisdiction, franchises, and royalties, both by sea and land, which were granted in all the charters.

The Master's conclusion rests in part on his premise that the 17th-century English admiralty jurisdiction was purely "protective," a premise we have shown to be wrong at pp. 41-44, *supra*. Indeed, plaintiff's witness Dr. Kavenagh conceded that the "jurisdiction" conveyed by the charters included the exclusive right to control and to license the fisheries of the American marginal seas (App. 535-36).

The Master gives virtually no reasons for his rejection of "franchises" as relevant to the issue here. We have shown that the term *franchises* was in common use as including, among other things, exclusive fisheries, as Blackstone, Hall and Moore all pointed out. Exhibit 728, p. 709; Exhibit 729, pp. 20, 33.

As to "royalties," the Master argues that a list of prerogative rights in *De Prerogativa Regis*, a document written *in the early 14th century*, does not specify the right here at issue. The fact is that in 17th-century usage the term *royalties* (sometimes *regalities* or *regalia*) was universally understood to include every one of the crown's rights

[48] The record is replete with evidence that puts this point beyond question. App. 254, 649, 675-77, 716, 719, 777, 791-94, 823, 852, 880; S.B. 13, 58-59, 60, 73, 74, 78, 79, 81, 83, 86, 89, 90, 96, 109, 112, 113, 114, 116, 133, 181.

of sovereignty and property in the adjacent sea and seabed, specifically including the exclusive right to seabed resources, and is the normal term a 17th-century conveyancer would have used to grant such rights.[48] The Master himself elsewhere concedes (Report, p. 33) that the crown's rights of ownership of the seabed and the resources thereof were referred to in the 17th century, "in conventional terminology, as the crown's royalties or regalia." Plaintiff's own witnesses likewise conceded this point (App. 555-58).

The Master goes on (p. 50) to argue that general grants of franchises and royalties conveyed nothing; that these words were mere nullities in the charters and that more specific words were necessary. The first answer, of course, is that more specific, wholly adequate words *are* present. For example, the New England charter of 1620 conveyed all "Fishings, Mines, and Minerals as well Royal Mines of Gold and Silver, as other Mine and Minerals, precious Stones, Quarries, and all, and singular other Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preeminences, both within the same Tract of Land upon the Maine, and also within the said Islands and Seas adjoining" (S.B. 186; App. 270-71). Every other charter contains similar language. The Master simply ignores it.

The second answer is that the principle of construction on which the Master relies stopped far short of a general rule that a grant of all royalties and franchises necessarily conveyed nothing. The rule correctly stated was that where the language of a grant to "a common person," 17 Viner, *General Abridgement* 133 (2d ed. 1792), was so vague as to create ambiguity as to the intent of the grantor, the grant would be construed narrowly with respect to prerogative or governmental rights since it would not be presumed without a clear showing that the crown intended to convey such rights to a private person. S.B. 199-200; 17 Viner, *op. cit.* at 138-39; *Grabham v. Geales*, 81 Eng. Rep. 995 (1619). The rule had no application to the colonial charters, which

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created governmental, viceregal bodies with palatine prerogatives, and which expressly included provisions requiring the construction most favorable to the grantee (pp. 69-71, *supra*). Massive authority demonstrates that this view of the rule and the charters is the correct one.[49]

Finally, in *Martin*[50] and *Shively*, cited in the margin, this Court expressly relied on the "royalties" language of the charters as including a conveyance of the soil under all navigable waters, without making any distinction between inland waters and the marginal sea. The application of this principle to embrace colonial ownership of "the soil under the sea" was expressly recognized in *Weston v. Sampson*, 62 Mass. (8 Cush.) 347, 351-53 (1851). For the contrary proposition the Master relies on *Attorney General v. Trustees of the British Museum*, [1902] 2 Ch. 598; but as demonstrated at S.B. 200-01, the court's holding did not apply the rule embraced by the Master at all, but expressly reserved judgment on that point. The Master also relied on an opinion by the law officers of the crown, issued in 1723, that the New Jersey charter did not convey royal mines. The opinion, Chalmers, *Opinions of Eminent Lawyers* 141-42, did not mention the word royalties, and its authors may have overlooked its presence in the charter.[51]

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[49] S.B. 191-204; Dyke v. Walford, 5 Moore's Rep. 434 (Privy Council 1846); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Shively v. Bowlby, 152 U.S. 14, 16 (1894); Gould, The Law of Waters 70-72 (3d ed. 1900); Angell, Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof 36-38 (1826).

[50] In *Martin* this Court held that the strict-construction rules "apply more properly to a grant of some prerogative right to an individual to be held by him as a franchise, and which is intended to become private property in his hands," and thus had no application to a governmental charter. 41 U.S. (16 Pet.) at 411. And the Court relied on the charter conveyance of "other royalties" as granting the soil under navigable waters. *Id.* at 413.

[51] The result was doubtless influenced by the fact that the New Jersey proprietors had surrendered their governmental rights, placing them in the position of "common persons"; and the opinion could well have

E. THE CHARTERS CONVEYED SEAS TO THE SAME DISTANCE TO WHICH ISLANDS WERE CONVEYED.

The second Virginia charter, in typical language, conveyed "all the islands lying within 100 miles along the coast." At S.B. 182-85 we demonstrate from 17th-century usage that such language was regarded either as a conveyance of the intervening seas or as a recognition that the intervening seas likewise passed as a necessary appurtenance to the mainland. That view is confirmed by a grammatical analysis of a number of the charters (S.B. 184-85). Plaintiff's own witness Dr. Kavenagh admitted, on the basis of this analysis, that charter language conveying islands must be read as creating a "sea of the province," a "sea within the premises," and "the said seas . . . aforegranted" within which royalties were then conveyed (App. 528-35).

The identification of offshore islands with the intervening seas, as well as the 100-mile limit, can be traced back to the famous 14th-century jurist Bartolus (S.B. 183). Turning the argument on its head, the Master responds (Report, pp. 50-51) that Bartolus, while conceding to a coastal state offshore islands and exclusive maritime jurisdiction out to 100 miles, did not concede full sovereignty or ownership. The Master goes on to say that he finds nothing in the English writers of the 17th century contrary to Bartolus' doctrine. Quite apart from the fact that full sovereignty or ownership of the sea is unnecessary to the States' claims (p. 63, *supra*), the Master's reasoning is unpersuasive and inconsistent. The Master elsewhere asserts that 17th-century English law had advanced far be-

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reached its result on the ground that the surrender included royalties (as was held by this Court, with respect to this very surrender, in Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842)). The opinion gives no reasoning, and states that the proprietors had not been heard on the subject.

yond that of earlier centuries w[illegible] to maritime sovereignty and dominion, and that [illegible] least by the middle of the century crown ownership of the seabed was fully recognized in English law. W[illegible] Bartolus shows is that both the 100-mile limit and the habit of thought which linked national rights in offshore islands and in the surrounding seas were long established by the 17th century. Those aspects of Bartolus' thought, as they influenced subsequent generations, are highly relevant in construing the "islands" language of the charters, even though the content of the national rights which he recognized had expanded by the 17th century.

The Master also argues that our contention as to the "islands" language "loses its force" because allegedly we do not contend that the third Virginia charter, which conveyed islands within 300 leagues of the Virginia coast, conveyed sea and seabed resources to that distance. The specific purpose of the expanded limit in that charter was to include the islands of Bermuda within the Virginia colony (App. 268). It is surely not unreasonable, in construing that charter, to take into account the fact that no 17th-century authority argued for national maritime rights as far as 300 leagues from shore,[52] while the 100-mile limit in the second Virginia charter was wholly in accordance with law and practice of the time. It may be, nonetheless that the third charter was intended to convey the sea out to 300 leagues; that construction is supported by language declaring a subsidiary purpose of the charter to be "a more ample Extent of their Limits and Territories into the Seas

[52] An exception was sometimes made in the case of waters whose opposite shores were under the same sovereignty; see S.B. 171, 252; App. Vol. III, Exhibit 816. It may be that at this early date the charter draftsmen believed that Bermuda was so situated that its surrounding seas could be claimed under this rule, or that Bermuda was itself regarded as a coast opposite Virginia justifying the assertion of sovereignty over the waters in between.

adjoining . . ." (App. 267). In any event, the claim was cut back to the earlier 100-mile boundary when Bermuda ceased to be part of Virginia later the same year (1612) the third charter was issued (App. 268-69). And the language just quoted makes it clear beyond peradventure that the customary "islands" language of the charters was understood as creating "limits and territories" in the marginal seas.

Finally, the Master states that in the second Louisiana case, *United States v. Louisiana*, 363 U.S. 1 (1960), this Court held that an early 19th-century boundary formula referring to islands within certain limits did not embrace the surrounding waters. There the Court declared that the formula in question did "not appear on its face to mean to establish a boundary line that distance from the shore," and that nothing in the history of Mississippi and Louisiana had been shown to require departure from that conclusion. 363 U.S. 1 at 81-82. In his separate opinion Justice Black, who had written for the Court in *California*, conceded that the "islands" language provided "some color of title" to boundaries in the sea and that Congress had regarded the language as highly significant. *Id.* at 96-97. In the present proceeding, unlike the Gulf States litigation, we have a record which permits construction of the "islands" language in 17th-century charters in the legal and semantic context of that time.

F. THE "FREE FISHING" CLAUSES CONFIRM THE OTHERWISE EXCLUSIVE MARITIME RIGHTS CONVEYED BY THE CHARTERS.

The Master never mentions the clauses, found in a number of the charters (S.B. 207-10), which saved and reserved to some or all classes of British subjects the right of free fishing in the seas of the colonies in question. The presence of these clauses is further proof that in their absence the

general language of the charters would have conveyed to the patentees a wholly exclusive right to the marginal-sea fisheries. No distinction is made between surface and sedentary fisheries. Foreigners were never included in the classes to whom free fishing was reserved. An eminent Maryland lawyer, Daniel Dulany, in 1766 drew the obvious conclusion that the colonies had the right to exclude from their seas all fishermen other than those who were express beneficiaries of the free-fishing clauses (S.B. 208-10). Angell, the leading early 19th-century American scholar on the law of the marginal seas, agreed (S.B. 209-10).

G. MAPS MADE IN THE COLONIAL PERIOD PROVIDE ADDITIONAL EVIDENCE FOR MARITIME SOVEREIGNTY AND DOMINION.

Some of the many maps introduced in this proceeding are reproduced in Volume III of our Appendix; see S.B. 251-54 for our detailed discussion of them. Several of these maps, not mentioned by the Master, strongly support the States' claims. For example, Exhibits 815, 615 and 616 are maps, dating respectively from the 17th century, 1726 and 1733, which show the colonial boundaries in New England as extending out into the sea. Exhibit 816, dating from 1680, shows maritime boundaries, labeled the north and south "bounds of the dominion of the British seas," extending from Van Staten and Finisterre due westwards across the Atlantic ocean to the coast of North America. Exhibit 820, a portion of a map of 1720, shows the Carolina boundary, identified as the "limit of King Charles II granted to the present proprietors of Carolina in 1663," as not stopping at the coast but rather extending a considerable distance into the sea.

Neither does the Master mention Exhibit 821, which is an early 18th-century French map of what is now the United States. The English possessions have been shaded

in, and the shading includes the marginal sea of each of the English colonies. While the boundaries of this maritime shading are somewhat eccentric—usually following north-south and east-west lines rather than the indentations of the coast, and therefore producing a curious notching effect—in most areas the shading extends approximately 100 miles from the coast.

Exhibit 816, mentioned above, also includes, south of the southern "bound" of the "dominion of the British seas," the designation "sea of Carolina, Virginia, Maryland, New York, New England." Exhibits 817, 818 and 819 designate the colonial marginal seas as the "sea of the English Empire" or the "Sea of the British Empire." Exhibit 613, dating from about 1720, divides the sea off each province by precise designations: "the Sea of Nova Scotia," "the Sea of the Province of Maine," "the Sea of New Hampshire," "the Sea of New England," "the Sea of Rhode Island," and "the Sea of New York."

The Master holds that these are mere geographical designations which involved no claim to sovereignty or ownership of any kind. But a term like "Sea of the British Empire" is obviously too unwieldy in length and political in language to be appropriate for use as a mere geographical designation. And as to the maps which name the sea of each colony separately, the fact of course is that these "seas" were in no sense separate bodies of waters geographically, but all parts of the Atlantic Ocean; the maps' insistence on dividing them by separate names corresponds to no geographical fact, but does correspond precisely to political facts.

For his view the Master relies on Sir Philip Medows, who denied that such terms as "the English seas" carried any political or proprietary connotation (Report, p. 55 n.). Medows, however, was opposed to the then-dominant

opinion. While Medows vigorously supported England's claim to full sovereignty and dominion in a belt of marginal waters around its coasts, of which belt he thought 14 miles was the *minimum* reasonable extent (S.B. 68-69), Medows did oppose the English claim, fully maintained in his time, to ownership of the entire "English seas" up to low-water mark on the shores of the continent. His minority view as to the significance of the term "English seas" can hardly be taken as authoritative with respect to the common understanding of the far more explicit and political designations on the maps in this record.

H. THE RECORD ESTABLISHES A UNIFORM TERRITORIAL SEA 100 MILES IN WIDTH OFF THE COASTS OF THE AMERICAN COLONIES.

The double charter of 1606, which conveyed the entire coastline of what are now the Common Counsel States, granted all islands within 100 miles of the coast (App. 261-62). Preservation of that 100-mile belt in subsequent charters which did not expressly mention it, and also the fact that the 100-mile limit for islands was regarded as a conveyance of the seas out to that limit, are conclusively demonstrated by a series of contemporaneous documents construing and applying the New England charter of 1620. That charter, while conveying the adjoining seas and islands, stated no exact limit for the maritime belt. Yet in three subgrants of portions of its territory made during the 1620's (App. 641-45), the Council for New England described its 1620 charter as having conveyed the land area "together with the seas and islands lying within 100 miles of any part of the said coast of the country aforesaid."

These documents, which the Master never mentions, shed decisive light on how we are to interpret both the 1620 charter and the many other charters which speak of the adjacent islands and seas without specifying any particular

distance. The Council doubtless based its construction on two factors: first, that 100 miles was generally understood to be the breadth of the territorial sea in the absence of special historic factors; second, that the charter of 1606 had established or recognized a uniform 100-mile territorial belt all up and down the Atlantic coast and that such boundaries were to be deemed incorporated into subsequent charters for particular areas. These, as well as other grants by the Council (S.B. 207-08; App. 1003-05), make the identification of island limits and maritime limits clear beyond peradventure. Further, the Council's express conveyances to its subgrantees of the seas out to three leagues, three miles and 15 miles of the coast also confirm that it viewed the 100-mile limit as incorporated by reference in the 1620 charter, that it regarded that limit as applicable to seas as well as to islands, and that it preserved to itself the ownership from those varying limits out to 100 miles.

The thrust of these documents, which the Master ignores, is explained and supported by the fact that 100 miles were generally understood in English and international law at the time to be the breadth of the territorial sea, absent special historical circumstances (pp. 47-54, *supra*). Thus it was entirely rational in the 1620's to read the New England charter as incorporating the 100-mile limit by reference to existing practice as well as the earlier charter of 1606. The same meaning may properly be imparted to the other colonies whose subsequent charters mentioned no express limit.

Certain of the colonies (*e.g.*, New Hampshire in 1635, App. 312) were granted island (and thus sea and seabed) belts of less than 100 miles, such as five leagues. In light of the establishment in 1606 of the 100-mile belt all up and down the coast, which moreover entirely conformed to the English and international law of the period, the crown in granting lesser belts to certain of the later colonies clearly

did not renounce the residue, but rather retained that residue for itself—just as the Council for New England on several occasions conveyed to subgrantees narrower belts than it was simultaneously asserting it itself possessed (S.B. 210-16). Where the crown granted only a limited part, retaining the remainder for itself, its rights and royalties passed to the States at the time of the American Revolution. (See pp. 94-98, *infra*.)

Even if the evidence did not establish a uniform 100-mile belt all along the North American coast, it does not at all follow that the exclusive right of exploitation under overall British ownership was limited in the case of each colony to the width specified in its charter. Certainly the crown frequently granted less than all it possessed, and during the 17th century the crown never took the view that its territorial sea was as constricted as, for example, the five leagues granted to New Hampshire in 1635. Rather, the proper conclusion would be that the maritime belt of exclusive exploitation was regarded as not finally fixed and defined as to its width, but embraced all those areas of sea and seabed which could reasonably be said to be adjacent to the coast or which possessed valuable resources capable of exploitation from the coast.[53]

From this conclusion it would follow that the States at independence inherited a right to hold continental-shelf rights to whatever distance was then recognized, or would come to be recognized in the future, as appropriate and proper for the exclusive seabed jurisdiction of a coastal sovereign. While no one doubts today that the exclusive exploitative rights of coastal nations in the continental shelf extend to the point where the depth of the sea reaches 200

[53] Judge Jessup has demonstrated that international law from prior to the 17th century to this day has recognized such a concept with respect to seabed resources, even though views as to the maximum permissible limit of full territorial surface rights have fluctuated upwards and downwards during the period. (See pp. 111-29, *infra*.)

meters (a line which, as it happens, is approximately 100 miles offshore along most of the North Atlantic coast), controversy continues as to whether exclusive rights extend farther. Plainly the fact that the definition of the outer limit of exclusive rights to the continental shelf is an ongoing process, which even today is not fully completed, could not lead to the conclusion that no such rights exist or existed at at particular time in the past.

I. RIGHTS OF SOVEREIGNTY AND DOMINION WERE CLAIMED AND EXERCISED IN THE MARGINAL SEAS OF THE COMMON COUNSEL STATES DURING THE COLONIAL PERIOD.

The record plainly shows that rights of sovereignty and dominion over the marginal seas and seabed of the Common Counsel States were asserted and exercised during the colonial period to the extent the question arose. The Master assumes that every instance of a colonial claim or practice has no significance beyond the precise area and the precise practice involved. We submit that, to the contrary, the evidence is chiefly relevant as indicating an underlying, universally shared view of the law which to a great extent was assumed rather than articulated.

Whenever the occasion arose—whenever exploitable resources existed, and especially whenever any challenge was made to the colonies' exclusive rights—the colonies promptly acted to assert and to exercise maritime sovereignty and dominion. The fact that such occasions were relatively rare is accounted for by the state of technology and the previously mentioned circumstance (pp. 53-54, *supra*) that the marginal seas were occupied in fact by the colonies, with no other power able to gain a foothold because of distances and the capacity of ships. (The Master himself admits, Report, p. 57, that in the case of the Common Counsel States he who controlled the shore in fact controlled the coastal fisheries.) Neither the Master nor the plaintiff has produced a single example of foreign ex-

ploitation of marine resources in the marginal seas or seabed of the Common Counsel States during the colonial period. The entire record as to the law and practice of the time puts it beyond question that any such foreign exploitation would have been instantly and successfully challenged. Plaintiff's witnesses so conceded (App. 535-36, 538-42, 554-55).

The most significant proof is the massive evidence of record, summarized at S.B. 222-23 (see also App. 830-46, 881-85, 893-94), regarding the history of Canadian waters. There the presence of rich exploitable resources led to wars between England and France over the fisheries and the adjacent coasts. Both England and France vigorously asserted that the sovereign of a coast has an exclusive right to the fisheries for many miles out — far beyond three miles; generally 100—in the absence of a treaty to the contrary. By the Treaty of Utrecht of 1713 the French conceded their exclusion from the Nova Scotia waters up to 30 leagues, substantially 100 miles (S.B. 223-24). A map used in the treaty negotiations leading to the Peace of Paris of 1783 (App. Vol. III, Exhibit 327) demonstrates that the British regarded this limit as applicable to the waters of the Common Counsel States as well.

When some concessions were made by treaty to the French in Newfoundland waters, the American colonists demonstrated their legal view of the matter by protesting those concessions as harmful to their rights and inconsistent with English sovereignty (S.B. 226-28). In repeatedly rejecting Spanish claims to fish in Newfoundland waters, the British constantly relied on the legal principle that the owner of a coast owns the fisheries in adjacent waters except only as a vested right (based on long use) or a treaty provides to the contrary (S.B. 230-32). All this happened during the 18th century, a period when the Master claims the earlier British view of maritime sovereignty and dominion had vanished without a trace.

It defies reason and human experience to assert that the Canadian experience took place in a vacuum and has no relevance as indicating the general legal views and practices of the time, applicable to the waters of the Common Counsel States as elsewhere. Obviously, the areas where the issue was as a practical matter most acute furnish the richest body of evidence. If the situation had been the same in the waters of the Common Counsel States—if resources rich enough, and near enough to foreign bases, to attract foreign exploitation, had been present in those waters—there cannot be the slighest doubt that the British and colonial posture, based on the same underlying legal attitudes, would have been the same as in Canada—as in fact it was in Maine waters, the one place south of Canada where the issue did arise (App. 784-91, 838-46, 882-89, 903-04). Nor can there be any doubt that the same legal principles would have been applied in the case of exploitable subsoil mineral resources in the marginal seas if those had existed (S.B. 240-46). Indeed, it would have been both easier and more important to ensure the exclusion of foreigners from the exploitation of such resources than to exclude them from the fisheries: the permanent and immobile installations necessary for mining would have been far easier to regulate than the fisheries, and it is inconceivable that a colony would have tolerated the construction of such installations by foreigners in its marginal waters.

As the Master admits (Report, pp. 56-58), the substantial body of evidence relating to the fisheries of the Common Counsel States, including sedentary fisheries, demonstrates colonial control, licensing, grants of exclusive fishing rights, regulation and exclusion of foreigners (S.B. 219-22, 233-41).[54] The Master asserts, however, that all this evi-

[54] One of the principal duties of the colonial admiralty officers, in the American as in the English seas, was the exclusion of foreign fishermen from adjacent waters. S.B. 220, 248-49; App. 784-91.

dence is irrelevant because he believes the fisheries in question were relatively close to shore. He concludes (without any evidence of record) that all of it was within three miles of the coast; and he therefore argues that it is irrelevant to the maritime areas beyond three miles with which this litigation deals.

The difficulty of the Master's reasoning is that *any* evidence of colonial sovereignty or dominion below low-water mark is enough to undermine the rationale of *California*, which was that evidence was lacking to show that the colonies owned the three-mile belt. No one claims that the three-mile limit had ever been heard of during the colonial period; it was invented only later. Once it is established (as it clearly is and as the Master virtually concedes) that the colonies possessed and exercised rights of sovereignty and dominion below low-water mark, the alleged *California* doctrine stands refuted and the only question is how far out those rights extended. On the basis of the governing English and international law and practice, the Canadian experience and the colonial charters themselves, colonial rights extended far beyond three miles and were generally recognized to extend out to 100 miles.

Further evidence of colonial title to submerged lands is supplied by colonial ownership and grants of derelict lands reclaimed from the sea (S.B. 241-43). While the Master recognizes the facts, he reasons that such ownership did not involve ownership of the lands before they emerged from the waters, but only afterwards (Report, p. 58). This ignores the principle, fully incorporated and well understood in English law from at the latest the time of Diggs onward, that the crown owned derelict lands *because* it had owned them while part of the seabed and the retreat of the waters caused no change in ownership (S.B. 36-38, 99-101, 110-12).

The New England fishing controversy, at the very outset of the colonial period, also illustrated the exclusive maritime rights conveyed by the charters and the intense awareness of those rights on the part of the charters' recipients (S.B. 219-22). The controversy involved a claim by Virginia that, by the double charter of 1606 (which divided the entire Atlantic seaboard between the "Southern . . . Colony" (Virginia) and the "Northern Colony" (New England)), its citizens had a right to fish in New England waters, from which they were being excluded by the grantees. The Privy Council orders of 1620-21 (expressly stated that Virginia would have the very limited right they conceded it "by the consent of both colonies" (S.B. 219; App. 678-79). The Master seeks to use the controversy to support his own conclusions by reasoning that, by allowing Virginia's claim, the Privy Council showed that the crown retained "ultimate control" of the fisheries for itself (Report, pp. 56-57).[55] However, Virginia had never argued that New England's charter rights should be overridden, but rather that the reciprocal fishing rights it claimed could be found in the double charter of 1606 itself; and, as noted, New England agreed to the Privy Council's proposal.[56] The rights conceded to Virginia themselves represented only a limited exception to the exclusive maritime dominion established by the charter. Finally, the Privy Council orders excluded other Englishmen, and that exclusion was made explicit a few months later (S.B. 219-20; App. 1001-02). No one ever suggested that *foreign* fishing should be permitted. The Council for New

[55] Other difficulties aside, the Master's argument is wholly inconsistent with his position that the law and practice of exclusive maritime dominion were not imported to this side of the Atlantic by the charters or otherwise.

[56] Of course, even if the crown retained some degree of control, that passed to the States, with other crown rights, at the time of the Revolution. See pp. 94-98, *infra*.

England zealously enforced its rights by excluding all unlicensed fishing except as permitted by the agreement of 1620-1621 (App. 784-91).

Among the many indications of record bearing on maritime sovereignty and dominion during the colonial period which are not discussed by the Master, we shall mention only the debates in Parliament leading to the passage of the New England Restraining Act of 1775, which prohibited the New England colonists from fishing in American waters (S.B. 256-57). Lord North, Prime Minister, justified the act on the ground of British ownership of the fisheries in the American seas (App. 847). Thus at the very end of the colonial period the British government still fully asserted that the American seas and their fisheries were subject to sovereign ownership and were not free to all. While there were bitter debates in Parliament on the measure, no one opposed it on the ground that the American seas and their fisheries were incapable of ownership. Quite to the contrary, the opposition argued that "the people of New England, besides the natural claim of mankind to the gifts of Providence on their own coast, are especially entitled to the fishery by their charters, which have never been declared forfeited. These charters, we think . . . to be of material consideration. The bill therefore not growing out of any judicial process [i.e., to revoke the charters] seems equally a violation of all natural and all civil right." 3 *Parliamentary Papers* 519 (1797). Obviously, the positions of both sides in this debate are squarely contrary to the Master's views.

J. THE BRITISH AND DOMINION CASES RELIED ON BY THE MASTER WHOLLY FAIL TO SUPPORT HIS CONCLUSIONS.

The Master relies (Report, pp. 52-53) on *Re Off-Shore Mineral Rights of British Columbia*, [1967] Canada L. Rep. 792, 65 D.L.R. (2d) 364, U.S. Exhibit 34, and *Bonser v. La*

Macchia, 43 Austr. L.J. Rep. 411 (1969), U.S. Exhibit 18, for the proposition that provincial ownership rights (in the case of British Columbia) and state territorial limits (in the case of New South Wales) stopped at the water's edge. The Master believes these cases support his conclusions as to the interpretation of the 17th-century American colonial charters. He seems to think that we object to reliance on these cases only on the ground that they were decided "long after 1776" (Report, p. 54), and finds such an objection not persuasive, reasoning that the cases are good authority to the extent that they discuss pre-1776 English law.

The short answer is that (1) these cases do not to *any* extent discuss pre-1776 English law: there is not a word in them dealing with the law of that period;[57] and (2) neither case dealt with colonial charters, let alone charters from the period here under discussion.

For analysis of the *British Columbia* opinion, see App. 85-89; S.B. 477-83. British Columbia never had a colonial charter; it came into existence as an unchartered British administrative unit by an act of parliament of 1858. The Canadian court's conclusion that that act reserved maritime rights to the crown, rather than delegating them to the British Columbia authorities, bears no relation whatever to the 17th-century colonial charters involved here. At S.B. 477-83 we show that other Canadian cases strongly suggest that a different result will be reached when the rights of Canada's Atlantic provinces, which did have 17th-century charters, are litigated, which they have not been as yet.

Bonser v. La Macchia (analyzed at App. 83-85; S.B. 483-

[57] The only exceptions are a few passages in Judge Windeyer's individual opinion in *Bonser*, U.S. Exhibit 18 at 289-98, in which he recognized that the older English law had recognized extensive rights of sovereignty and dominion in the marginal seas. Nowhere does he say that the law changed before 1776.

84), dealt solely with the power of the Australian federal government under a particular Australian statute to regulate offshore fisheries beyond three miles; the court unanimously held in favor of the regulation. The Master to the contrary, *Bonser* did not purport to resolve, and did not resolve, the question of territorial boundaries of the Australian states in the marginal seas, let alone the ownership of the seabed as between the Australian states and the federal government. On the question whether the territorial limits of the Australian states extend below low-water mark, *Bonser* is wholly inconclusive: two judges (Kitto and Menzies)[58] opined in the affirmative, two (Barwick and Windeyer)[59] in the negative and two (McTiernan and Owen) found it unnecessary to decide the question.[60] The issue of continental-shelf ownership was not addressed at all.

Thus the Master wholly misunderstood the alignment in the case: Judge Barwick wrote merely as one of six judges who all reached the same result, and there was no majority in favor of his view that the limits of Australian states did not extend below low-water mark. Even his individual view on that subject is irrelevant here, since the Australian states, like British Columbia, were unchartered administrative units erected in the 19th century. The allocation of powers between the imperial crown and overseas provinces in 19th-century British imperial law and practice gives no guidance whatever as to what was granted to the North American chartered colonies more than two centuries earlier, much less as to what the crown then claimed for itself. Finally, even if the question of territorial boundaries had been settled in *Bonser*, which it was not, that would not have settled the matter of continental-shelf

[58] U.S. Exhibit 18, pp. 285, 288-89.

[59] *Id.* at 277-80, 293.

[60] *Id.* at 284, 299.

rights, which were never mentioned or involved in that litigation. The question of continental-shelf rights is still wholly open in Australian law (S.B. 484), and is now in litigation there.

The Master also relies on the English decision *Queen v. Keyn*, decided in 1876 (Report, pp. 53-54), to demonstrate that "the realm . . . ended at the low-water mark on the coast." An exhaustive analysis of the many opinions in that case is in the record (App. 48-89). It demonstrates that the holding of the case was limited to the thesis that the admiralty jurisdiction did not extend to foreigners in the English seas without a specific parliamentary enactment to that effect (App. 80). That holding was based on an erroneous analysis of the history of the admiralty jurisdiction (App. 55-58; see pp. 32, 41-44, *supra*). All the judges acknowledged the existence of various crown rights in the marginal sea, *and a majority of them, unlike Cockburn on whom the Master exclusively relies, believed that the marginal sea was part of the territory of England* (App. 58-74, 80-81). The holding of *Keyn* as to the admiralty jurisdiction was promptly overruled by Parliament, which pointedly declared that the jurisdiction "extends *and has always extended* over the open seas adjacent to the coast of the United Kingdom and of all other parts of her majesty's dominions to such a distance as is necessary for the defence and security of such dominions" (App. 75-76, 646-47). (Emphasis added.) [61]

[61] The Master relies (Report, p. 46 n.), apparently for the proposition that the Territorial Waters Jurisdiction Act, in spite of its language, did not repudiate the *Keyn* decision, on the case of Harris v. Owners of the Steamship Franconia. But that case was decided *before* enactment of the Territorial Waters Jurisdiction Act. Thereafter, the British courts recognized that the Act had established that the decision in *Keyn* "was not the law of England; because the Act does not purport simply to alter the law, but it declares the law and says, in very plain terms, that it is and always has been the law of this country." Carr v. Francis Times & Co., (1902) A.C. 176, 181.

In addition, both Cockburn's and many of the other opinions in *Keyn* acknowledged that in earlier centuries the English law of maritime sovereignty and dominion had been far more spacious. Thus even Cockburn's dicta, taken on their own terms, asserted a change in English law after 1776—a change that would have no effect in impairing the State's claims here. And since *Keyn* never mentioned the charters or dealt with the colonies at all, there is no wisdom to be found there as to whether the English law of seabed ownership was carried to this side of the Atlantic or whether, if so carried as we contend, the law reserved the seabed to the crown or assigned it to the colonies.

Finally, this Court itself disposed of the *Keyn* dicta in *Manchester v. Massachusetts*, 139 U.S. 240, 257 (1891), observing that *Keyn* dealt only with the admiralty jurisdiction, and refused to apply it as in any way casting doubt on sovereign juridiction in territorial waters or on the right of coastal States to control sea fisheries.[62] The British courts have uniformly rejected the authority of *Keyn*, have refused to allow the *Keyn* dicta to cast any doubt on the traditional British law, and have uniformly reaffirmed the sovereignty and dominion of the crown in the marginal sea (S.B. 469-71 and 478-83). Among many examples, it is sufficient to cite *Secretary of State for India v. Chelikani Rama Rao*, 43 L.R. Ind. App. 192 (1916) (S.B. 469-70; Exhibit 165), in which the Privy Council, the highest court in Britain with respect to the colonies and dominions, squarely repudiated the *Keyn* dicta as unsound and reaffirmed the traditional doctrine of crown ownership of the seabed.

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[62] For other authoritative comments on the *Keyn* case, see App. 138-40, 890-92, 977-87; Exhibits 162, 163, 164, 165; U.S. Exhibit 7, pp. 109-11; U.S. Exhibit 9, pp. 51-53, 59-61, 65-73.

IV.

THE STATES INDIVIDUALLY SUCCEEDED AT THE REVOLUTION TO ALL THE MARGINAL-SEA RIGHTS PREVIOUSLY HELD BOTH BY THE CROWN AND BY THE COLONIAL GOVERNMENTS, AND HAVE NEVER SURRENDERED TO THE FEDERAL GOVERNMENT THE EXCLUSIVE RIGHT TO EXPLOIT SEABED RESOURCES.

A. THE STATES WERE INDIVIDUALLY SOVEREIGN DURING THE REVOLUTIONARY AND CONFEDERATION PERIODS AND INHERITED ALL RIGHTS OF SOVEREIGNTY AND DOMINION BOTH OF THE CROWN AND OF THE COLONIAL GOVERNMENTS.

At independence each State became a complete sovereign, recognized as such both by our law and by international law. Accordingly, the States inherited directly all rights of sovereignty and dominion appurtenant to their territories which had been previously held either by the crown or by the antecedent colonial governments. Since the maritime claims of the crown and the colonial governments were well established, as we have already shown, it follows that they were inherited by the new States in the most direct and embracing manner. Under the constitutional law of the revolutionary period the "United States" was not regarded as a separate entity distinguished from the States, but rather as the States themselves, acting in confederation or concert for the winning of the war. Ultimate sovereignty was regarded as vested in the people of each State separately (S.B. 286-90). Congress consisted of the States, acting as all states do through their agents; and the State agents who collectively made up the Congress possessed only those powers

specifically delegated to them (S.B. 290-94). The States were individually recognized in treaties, and individually carried on substantial foreign-affairs and defense activities (S.B. 299-305; App. 230-35). Juridically the United States consisted, *de facto* before the Articles of Confederation and *de jure* thereafter, of a federation; and the international law of the period, like the Articles of Confederation themselves, was wholly clear that each state of a federation was a sovereign in the fullest sense (S.B. 294-99). These propositions, throughout our history, have commanded the all-but-universal assent of statesmen and scholars alike (S.B. 306-14).

The evidence for these propositions, discussed in detail at S.B. 286-314, is massive and overwhelming. This Court has repeatedly recognized that at independence each State became fully sovereign, in the international-law sense as in other senses, and succeeded to every territorial and property right both of the colonies and the crown; whatever the United States subsequently obtained was granted to it by the States.[63] The dicta to the contrary in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), much criticized by commentators and tacitly repudiated on

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[63] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (S.B. 341-44); Penhallow v. Doane, 3 U.S. (3 Dall.) 53 (1795) (S.B. 344-50); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (S.B. 350-55); Sim's Lessee v. Irvine, 3 U.S. (3 Dall.) 424 (1799) (S.B. 355); Cooper v. Telfair, 4 U.S. (4 Dall.) 14 (1800) (S.B. 355); McIlvaine v. Cox's Lessee, 8 U.S. (4 Cranch) 209 (1808) (S.B. 356); Smith v. Maryland, 10 U.S. (6 Cranch) 286 (1810) (S.B. 356); Preston v. Browder, 14 U.S. (1 Wheat.) 114 (1816) (S.B. 356); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) (S.B. 358-60); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (S.B. 360); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838) (S.B. 362-64); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588-92 (1839) (S.B. 308-09, 364-65); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842) (S.B. 365-70).

several occasions by this Court itself (S.B. 371-75), are contrary to this otherwise unbroken line of authority and are without historical foundation.

B. THE STATES, WHETHER "EXTERNALLY SOVEREIGN" OR NOT, SUCCEEDED INDIVIDUALLY TO THE TERRITORIAL BOUNDARIES AND PROPERTY RIGHTS BOTH OF THE CROWN AND OF THE COLONIAL GOVERNMENTS, INCLUDING RIGHTS IN THE MARGINAL SEA AND SEABED.

Even if the States had not themselves achieved sovereign independence in 1776, they would still have inherited all existing rights in the marginal sea and seabed. If, contrary to historical fact, it is assumed that external sovereignty—comprising international recognition and the foreign-affairs and defense powers—had passed directly to a single "national government" at independence, the States nonetheless succeeded to antecedent territorial boundaries and property rights. The right here at issue is the exclusive right to exploit the seabed resources of the marginal seas. That right, essentially a right of ownership of property, has nothing to do with "external sovereignty." No matter when and how external sovereignty was transferred, that transfer did not carry with it the cession by the States of any portion of their territory or of any property owned by them. We have already shown (pp. 15-24, *supra*) that neither the constitutional concept of external sovereignty nor the practical exigencies of the foreign-affairs and defense powers require any cession by the States of any property or territory below low-water mark. This was the historical understanding as well.

As detailed evidence shows (S.B. 314-28), it was the universal understanding during the revolutionary period that the Revolution was in significant part fought and won to vindicate the colonial charters, and the States were

universally regarded as having succeeded to every territorial and property right which had been created by the charters and to every sovereign right of the crown itself pertaining to the colonial territories. Rights in the marginal sea were, of course, deemed an appurtenance of a land territory, passing along with that territory. Therefore, whatever the locus of the abstract concept of "external sovereignty," at independence the States succeeded individually to their boundaries, their charter rights and their common law, all as enjoyed by the antecedent colonial and proprietary governments, and in addition assumed the rights of the crown (App. 342-43, 402-08). Plaintiff's witnesses substantially conceded these propositions (S.B. 315-16).

The territorial and property rights inherited by the States were not lost at the time of the Articles of Confederation. Article IX expressly provided that "no State shall be deprived of territory for the benefit of the United States." This language was not non-controversial or *pro forma;* to the contrary, it represented the victory of the adherents of State sovereignty in a hard, bitterly fought dispute over the western lands, which divided the revolutionary statesmen both during the war itself and thereafter (S.B. 316-28). While no one ever attempted to take from the States for the benefit of the United States their rights in the marginal sea and seabed, those States not possessing charter rights to the western lands did seek to appropriate the western lands of the other States, without consent or cession by those States, for the benefit of the entire Confederation. That effort was repeatedly, decisively and categorically rejected. The western-lands controversy, ignored by the Master, furnishes the strongest possible proof that the States successfully insisted on preserving the sanctity of their charter claims in every respect, and that the federal government was regarded as acquiring no territory or property rights except those which each State chose to convey by cession.

Congress took this position in the most forceful and unambiguous terms during the negotiations which preceded the Peace of Paris of 1783. In arguing the contested American claim to the western lands, Congress steadfastly refused to rely on any argument of collective succession or devolution, but insisted throughout on relying exclusively on the sole and sufficient validity of the charter claims of the individual States (S.B. 321-27). The federal government did eventually acquire some of the western lands by State cession, but it has always regarded its title as founded solely on those acts of cession (S.B. 321). This Court has repeatedly so held.[64] In *Harcourt*, for example, the Court declared: "There was no territory within the United States that was claimed in any other right than that of some one of the confederated states. . . ." 25 U.S. (12 Wheat.) at 526.

The entire history of the western-lands question, both with respect to controversies among the States in Congress and with respect to the diplomatic negotiations leading to the Peace of Paris of 1783, can leave no doubt that, even where State charter claims were bitterly contested, they were upheld as part of our law. And *except* with respect to the western lands, nobody questioned the proposition that each State succeeded to its charter boundaries and to all territorial and property rights formerly possessed by the crown and by the antecedent colonial or proprietary government.

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[64] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212-21, 222-24, 229-30 (1845) (S.B. 319-20); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 586 (1823) (S.B. 358-60); Harcourt v. Gaillard, 25 U.S. (12 Wheat.) 523 (1827) (S.B. 361-62); and Poole v. Fleeger, 36 U.S. ((11 Pet.) 184 (1837) (S.B. 362).

C. THE PEACE OF PARIS OF 1783 AND THE NEGOTIATIONS PRECEDING IT DEMONSTRATE AMERICAN AWARENESS OF MARITIME RIGHTS, SHOW NO DISAGREEMENT WITH TERRITORIAL SEAS 100 MILES IN WIDTH, AND ESTABLISHED, FOR AT LEAST SOME PURPOSES INCLUDING EXCLUSIVE FISHERIES, A 20-LEAGUE MARITIME BOUNDARY OFF THE COASTS OF THE DEFENDANT STATES.

The negotiations preceding the Peace of Paris of 1783 were devoted in substantial part to the question whether American citizens would continue to be able to fish in the waters adjacent to Newfoundland, where their ancestors had fished from colonial times, or whether, now being foreigners *vis-a-vis* the coastal sovereign, they would be excluded. The American position papers during these negotiations made it clear that the American position fully recognized that "a reasonable tract" of coastal fishery belonged to the owner of the coast, and that 100 miles and 60 miles were the most common and recognized limits for the extent of that exclusive fishery (S.B. 330-33).[65]

As to the coastal waters of the United States themselves, the Peace of Paris provided (Article II) that the boundaries of the United States should be on land as defined, and "comprehending all islands within 20 leagues of any part of the shores of the United States." Obviously the commissioners on both sides well knew that 60 miles (20 leagues) was one of the measurements most in vogue in in-

[65] With respect to the outer banks of Newfoundland, the American position was that those fisheries, being 35 leagues (about 105 miles) from land at their closest point, lay beyond the maritime belt within which an exclusive fishery could lawfully be claimed (S.B. 333). As to closer-in Canadian waters, the Americans negotiated for a share of those fisheries, *not* on the ground that these marginal seas were free to all, but solely on the ground that by long usage American fishermen had acquired a vested, established right in them (S.B. 330-32).

ternational law for the extent of exclusive fisheries and territorial waters; as we have just seen, the American position papers mentioned the 60-mile limit with respect to exclusive fisheries. The record contains copies of the maps used by both the British and American Commissioners in the negotiations, and both maps show a boundary line in the sea, obviously intended to be 20 leagues out, all along the coast of the United States (Exhibits 327, 339, App. Vol. III; Exhibit 355).

Quite plainly, as Judge Jessup and Professor Smith[66] have testified, the treaty did establish, and was understood to establish, a boundary line 20 leagues out in the sea for some purposes other than mere ownership of islands (App. 134-36, 342-44; Tr. 1195-1206, 1271-77). As Judge Jessup has emphasized, in view of the long history of fisheries disputes and treaties in the North Atlantic waters, the provision was intended at least to recognize exclusive American fisheries out to the 20-league line (Tr. 1195). That conclusion is confirmed by the fact that the British copy of the map (Exhibit 327, App. Vol. III) also shows, obviously for comparative purposes, the 30-league Treaty of Utrecht line, which dealt with exclusive fisheries, and drew that line all up and down the coast of the United States, thus confirming that Britain had asserted exclusive fishing to that limit in the marginal seas of the Common Counsel States.

The retreat from the 100-mile boundaries of the charters to 60 miles for exclusive fisheries was obviously influenced by the freedom-of-navigation theories beginning to come into vogue at this period among maritime powers. Plainly, seabed and subsoil rights would have been regarded as no more restrictive; and since the reason for the retrenchment

[66] Judge Jessup is identified at p. 55, *supra*. Joseph H. Smith is an eminent legal historian specializing in English and American colonial law (App. 240-46).

to 60 miles related to freedom of navigation, the provision carries no implication that the 100-mile charter boundaries did not remain in effect as to the seabed and subsoil, and perhaps as to surface rights other than navigation and exclusive fisheries.

The Master seems to suggest (Report, p. 64) that the "uniform" 20-league line implies that whatever marginal-sea rights were recognized by the treaty were confirmed to the United States collectively, not to each State individually. But it has never been questioned that islands off our coasts belong to the adjacent State, not to the United States as a separate territory. The States' title to their offshore islands depends, *vis-a-vis* Britain, on this very same provision of the treaty. The creation of a uniform 20-league belt carries no implication that it was to be federal rather than State territory. Indeed, the maritime belt in the North American coastal seas had always been uniform *vis-a-vis* other nations, although the crown might and did vary its grants from colony to colony. And the negotiating history of the treaty establishes beyond question the American position that all boundary and territorial claims were based on the titles of the individual States, derived from their charters (S.B. 321-27).

Finally, the Master relies (Report, p. 64) on this Court's observation in *United States v. Louisiana*, 363 U.S. 168 (1960), that the Treaty's 20-league provision should not be read to establish "territorial jurisdiction" over all waters within that belt. We submit that the entire record developed in this proceeding, and not available to the court in *Louisiana*, makes it clear that the assertion in 1783 of a 60-mile maritime belt, in the conventional "islands" language of the time, was wholly customary and in accordance with existing law. In any event, what matters here is that the treaty must, at minimum, be read as covering fisheries and other exploitable resources within the belt, whether or not full "territorial jurisdiction" was involved.

D. THE EXCLUSIVE RIGHT OF THE STATES TO EXPLOIT CONTINENTAL-SHELF RESOURCES WAS NOT TRANSFERRED TO THE UNITED STATES BY THE CONSTITUTION.

It is clear, from history as well as policy, that the Constitution effected no transfer of continental-shelf rights from the States to the federal government. Certainly there was no express transfer. The Master relies on the foreign-affairs and defense powers as effecting a transfer by implication. As already shown (pp. 15-30, *supra*), nothing in those powers requires a transfer of property rights in the marginal sea or elsewhere, and the States' retention is far more compatible with the residual sovereignty, powers and responsibilities retained by them.

The Constitution itself, as noted earlier, refutes any claim that it transferred *sub silentio* any territory or property from the States to the federal government. It provides, in Article IV, Section 3, Clause 2 that "nothing in this Constitution shall be so construed as to prejudice any Claims of the United States, or of any particular State." The claims referred to are precisely claims to territory and property; the immediately preceding language is that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[67]

The thrust of the language is confirmed by its drafting history, which shows that the clause arose out of the western-lands controversy, and was intended to make clear that the Constitution did not prejudice the merits of any previously asserted State or federal title to those lands (S.B. 337-39). The clause was then broadened to make it clear that it applied to *all* territorial and property claims—such as claims to sovereignty and dominion in the marginal seas. Thus the

[67] Other provisions, previously noted, are also inconsistent with any notion of an implied transfer. See pp. 24-25, *supra*.

Constitution made it as certain as drafting could do that the vesting of certain governmental powers, such as foreign affairs and defense—"external sovereignty"—in the United States was not intended to carry any territory or property along with it.[68]

No case, except perhaps *California* and its progeny, has ever intimated that the Constitution effected any implied transfer of property.[69] It appears that the only prior case in which such a claim was made was *United States v. Bevans*, 16 U.S. (3 Wheat.) 336 (1818), where the Court rejected an argument that the grant of admiralty jurisdiction to the federal courts in the Constitution had divested Massachusetts of territorial sovereignty over the waters of Massachusetts Bay. Chief Justice Marshall declared:

> "The article which describes the judicial power of the United States is not intended for the cession of territory, or of general jurisdiction. It is obviously designed for other purposes. It is in the 8th section of the 2d article, we are to look for cessions of

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[68] A proposal in the Constitutional Convention that unallocated State lands be transferred to the United States met with a total lack of support, and was quickly dropped (S.B. 339).

[69] The Master relies (Report, p. 63) on Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842), and Massachusetts v. New York, 271 U.S. 65 (1926), for the proposition that a new sovereign inherits maritime sovereignty and dominion upon a transfer of sovereignty. The Master's citation simply begs the question, since the issue here is whether it is "external sovereignty" or "residual sovereignty" which controls the maritime rights here involved. The whole thrust of these and other decisions was of course that it was the States which inherited all maritime territory and property. This Court admitted in *California*, 332 U.S. at 36, that the pre-*California* cases plainly indicated that "the Court then believed that states not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not."

territory and of exclusive jurisdiction. . . . It is difficult to compare the two sections together, without feeling a conviction, not to be strengthened by any commentary on them, that, in describing the judicial power, the framers of our constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction.

"It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction, is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. *Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away.* The residuary powers of legislation are still in Massachusetts." 3 Wheat. at 388-89. (Emphasis added.)

E. IT WAS WELL UNDERSTOOD THROUGHOUT OUR HISTORY DOWN TO 1947 THAT UNDER THE CONSTITUTION THE STATES RETAINED THEIR RIGHTS IN THE MARGINAL SEAS AND SEABED.

It was universally recognized and understood throughout our history until the beginning of the "tidelands" controversy in the 1930's that the States individually retained whatever territorial and property rights existed in the marginal sea, and that no such rights had been transferred to the federal government by the Constitution or otherwise. The plaintiff made no such claim until 1937, when Secretary Ickes did so, reversing a position he had taken previously. Bartley, *The Tidelands Oil Controversy* 95-101, 128-35 (1953); U.S. Exhibit 11, p. 56. Little need be said about the universal understanding, since the Court in the

California case recognized and admitted it, if somewhat grudgingly, with respect to its own past decisions:

> "As previously stated, this Court has followed and reasserted the basic doctrine of the *Pollard* case many times. And in doing so it has used language strong enough to indicate that the Court then believed that states not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not." *United States v. California,* 332 U.S. 19, 36 (1947).

While many of the cases dealt with internal waters rather than with the marginal sea, they all relied on the English law of property in land under water; and, as we have seen, that law never made any distinction between property rights in internal tide waters and those in the marginal sea. The *California* Court ignored that English legal background when it said that the statements in prior Supreme Court decisions were "merely paraphrases or offshoots of the *Pollard* inland-water rule, and were used, not as enunciation of a new ocean rule, but in explanation of the old inland-water principle." *Ibid.* The point is that English and American common law had never made any distinction whatever between "inland" and "ocean" waters with respect to property rights. There was no need for a "new" ocean rule; it had been there all along.

Moreover, *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212 (1845), enunciated no "inland-water rule"; that decision expressly declared that "the territorial limits of Alabama have extended all her sovereign power into the sea." 3 How. at 230. It is beyond question that for the *Pollard* Court "navigable waters," title to the bed of which was in the States, included the marginal sea as well as

inland waters, with no distinction between them, just as had always been the case in English law and practice.

The *California* Court recognized that there were a number of cases which did specifically affirm State rights in the marginal seas, 332 U.S. at 37-38, and its own treatment of such decision actually understates their force. Speaking of *Manchester v. Massachusetts*, 139 U.S. 240 (1891), the Court observed that "the illegal fishing charged was in Buzzard's Bay, found to be within Massachusetts territory." *Id.* at 37. The *Manchester* Court, however, said nothing about limiting the Massachusetts fisheries statute in question, which extended to all of Massachusetts' waters, including its territorial sea. It held: "the extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and except so far as any right of control has been granted to the United States, this control remains with the States." 139 U.S. at 264. And the Court declared that Massachusetts had a right to territorial waters to a minimum of three miles from the coast. *Id.* at 257.[70]

The two principal 19th-century learned authorities on the law of waters likewise had no doubt that the States had preserved their rights under English law and their own charters to all their waters, including the marginal seas. Angell, *Treatise on the Right of Property in Tide Waters, and in the Soil and Shores Thereof* 50 and *passim* (1826);

[70] Since as we have seen the *California* Court recognized that it was overruling a long tradition of law and practice which had many times been approved in its own prior decisions, it is unnecessary to discuss in detail the many similar decisions of this and other courts. See especially U.S. Exhibit 6, pp. 672-73, 678-79, 697-98; U.S. Exhibit 8, pp. 23-26, 31-34, 48-49, 51-73, 101-26; U.S. Exhibit 11, pp. 7-8, 24-40, 51-52; U.S. Exhibit 12, pp. 10-16, 23; U.S. Exhibit 17, pp. 208-10. State-court cases are uniformly to the same effect; a few of them are cited at S.B. 115-17 and 192.

Gould, *A Treatise on the Law of Waters* 75-76 and *passim* (1900). Other authorities to the same effect are cited at S.B. 378-79. We have found no authority to the contrary.

As noted earlier, there was also throughout the period 1783-1947 a very considerable body of State legislative and administrative assertion and exercise of territorial and property rights in the marginal sea. Neither plaintiff nor the Master has contested the assertion. A large body of material on these points is found in U.S. Exhibits 1 through 17; that material has been supplemented to some extent by exhibits introduced by the Common Counsel States in this proceeding. The State powers in question are documented, and examples given, in Gould, *op. cit.* at 72-95.

Finally, when exploitable mineral resources of oil and gas began to be discovered, in the late 19th century and the early years of this century, in the seabed of the marginal seas of certain of the States, it was assumed as a matter of course for many years that it was the State government, not the federal, which had the exclusive right to explore and to exploit them.[71]

Bartley aptly described the reaction to the *California* line of cases, in the light of the universal understanding prior thereto, as follows:

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[71] Bartley, The Tidelands Oil Controversy, *passim* (1953); Hearings on Submerged Oil Lands Before Subcommittee No. 4, House Committee on the Judiciary 76th Cong., 1st Sess., p. 110 (1939); Boone v. Kingsbury, 206 Cal. 148, 273 Pac. 797 (1928); Calif. Stats. 1921, c. 303, p. 404; Calif. Stats. 1923, p. 593; Ireland, "Marginal Seas Around the States," 2 La. L. Rev. 252 (1940); U.S. Exhibit 7, pp. 70-71 n. 10. The *Boone* decision held that California owned the soil of its marginal sea and had the right to license the exploitation of the mineral resources thereof. Review was sought in this Court, which denied certiorari and dismissed the appeal for want of a substantial federal question. Workman v. Boone, 280 U.S. 517 (1929).

"It came as a considerable shock to the officials of coastal states to find that they did not have the authority over the area from low-water mark to the three-mile limit which they had assumed. The coastal states for nearly 150 years had utilized and controlled the marginal sea area as though they owned it—which in fact they thought they did. They had regulated the fisheries in the area, applying state laws to vessels licensed under national statutes and operated by out-of-state persons. They had prescribed the size of fish that might be taken, had directed the manner in which fish might be caught, and had even exercised successful though indirect control over the activities of floating canneries operating outside the three-mile limit. Oysters, shrimp, and sponges had been subjected to similar controls. The states had granted or leased areas in the marginal sea to private persons and corporations and to the national government itself. The purposes of these state grants were many and varied. Long before any person dreamed of black gold, the process of land reclamation and harbor development, on land granted or leased by the states, had begun. Breakwaters had been built and harbors dredged from below low-water mark and converted to useful commercial purposes. Later, with visiions of wealth from petroleum royalties spurring them to action, the states of California, Texas, Louisiana, and, to a lesser extent, others, had leased the offshore lands for oil production." *Op. cit.* at 5; see also *id.* at 27-42.

In *United States v. Louisiana*, 363 U.S. 1, 17-19 (1960), this Court frankly recognized the overwhelming opposition to its *California* decision, and set forth conclusive evidence showing Congress' own view that the

decision was contrary to settled understanding. Quoting from the legislative history of the Submerged Lands Act, the Court described one of the Senate reports as follows:

> "S. Rep. No. 1592, 80th Cong., 2d Sess., to accompany S. 1988, at 17-18 (June 10, 1948), after noting that the legal profession had long believed that the States owned the lands under navigable waters within their territorial jurisdiction, went on to comment:
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> " 'The evidence is conclusive that not only did our most eminent jurists so believe the law to be, but such was the belief of lower Federal court jurists and State supreme court jurists as reflected by more than 200 opinions. The pronouncements were accepted as the settled law by lawyers and authors of leading legal treatises.
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> * * *
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> " 'For the first time in history the Court drew a distinction between the legal principles applicable to bays, harbors, sounds, and other inland waters on the one hand, and to submerged lands lying seaward of the low-water mark on the other, although it appears the Court had ample opportunity to do so in many previous cases, but failed or refused to draw such distinction. In the California decision the Court refused to apply what it termed 'the old inland water rule' to the submerged coastal lands; however, historically speaking, it seems clear that the rule of State ownership of inland waters is, in fact, an offshoot of the marginal sea rule established much earlier.' " 363 U.S. at 18, n. 17.

It is no less clear from the legislative history that the purpose of the Act was to *restore* a pre-existing title to the

States. Quoting from House and Senate reports, the Court acknowledged:

> "H.R. Rep. No. 695, 82d Cong., 1st Sess., to accompany H.R. 4484, at 5 (July 12, 1951):
>
> " 'Title II merely fixes as the law of the land that which, throughout our history prior to the Supreme Court decision in the California case in 1947, was generally believed and accepted to be the law of the land; namely, that the respective States are the sovereign owners of the land beneath navigable waters within their boundaries and of the natural resources within such lands and waters.'
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> * * *
>
> " 'The purpose of this legislation is to write the law for the future as the Supreme Court believed it to be in the past—that the States shall own and have proprietary use of all lands under navigable waters within their territorial jurisdiction, whether inland or seaward, subject only to the governmental powers delegated to the United States by the Constitution.' "[72] 363 U.S. at 19, n. 17.

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[72] In his separate opinion Justice Black, author of the *California* decision, likewise fully recognized Congress' conclusions and the facts on which they were based:

> " 'The evidence shows that the States have in good faith always treated these lands as their property in their sovereign capacities; that the States and their grantees have invested large sums of money in such lands; that the States have received, and anticipate receiving large income from the use thereof, and from taxes thereon; that the bonded indebtedness, school funds, and tax structures of several States are largely dependent upon State ownership of these lands; and that the legislative, executive, and judicial branches of the Federal Government have always con-

V.

LEGAL DEVELOPMENTS BETWEEN 1787 AND 1945 DID NOT DESTROY THE EXCLUSIVE RIGHT OF THE COMMON COUNSEL STATES TO EXPLOIT THE RESOURCES OF THEIR CONTINENTAL SHELVES.

The Master took the view that the 17th-century claims to maritime sovereignty and dominion vanished without a trace long prior to 1787, leaving a hiatus during which the rights of England and other nations stopped at low-water mark. Gradually a wholly new three-mile rule developed and, at some unspecified time, acquired the force of binding international law, foreclosing national claims to maritime areas beyond it (Report, p. 66). Since the federal government was a leading adherent of the three-mile limit, that adherence destroyed any remaining rights of the States beyond three miles, including rights to seabed resources (Report, p. 68).[73]

Then, the Master's argument continues, beginning with the Truman Proclamation of 1945 a wholly new rule of international law sprang up recognizing ownership of all continental-shelf resources by the adjacent nation (Report, pp. 68-70). The federal government, having earlier destroyed the states' title by its own conduct, now acquired the very same rights on its own behalf. The Master's theory is erroneous on several independent grounds.

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sidered and acted upon the belief that these lands were the properties of the sovereign States.' " 363 U.S. at 91, n. 8.

[73] The Master concedes one exception: he asserts that, in a few isolated cases, national exclusive rights of exploitation were admitted over certain limited seabed resources beyond three miles on the basis of long enjoyment or actual exploitation (Report, p. 69).

A. PRESENT LAW, NOT PAST LAW, SHOULD BE THE TEST OF THE STATES' TITLE.

Even if the federal government had at one time adopted an international rule or practice inconsistent with national ownership of the shelf, the federal government has long since changed that position. Since 1945, by plaintiff's admission, it has been a vigorous advocate of exclusive continental-shelf rights, while continuing to adhere to the three-mile limit with respect to full territorial sovereignty. The legitimacy of the States' title should be judged in the light of the federal government's present expressly asserted title against foreign nations, rather than in the light of an alleged implied position in past years inconsistent with that title.

In a court of equity, certainly, it would be unconscionable to presume that the federal government had extinguished State property rights through a course of conduct alleged to be inconsistent therewith, and that thereafter, by reversing that course of conduct, it had asserted and perfected those very same rights, not on behalf of the States but on behalf of itself. From an equitable point of view such a sorry argument is little better than a defense of larceny after trust.

Similarly, with respect to international law: even if for some period of years the claims of the Common Counsel States were repugnant to international law, in the end it was international law which gave way. On the Master's theory, international law changed in or about 1945 and since then has sanctioned precisely the rights in the continental shelf which the States were granted in their charters, claimed in earlier centuries and continue to claim. Today, therefore, there is concededly no conflict between the State claims and international law.

In the second Gulf States litigation, the Court measured the claims of the States against international law as it exists today. *United States v. Louisiana*, 363 U.S. 1, 33-34 (1960). Comparably, if this Court or any international court were considering the federal government's asserted exclusive rights in the continental shelf as against other nations, it would not concern itself with the international law of the 19th or early 20th centuries, but solely with the law of today. There is no reason why any different treatment should be accorded to the claims of the Atlantic States.

B. THE THREE-MILE RULE DID NOT INVALIDATE THE STATES' TITLE TO SEABED RESOURCES.

The weight of authority is to the effect that the three-mile limit never became an obligatory rule of international law, even with respect to surface waters. At S.B. 409-14 we demonstrate that the height of popularity of the three-mile rule was very brief, lasting only from about 1880 to 1930, and that even during that period its status as an obligatory rule was denied by the majority of those scholars who treated the subject. The United States, moreover, was far from consistent in its adherence to the three-mile rule (S.B. 393-401).

The Master's own authority Fulton (writing in 1911) concedes that the three-mile limit was not an obligatory rule; that it was unsound to contend "that territorial jurisdiction cannot be carried further," and that wider claims "have been quite lately fully justified . . . by the most authoritative exponents of international law . . . as well as by various international congresses of fishery experts dealing with the subject from a fishery point of view." *Op. cit.* at 664.

In any case, the definitive answer to the Master's theory is that the three-mile limit was never regarded as fully ap-

plicable to the seabed and its resources or as outlawing claims of the sort the States make here.

The three-mile limit was not a wholly new rule, springing out of nothing and creating new national rights; it represented rather a restriction or retrenchment in the previous law which had permitted nations to claim and to exercise sovereignty over far broader maritime belts (App. 132). "The sovereignty allowed by international law over portions of the sea is in fact a decayed and contracted remnant of the authority once allowed to particular states over a great part of the known sea and ocean." Maine, *International Law* 78 (1888).[74]

The sole reason for this retrenchment was the desire of the principal maritime powers, including Britain and the United States, to maximize those maritime areas which were free for navigation, naval operations and to some extent surface fishing. See *e.g.*, Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* 653-56 (1919). This rationale had no application to the exploitation of seabed resources. Exclusive seabed-resource exploitation could be carried out without any significant interference with freedom of navigation in the superjacent waters. Moreover, seabed resources were recognized as capable of overexploitation leading to exhaustion, and therefore as requiring regulation to ensure their preservation. The adjacent coastal state was recognized as having a legitimate interest in such resources which made it reasonable for other states to be excluded.

Every writer we have encountered recognized that the three-mile limit could not be applied fully or mechanically to the matter of seabed resources. Fulton, for example, asserted that sedentary fisheries, as well as the mineral

[74] Exclusive rights to exploit known seabed resources are "the survival of more extensive claims to the ownership of and sovereignty over the bed of the sea." Hurst, "Whose Is the Bed of the Sea?", 4 Brit. Y.B. Int'l L. 34, 43 (1923).

resources of the subsoil, were not subject to the narrow-limit rules applicable to surface waters or to the reasons therefor, but rather "require special treatment." Fulton, *op. cit.* at 612. Such resources "have always been considered as on a different footing from fisheries for floating fish. They may be very valuable, are generally restricted in extent, and are admittedly capable of being exhausted or destroyed; and they are looked upon rather as belonging to the soil or bed of the sea than to the sea itself." *Id.* at 697.[75]

This distinction was a natural one, because maritime boundaries have never been regarded as an all-or-nothing matter, requiring specification of a fixed line within which all sovereign rights are permitted and outside which all such rights are prohibited. As this Court remarked in *United States v. Louisiana*, 363 U.S. 1, 34 (1960), "assertions of jurisdiction to different distances may be recognized for different purposes." No one denies that the three-mile limit for full territorial sovereignty did not conflict with the assertion of national jurisdiction over far broader areas for such purposes as control of smuggling (S.B. 393-94). Likewise, the three-mile limit did not abrogate exclusive rights to exploit the resources of the continental shelf.

Borchard, writing in 1941 in defense of Florida's regulation of sponge fisheries beyond three miles, regarded occupation as only one of a number of grounds for vindicating that claim:

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[75] *Accord*, the British Under-Secretary of State for Foreign Affairs, speaking in Parliament in 1923, Parliamentary Debates, May 30, 1923, cols. 1265-66; Jessup, The Law of Territorial Waters 13-17 (1927); 1 Oppenheim, International Law 628-29 (8th ed. Lauterpacht 1955); Hurst, "Whose Is the Bed of the Sea?", 4 Brit. Y.B. Int'l L. 34 (1923) (App. 175-77); Waldock, "The Legal Basis of Claims to the Continental Shelf," 36 Grotius Society (1951) 115, 116-17.

"But there is another type of claim—riparian exploitation or licensing of the sedentary fisheries or subsoil mines or petroleum reserves close to the shore but outside the three-mile limit. Here other considerations enter the problem. Could a country tolerate a permanent foreign occupation or stationary works at its front door, especially if the operations occur on a shallow bank or shelf? Practical considerations would seem to dictate a negative answer. *In English history the Crown laid claim to minerals won from mines and workings below the low-water mark under the open sea adjacent to the coast but outside the three-mile limit. So, the pearl fisheries of Bahrein and Ceylon, extending many miles from shore, have for centuries been regulated by local ordinances of the riparian States,* and Vattel seems to have supported the ancient claim of monopoly in these sedentary fisheries. . . . Even so, there would be no right to interfere with navigation and surface fishing beyond the three-mile limit." Borchard, "Jurisdiction Over the Littoral Bed of the Sea," 35 *Am. J. Int'l L.* 515, 518-19 (1941). (Emphasis added.)

C. THE STATES' TITLE IS FULLY CONSISTENT WITH INTERNATIONAL LAW AND PRACTICE BOTH BEFORE AND AFTER THE TRUMAN PROCLAMATION

Far from being admitted only in a few special cases with peculiar histories, the exclusive right of coastal states to exploit and to regulate seabed resources in its adjacent continental shelf has been recognized and exercised over the years, including the period in which the three-mile rule had its greatest currency, all over the world and wherever exploitable resources exist. Judge Jessup—who is the leading

expert on the three-mile limit and law of the sea in this country and perhaps the world—discusses the evidence in detail at App. 173-230. He has adduced examples to this effect, relating to sedentary fisheries or subsea mining or both, all dating from long prior to the Truman Proclamation, in the adjacent waters of more than two dozen jurisdictions.[76]

Judge Jessup has shown that the virtually uniform practice of nations—which is the principal basis for determining international law (App. 109-13)—has been that, whenever an exploitable resource is discovered in the continental shelf of a coastal state, that state has asserted and exercised exclusive rights over exploitation of the resource.[77] He has likewise shown that such assertions have almost

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[76] Algeria, The Bahamas, British Honduras, Burma, Canada, the Channel Islands, Ceylon, Colombia, Cuba, Egypt, England, France, Greece, India, Ireland, Italy, Japan, Libya, Mexico, Pakistan, Panama, the Persian Gulf states, The Philippines, the Red Sea, Tunisia, Turkey, the United States and Venezuela. The only instance Jessup found of the apparent *failure* of a coastal nation fully to regulate or to exclude foreign exploitation of such resources is the case of the Australian pearling industry prior to 1953 (App. 193-97), a situation due to special circumstances as O'Connell has shown, International Law in Australia 280-83 (1965). Since 1953, Australia has clearly asserted and exercised the exclusive power to control and to regulate these fisheries. *Id.* at 282-83; see S.B. 476.

[77] Plaintiff's witness Professor Henkin conceded the conclusive body of state practice on which we rely:

> "Q. . . . Can you give me a single example from anywhere in the world within, say, the last 300 years where a valuable resource has been discovered on the seabed within, say, 60 miles of the coast of one state and no closer to the coast of any state, when the coastal state has not claimed and exercised the exclusive right to exploit it?
>
> "A I don't know of any such examples." App. 541.

never been challenged, and never effectively challenged. It is precisely this widespread, consistent assertion of national rights, coupled with the failure of other states effectively to challenge such assertions, which is the best evidence for a rule of international law.

The leading authorities accord with Judge Jessup's views. The situation was thus summarized by P.R. Feith, speaking for the relevant committee of the International Law Association in 1950:

> "At all times and in many parts of the world coastal states, have, without incurring any protests, undertaken the development of sea-bed and subsoil resources lying outside territorial waters, whenever this was technically possible.
>
> * * *
>
> "And there can be no doubt that international law has sanctioned such appropriation, even though it is in conflict with the idea of 'res communis.' " App. 198.

Edwin Borchard, an eminent American international-law authority, is to the same effect. After considering the legal bases for such claims,[78] he concludes:

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[78] "Whether this jurisdiction or control be claimed as public property, under the sovereign right over the marginal sea in international law and the common law, or because the continental shelf is a continuation of the littoral state, or as a property right in the controllable soil and subsoil without any claim to surface waters, or that foreign rights in the subsoil beyond the three-mile limit would give rise to trouble, the fact is that the local claim has often been asserted and acquiesced in, especially where a specific resource was in question." Borchard, "Resources of the Continental Shelf", 40 *Am. J. Int'l L.* 53, 59-60 (1946).

> "Assertion of jurisdiction and acquiescence therein—without entering upon the abstruse question of title—must explain the coastal states' jurisdiction over unexploited resources in the continental shelf."

The United States' conduct has been fully consistent with this international practice. When the United States occupied the Philippines, it promptly prohibited unlicensed pearl fishing within three leagues of land (App. 193; Ex. 345, pp. 213-17). Significantly, the United States, while often protesting against claimed extensions of surface territorial waters beyond three miles, never protested against the many claims by other coastal states to exclusive rights to continental-shelf resources in areas where such resources were discovered and exploitable.

Judge Jessup summarized the matter in bringing the standards of international law to bear directly upon the issue of State claims:

> "To give a hypothetical example: suppose that in 1720, or 1770, or 1785, a pearl oyster bed or a tin deposit, technologically and economically exploitable, had been discovered on the seabed ten miles off the coast of Massachusetts (or any other of the Atlantic colonies) . . . . From what I know of the international law climate of that era, both generally and with particular respect to British and American attitudes, I believe it virtually certain that on the discovery of the resource Massachusetts would have asserted the exclusive right to regulate the resource, on behalf of itself, and the exclusive right to exploit it, either on behalf of its own citizens alone or on behalf of all British subjects. . . . I do not believe there would have been any significant international protest against that assertion. *And I believe that assertion*

> *would have been fully in accordance with the international law and practice of the time.* I think other sovereigns would have been bound to respect it, and I think they would have respected it. *And I do not think the legal situation was significantly different at any more recent time, including the 19th and early 20th centuries.*" (App. 229-30.) (Emphasis added.)

Judge Jessup rejected the suggestion that the federal government has ever renounced or abandoned the historic seabed claims of the Atlantic States (App. 502-03, 524).

D. INTERNATIONAL LAW AND PRACTICE DID NOT AND DOES NOT REQUIRE "OCCUPATION" IN ADVANCE OF DISCOVERY TO ESTABLISH PREEMPTIVE RIGHTS TO SEABED RESOURCES.

The Master's analysis of the States' claims is fundamentally flawed by the repeated assumption (see Report, pp. 39, 67-69) that the claims were vitiated by the States' failure to effect actual occupation of the submerged lands. In fact, as we show below, international law has never imposed any requirement of occupation by the coastal state in advance of the discovery of seabed resources.

It has been repeatedly recognized that any requirement of "effective occupation" found in the works of some writers was not in accordance with state practice and that, in any event, the standards for an "occupation" were so low as to make such a requirement essentially fictitious. Moreover, discussion has revolved around what a coastal state must do to validate its claim once an exploitable resource is discovered; no writer has ever, to the best of our knowledge, ever argued that "occupation" or any other act, even a bare claim, need antedate the discovery to give the coastal state the exclusive right to exploit a seabed resource once its discovery occurs.

Sir Hersch Lauterpacht, late Judge of the International Court of Justice and editor of the edition of Oppenheim's *International Law* from which the Master quotes, has given perhaps the most comprehensive demonstration that the claims asserted in the Truman and similar Proclamations were not inconsistent with prior international law. In his article "Sovereignty Over Submarine Areas," 27 *Brit. Y.B. Int'l L.* 376 (1950) (quoted *in extenso* at App. 155-67), Lauterpacht demolishes any notion of "effective occupation" as the test for the exclusive rights of a coastal state to its continental shelf:

> "The main argument, other than that based on the freedom of the seas, which has been raised against the acquisition of title over submarine area is that international law requires effective occupation as a condition of valid acquisition of territorial title and that no such effective occupation is possible with regard to submarine areas. That argument is based on two assumptions. The first is that the principles applicable with regard to acquisition of title over territory apply, automatically and without modification, to the novel case of the submarine areas. The second is that effective occupation is, according to international law, invariably and rigidly a condition of acquisition of territorial sovereignty. Both these assumptions are unwarranted.
>
> "Any attempt to base the title to submarine areas on the accepted notion of effective occupation must result either in a denial of the legality of the title thus claimed or in depriving the notion of effective occupation of its natural meaning. *For it is clear that in all cases in which the title to submarine areas has been proclaimed there has been no approximation to effective occupation.* There has been only a proclamation

and, in some cases, a conferment of concessions in respect of the areas in question. *This absence of effective occupation is in no way fatal to acquisition of territorial title over submarine areas.* For modern international practice does not invariably consider effective occupation to be a condition of acquisition of title. As it is occasionally put in a more circuitous fashion, the requirement of effectiveness of occupation is a matter of degree. Even that attenuated condition of effectiveness represents an over-simplification of the true legal position. What is true is that, *all other things being equal,* effective occupation constitutes, except as against the lawful sovereign, a title superior to any competing title. To that extent — but to that extent only — is it possible to consider as accurate the statement that international law has discarded discovery, purely symbolic occupation (which does not differ in nature from pretensions based on mere discovery) and similar claims, including that of contiguity, as a valid source of territorial title. Thus in modern international judicial practice the borderline between the attenuated conditions of effectiveness of occupation and the total relinquishment of the requirement of effectiveness has become shadowy to the point of obliteration." App. 155-57.[79] (Emphasis added.)

And Lauterpacht concludes, just as the United States had done in the Bering Sea arbitration (pp. 124-25, *infra*), that what is really involved is an inherent right belonging

[79] Lauterpacht states at a later point:

"To speak of occupation of submarine areas is to use language even more unreal than that referring to occupation, as a basis of territorial title, of arctic and antarctic regions." App. 160.

only to the adjacent coastal state, not a requirement of "occupation" which could theoretically be exercised by any nation:

> "[T] he defect of the attempt to base the title to submarine areas on occupation is not only one of logic. If 'occupation' thus conceived were the true basis of the legal claim to the adjacent submarine areas then there would be nothing—save the extra-legal remedies of intervention or self-preservation on the part of the coastal state — to prevent distant and strategically and economically powerful states from 'occupying' the adjacent submarine areas of other states by proclaiming their annexation and by emphasizing the 'effectiveness' of the title thus claimed to have been acquired by granting concessions, by legislating in respect of them, by concluding treaties—with states willing to do so—relating to the submarine areas thus acquired, and, eventually and after a long period of uncertainty, to proceed to the actual exploitation, possibly in active competition with other states, of the submarine areas in question. Wide and disturbing possibilities of friction would thus be opened not only as between the coastal state and its more or less distant neighbours but also between the neighbours themselves." App. 162-63.

Lauterpacht's conclusion is that in the absence even of a claim the coastal state has an inherent right, which is perfected by a bare claim alone once an exploitable resource has been discovered.

> "It is possible to say that the littoral state is entitled *ipso jure* to the adjacent submarine areas, but that so long as it has not perfected its title by claiming it formally through the issue of a proclamation, declaratory of an existing right, the title is merely 'inchoate'." App. 165.

Decades prior to the Truman Proclamation, in the 1890's, the United States took the official position that a coastal state has the exclusive right to exploit seabed resources beyond the three-mile limit, and that no occupation of the seabed was necessary to vindicate that right. This was done in the Bering Sea arbitration with Great Britain, where the United States attempted (unsuccessfully) to extend this principle to a surface seal fishery (S.B. 403-07; App. 215-27). As Judge Jessup pointed out (App. 217), "the United States rested on the established doctrine that seabed resources could be the subject of ownership by the adjacent state—which was not disputed—and unsuccessfully attempted to reason from that fact to a sovereign right over *surface* fisheries."

The United States thus attempted to extend to surface fisheries precisely the doctrine of proprietary rights which had uniformly been recognized as to seabed and subsoil resources whenever they were capable of exploitation. The United States argued:

> "These regulations are found in the cases of oyster beds, coral beds, beds where the pearl fishery is carried on, beds which are found in a certain proximity to the coast of a country, and which can be worked more conveniently by the citizens of that country than any other." App. 221.

> "It is where there is a natural advantage, within a certain proximity to the coast of a particular nation, which it can turn to account better than the citizens of any other nation, and in respect to which it enjoys peculiar advantages growing out of its proximity, and where, if it is permitted to establish and carry out a system of national regulation, it may furnish a regular, constant supply of a certain product of the seas, for the uses of

> mankind; which product, if it were thrown open to the whole world, would be destroyed." App. 221.

The British contended, just as the Master has found here, that the exclusive right to exploit seabed resources depended on effective occupation of the seabed. The United States squarely rejected that contention:

> "If they [seabed resources] are so situated as to be the special advantage of a particular power, and that particular power chooses to improve that natural advantage by the creation of an industry, it establishes a right which it can defend from invasion by the citizens of other nations. The explanation of that which is attempted to be made in the printed argument of the other side is, that it depends upon an ability *to occupy the bottom*. That does not explain it. That furnishes no ground of reason whatever. If it were true, it would justify the occupation of a portion of the bottom in any place in the seas, irrespective of the question whether there was a natural advantage or not; and such right to occupy the bottom certainly does not exist. Nor *can* you occupy the bottom of the sea. It is not susceptible of occupation. . . ." App. 222-23.

The United States thus pointed out that the "occupation" theory squared neither with state practice nor with logic, since if occupation were the test an exclusive seabed right could be established not only by the coastal state but by any nation over a seabed anywhere in the world, whereas both state practice and economic considerations limited the exclusive right to that of a coastal state in the seabed of its adjacent waters. See also App. 220.[80]

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[80] The decision of the arbitral tribunal said nothing about the "occupation" issue. The United States lost the case on the ground that

Given the background of state practice which we have described, it is not surprising that the continental-shelf proclamations of the 1940's by a number of nations, including the Truman Proclamation of 1945, were readily accepted, with hardly a dissenting murmur, as valid assertions of exclusive rights of the coastal sovereign. While the Truman Proclamation was indeed an important step in the formulation of a general doctrine which clarified and made much more explicit and uniform the rights of coastal states in their continental shelves, it was no sharp reversal of prior law, but was rather the natural outgrowth, in the light of vastly expanded potential uses of continental-shelf resources, of the substantial body of state practice and customary law which had been applied for centuries to those resources whenever and wherever they had assumed practical importance.

Indeed, if the Master's position were correct, then President Truman and this country would have committed an internationally unlawful act by promulgating the Proclamation of 1945. See App. 524-25. That proclamation, asserting the exclusive right to explore and to exploit all the resources of the continental shelf of the United States, was not a mere proposal offered for comment, acquiescence or objection by other countries. To the contrary, it was self-executing and took effect immediately; hence it was unlawful if not countenanced by the international law then in effect. In fact, as we have shown, at most the proclamation and its aftermath merely made more articulate, more systematic and more comprehensive what had always been the rights of coastal states.[81] In Lauterpacht's terms, the proclamation was "declaratory of an existing right" (p. 123, *supra*).

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its interference with *surface* navigation and fishery was not justified in view of the adherence of both parties to the three-mile limit. See S.B. 406-07.

[81] This was the general view taken of the legal significance of the Truman Proclamation both then and later. Judge Jessup has

Waldock, on whom the Master so heavily relies (Report, pp. 37, 69), was in entire agreement. As the passage quoted by the Master indicates (Report p. 37), Waldock did believe that under the law both before and after 1945 "occupation" of the seabed was in a sense necessary to validate a claim to the exclusive right to exploit seabed resources. However, Waldock believed that such an occupation could only be made by the adjacent coastal state, thus giving that state an exclusive right to occupy. Moreover, there is no word in Waldock's text suggesting that the occupation must be made *before* the discovery of exploitable resources. Finally and crucially, after describing the law as it existed "at the outbreak of the Second World War," 36 *Grotius Society* 115 (1951), Waldock goes on to inquire whether the Truman Proclamation was consistent with that law and concludes that it was. *Id.* at 138-49.

More specifically, he holds that the test of occupation "is not so rigorous as it is represented to be in some quarters"; that it is "impossible to maintain that actual settlement or exploitation is a *sine qua non* of effective occupation"; that "extensive assumption of jurisdiction over fairly extensive areas of sea-bed can probably be established without necessarily showing much or even any physical activity on the sea-bed itself." *Id.* at 140-41. While a proclamation asserting sovereignty to seabed areas on behalf of a non-adjacent coastal State would be a mere "paper occupation" having no legal effect, in the case of the coastal state the element of adjacency makes such a claim a valid act of appropriation. *Ibid.* Waldock concludes:

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exhaustively shown (App. 145-73) that in the extensive discussions in international legal circles on the subject after 1945 the prevailing view was that the Truman Proclamation was consistent with prior law. This was likewise Lauterpacht's thesis in his article quoted at pp. 121-23, *supra*, and more extensively at App. 155-67.

> "[T]he Truman and similar Proclamations, having regard to the special circumstances of submarine territory and to the potentiality of control which contiguity gives, may properly be regarded as effective first acts of occupation. If, thereafter, such State activity takes place as the circumstances call for, the requirements of effective occupation as laid down in the leading cases would seem to be satisfied." *Id.* at 142.

Thus Waldock—the very authority on whom the Master almost exclusively relies as establishing a requirement of effective occupation in the pre-1945 law—squarely and explicitly rejects the Master's view that the Truman Proclamation was inconsistent with prior law and could be justified only by a "new continental shelf doctrine" (Report, p. 68). Waldock rejects the proposal that "an entirely new doctrine of customary law," *op. cit.* at 142, either was needed or should be adopted to validate claims such as that made by the Truman Proclamation.

The critical facts for this proceeding are that, under the law as it existed in and prior to 1945, (1) an outstanding claim to sovereignty and dominion over the continental shelf, such as was established by the law and claims of England in the 17th and 18th centuries and was embodied in the colonial charters, when coupled with such activity as the circumstances and the presence of exploitable resources warranted, was entirely sufficient to establish an exclusive right; (2) even in the absence of an outstanding claim the coastal state nonetheless possessed an exclusive right in that on the discovery of an exploitable resource it had the sole right to assert and to exercise exclusive title, and other nations could come in only if the coastal state failed to implement that right. Either of these elements of pre-1945 law would be sufficient to validate the States' claims in this proceeding. Both taken together surely are.

The Master relies heavily on the arbitral decision of Lord Asquith of Bishopstone in the Abu Dhabi Arbitration, 1 *International and Comparative Law Quarterly* (1952) 247, in which it was held that by a concession agreement of 1939 the ruler of Abu Dhabi did not intend to grant rights in the continental shelf outside territorial waters. As Judge Jessup has demonstrated (Tr. 517-19), the statements in the arbitrator's opinion on which the Master relies are dicta unnecessary to his decision, and "did not adequately appreciate the rules and principles of international law or the background of relevant international practice" App. 141.[82]

Moroever, Abu Dhabi so far as appears had never made any assertion of jurisdiction beyond three miles comparable to that made in English law and the colonial charters. And while under the Lauterpacht-Waldock view Abu Dhabi had, at the least, an inchoate and exclusive right to claim continental-shelf resources when those were discovered, such a right may well not have been covered by the particular concession language involved ("the whole of the lands which belong to the rule of the Ruler of Abu Dhabi and its dependencies and of the islands and the sea waters which belong to that area"). Thus the case has little if any bearing on, let alone authority for, the issues presently involved.

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[82] Arbitral decisions have no status in international law greater than what can fairly be ascribed to them on the basis of their intrinsic merits, including the force of their reasoning, and the stature of the arbitrator or arbitrators. See 1 Whiteman (U.S. Dept. of State), Digest of International Law 94-97 (1963). Lord Asquith of Bishopstone, the sole arbitrator in the *Abu Dhabi* arbitration, was not a recognized international jurist or publicist in any sense comparable, for example, to Jessup or Lauterpacht.

VI.

THE STATES SHOULD PREVAIL EVEN IF EXCLUSIVE RIGHTS TO THE SHELF DID NOT ARISE UNTIL 1945; AND FEDERAL LEGISLATION CANNOT CONSTITUTIONALLY BE READ TO DEPRIVE THE STATES OF THEIR RIGHTS, WHETHER HISTORIC OR MODERN.

Although the fundamental basis of the States' claims has been established by prior discussion, several related issues must be addressed to provide a complete statement of the States' argument. We show below that the States are entitled to the seabed resources in question whenever such rights arose; that at the very least equal treatment principles entitle the States to establish their historic claims to three leagues on the Atlantic Coast; and that with respect to these claims, as well as to the historic claims of the States based on their charters and crown-inherited rights, federal legislation would be unconstitutional if construed to deprive the States of their property without just compensation.

A. THE ATLANTIC STATES ARE ENTITLED TO THE SHELF AS RESIDUAL SOVEREIGNS AND OWNERS OF PROPERTY OF THEIR LAND TERRITORIES, TO WHICH CONTINENTAL-SHELF RIGHTS ARE AN "INHERENT" APPURTENANCE.

In prior sections of this brief it has been shown that the States have compelling historic claims to the seabed and its resources and that such claims were not cut off by the adoption of the Constitution or any international three-mile limit or surface jurisdiction. Even if the contrary be assumed, however, unquestionably national rights to the resources of the shelf do exist today. As between the States and the federal government, the States have by far the better claim.

There is no doubt that as against the rest of the world this nation has exclusive rights to develop the natural resources of the continental shelf on the Atlantic coast.

Proclamation 2667, made by President Truman on September 28, 1945, declared that:

> "The Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." 3 C.F.R. 67, 68 (1943-48 Comp.).

International law confirms this nation's entitlement. Article II of the 1958 Geneva Convention on the Continental Shelf recognizes the rights of a state, by virtue of its sovereignty over the land to exploit the resources of the continental shelf; and such rights have been confirmed by the International Court of Justice as "inherent" and "exclusive." *North Sea Continental Shelf Cases*, [1969] I.C.J. 1, 22.

Yet, the Truman Proclamation does not purport to dictate whether the States or the federal government own these resources. On the contrary, Executive Order 9633, accompanying the Proclamation, stated that:

> "neither this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three-mile limit." 3 C.F.R. 437 (1943-48 Comp.).

International law is similarly silent on this question.[83] On

[83] This Court, in United States v. Louisiana, 363 U.S. 1, recognized that the ownership of submerged lands appertaining to this nation is a matter of internal law and that ownership of such rights by the States presents no difficulty under international law. See p. 21, *supra*.

three different grounds, the States have the better claim to these rights.

First, the States' claims are directly supported by their status, under our constitutional framework, as residual sovereigns and owners of property rights within their borders. Even if continental-shelf rights are deemed to have arisen only in this century, this development rests upon a recognition that ownership of those rights is a natural extension of ownership of the adjacent coastal area:

> "[T]he rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources." *North Sea Continental Shelf Cases*, [1969] I.C.J. 1, 22.

Upon this principle, ownership of the shelf, whenever it crystallized under international law, appertained to the States which were the residual owners of the adjacent lands, just as the creation of any territory by accretion vests ownership in the owner of the adjacent parcel (S.B. 453-54).

Second, even if the States' historic claims to the seabed and its resources based on their charters and crown-inherited rights were deemed defective—for example, because of some doubts concerning the scope of the charters or because of the contraction of rights based on 19th-century international-law developments—the States at least have far better historic claims than the federal government. The great weight of historical evidence during the colonial and federal periods points in the direction of State ownership. None of the historical evidence affirmatively supports the claim of the federal government

to ownership. Similarly, both common understanding and actual practice during 150 years of American history support State ownership.

Finally, as we have already shown, the regulatory and economic interests of the States are far more closely tied to the development of the submerged lands than the constitutional interests of the federal government. The latter can be properly secured by the normal, overriding exercise of federal regulatory authority to secure the national defense and to conduct the nation's foreign affairs. The States' interests, however, are broad-ranged ones requiring both police-power authority, to regulate the development of submerged lands, and the economic benefits of their ownership, to control and to offset the economic and social burdens and costs which such development inflicts on the adjacent coastal states. (See pp. 15-30, *supra*.)

The arguments set forth above are not lengthy because they rest on historical, constitutional and actual evidence and contentions that have been presented at length in connection with earlier points in this brief. Nevertheless, these arguments rest upon the settled principle of our constitutional system, namely, that the federal government is one of limited, delegated rights and powers and that all inherent and residual sovereignty and dominion remain with the separate States. Even if the States' claims somehow fall short of establishing a vested title, they are superior by every standard to plaintiff's claim.

B. AT THE VERY LEAST, THE ATLANTIC STATES ARE ENTITLED TO PROVE HISTORIC BOUNDARIES OUT TO THREE LEAGUES UNDER FEDERAL LEGISLATION.

Even if their more extensive claims are rejected, the Atlantic States should at minimum be allowed to establish

ownership out to three leagues by proving historic boundaries on the same basis as the Gulf States. All States have a right to be treated equally by the federal government in respect of their sovereignty and political rights. This doctrine of "equal footing" or "equal status" is inherent in the Constitution, and the principle that "equality of Constitutional right and power is the condition of all States of the Union, old and new" is well-established by judicial decision. *E.g., Escanaba Co. v. Chicago*, 107 U.S. 678, 689 (1882).[84]

The Master (Report, pp. 71-72) rejected the States' equal-footing claim on the ground that the equal-footing doctrine has been said to apply to "political rights" rather than "property." *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900). However, in the Submerged Lands Act Congress did not merely distribute property but gave to the Gulf States—but not to the other coastal States—the political or legal right of establishing their historic boundaries extending to three leagues to entitle them to exclusive continental-shelf rights. It is surely a sovereign or political right of the Atlantic States to be able to establish their own comparable historic boundaries for the same purpose.[85]

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[84] As emphasized in Coyle v. Smith, 221 U.S. 559, 567 (1911),

> " 'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution with others whose powers had been further restricted by an act of Congress accepted as a condition of admission."

[85] The Master also states that the Atlantic coastal States never claimed seaward boundaries beyond three miles (Report, p. 72). As

No one can plausibly suggest that the distinction drawn by the Act between Gulf and Atlantic coast States is based on any rational judgment based upon policy considerations. As the plaintiff virtually concedes (Pl. Post-Trial Br. 18), the basic reason why the Gulf States were afforded an opportunity to demonstrate that they possess a seaward boundary greater than three miles was that Congress was unaware of any claims by the Atlantic States to more distant boundaries. The discrimination is, therefore, unjustified by any rational judgment but rests on a misapprehension of fact. The misapprehension is quite understandable since the Atlantic coast was not the subject of mineral exploration in that period, but it cannot rescue an otherwise discriminatory provision.

Finally, the Master asserts (Report, p. 72) that the equal-treatment claim has been resolved adversely to the Atlantic States by *Alabama v. Texas*, 347 U.S. 272 (1954), although he acknowledged that the Court is free to reexamine that decision. That case, which arose in a different procedural context and involved different claims, cannot be deemed determinative.[84] In any event, if *Alabama v. Texas* did resolve the present equal-status claim on a summary basis, we submit that the case was wrongly decided and should be reexamined, especially because both it and the statutory distinction at issue were made in ignorance of the historic claims of the Atlantic States.

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previous discussion shows, the Atlantic States at the time of their entry into the union had historic rights to submerged lands going well beyond three leagues.

[84] The Court there refused to allow the protesting States to file a complaint. Though equal-treatment arguments of a sort may have been made in that case, they apparently were submerged in a welter of unrelated contentions. The basic equal-treatment claim there, moreover, was aimed at depriving the Gulf States of resources beyond three miles, while in this instance the claim seeks to provide an equal opportunity for the Atlantic States to obtain submerged lands in the belt between three miles and three leagues.

If the distinction between the Atlantic and the Gulf coastal States is unconstitutional, then it follows that the Atlantic States should be allowed the same opportunity as the Gulf States to prove their rights to the resources to a distance of three leagues. This Court has full authority to provide this remedy for a denial of equal treatment, and its aptness is reinforced by the severability clause of Section 17 of the Act.[87] Since a misapprehension of fact was Congress' sole apparent reason for denying the Atlantic States the equality of treatment they seek, the extension of such equal treatment is entirely consistent with the basic policy of the Act.

C. THE SUBMERGED LANDS ACT AND THE OUTER CONTINENTAL SHELF ACT ARE UNCONSTITUTIONAL IF THEY PURPORT TO DEPRIVE THE ATLANTIC STATES OF SEABED RESOURCES.

Although the Master did not discuss the point, the plaintiff may contend in this Court that the Submerged Lands and Outer Continental Shelf Acts furnish an independent ground for extinguishing the States' claims even if they were valid until 1953. Such a reading of the Acts would be contrary to their purpose and, if adopted, would render them *pro tanto* unconstitutional. The legislative history of the federal legislation confirms, beyond a shadow of a doubt, that Congress had no purpose to deprive the States of their historic claims to the submerged lands. On the contrary, the legislation was designed to restore to the States their historical rights within the three-mile belt. Where Congress understood that claims to three leagues existed in the Gulf, it specifically

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[87] See Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring); Champlin Ref. Co. v. Comm'r, 286 U.S. 210, 235 (1932). *Cf.* Schacht v. United States, 398 U.S. 58 (1970).

provided that the Gulf States should have the opportunity to establish such claims. See *United States v. Louisiana*, 363 U.S. 1 (1960).

The language of the legislation is, at best, ambiguous. There are, of course, provisions representing Congress' assumption that the Atlantic and Pacific States were not advancing any claims beyond the three-mile belt;[88] on the other hand, Section 4 of the Submerged Lands Act, 43 U.S.C. § 1312, expressly provides that nothing in the provision confirming the seaward boundaries of the original States at three miles and authorizing other States to fix similar boundaries shall prejudice the existence of "any State's seaward boundary beyond three geographical miles if its laws or constitution so provided at the time the State joined the Union." It is proper to resolve the ambiguity in light of Congress' purpose to preserve and not to foreclose the States' historic claims.

If read to divest States of their historic rights to continental-shelf resources beyond three miles, the legislation would be to that extent unconstitutional. The rights possessed by the States are unquestionably property rights, though they have other aspects as well.[89] The Fifth Amendment explicitly states: "nor shall private property be taken for public use, without just compensation." It is well settled that the Fifth Amendment applies to State property taken by the federal government. While such property may indeed be taken under the power of eminent domain, the

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[88] The principal language appears in a definitional provision of the Submerged Lands Act. Section 2(b), 43 U.S.C. § 1301(b). The Outer Continental Shelf Act merely incorporates by reference the assumptions or determinations of the Submerged Lands Act with respect to State ownership. See Sections 2-4, 43 U.S.C. § 1331-33.

[89] So far as the rights may be deemed territorial, the Constitution itself makes clear that the federal government may not diminish a State without its consent. See pp. 25, 102, *supra*.

Federal Government is not relieved of its duty to pay just compensation. As the Court states in *United States v. Carmack*, 329 U.S. 230, 242 (1946):

> "when the Federal Government thus takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it and it is conceded in this case that the Federal Government must pay just compensation for the land condemned."[90]

Since no compensation was either offered or intended in this instance, any purported divestiture of the States' rights violates the Fifth Amendment.

In reply, it might be urged that no compensation need be paid on some public-use or trust theory (*Stockton v. Baltimore & N.Y. R.R.*, 32 F. 9 (C.C.N.J. 1887), *appeal dismissed*, 140 U.S. 699 (1899)); but such a doctrine can have no application where, as here, the purpose of the taking is fundamentally economic in character.[91] Similarly, this is not a case in which an uncompensated taking from a

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[90] See also Oklahoma v. Atkinson Co., 313 U.S. 508, 534 (1941); St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 100-01 (1893); Yalobusha County v. Crawford, 165 F.2d 867, 869 (5th Cir. 1947); Wayne County v. United States, 53 Ct. Cl. 417, 423-24 (1918), *aff'd*, 252 U.S. 574 (1920).

[91] Quite a different question would be presented, of course, if the federal government, rather than attempting to take the States' continental-shelf rights for its own use and profit, renounced them by treaty or by acquiescence in a change in international law by which they would no longer be recognized. Such federal action, pursuant to the foreign-affairs power, would indisputably be valid and binding on the States; the hypothetical question whether compensation would be due is not involved in this proceeding.

State can be defended on the ground that the federal use is "superior" *(In re Certain Land in Lawrence,* 119 F. 453 (D. Mass. 1902)).

Plaintiff has itself recognized the obligation to pay just compensation for continental-shelf property it takes from the States. Under Section 6 of the Submerged Lands Act, 43 U.S.C. § 1314, Congress provided as to the three-mile/three-league belt of land ceded to the States that the federal government had the right to purchase undersea resources or portions of the ceded submerged lands, if required for national defense. The section explicitly provides that acquisition of the resources shall be "at the prevailing market price," and of the lands "by proceeding in accordance with due process of law and paying just compensation therefor."

CONCLUSION

For the reasons stated above, the defendant States are entitled to judgment. They own exclusive exploitation rights in the continental shelf out to 100 miles pursuant to their historic title. Wherever the continental shelf off their coasts exceeds 100 miles in width, they own exclusive exploitation rights in the remainder as residual sovereigns of the coastline to which those exclusive rights pertain.

Respectfully submitted,

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NOVEMBER 29, 1974

CERTIFICATE OF SERVICE

I hearby certify that I have this 29th day of November, 1974, served three (3) copies of the foregoing Exceptions and Brief and of the Supplemental Brief and Appendices of the Common Counsel States by hand delivery upon The Honorable Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. and by first-class mail, postage prepaid, upon the Attorneys General of the States of Georgia, North Carolina and South Carolina.

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November 29, 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE, *et al.*,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY THE COMMON COUNSEL STATES

1. English law and practice prior to the seventeenth century recognized the sovereignty and ownership by the crown of the English seas and the seabed and subsoil thereof. Supplemental Brief for the Common Counsel States (hereinafter "Br.") 7-46.

2. The English seas were within the realm of England. Br. 8-18.

3. The crown's rights in the English seas included control of the fisheries. Br. 18-25.

4. The English maritime jurisdiction was territorial in the English seas, and included both legislative power and criminal jurisdiction over foreigners. Br. 25-31.

5. The crown's ownership of the seabed of the English seas was recognized from very early times. Br. 31-33.

6. In the reign of Elizabeth I the law of maritime sovereignty and dominion was extended and elaborated in several important respects. Br. 33-45.

7. Exclusion of foreigners from coastal fisheries was firmly established in Scottish law and practice. Br. 45-46.

8. Seventeenth-century English law and practice fully recognized the crown's sovereignty and dominion in the English seas, seabed and subsoil. Br. 47-124.

9. The crown possessed territorial sovereignty over the English seas. Br. 48-73.

10. The crown possessed the legal right to exclude or to license foreign fishermen in the English seas and the right to create monopolies of newly discovered fisheries; and all fisheries in English waters were subject to regulation. Br. 73-92.

11. The admiralty jurisdiction was territorial in the English seas, was an attribute of sovereignty, and included jurisdiction over foreigners. Br. 92-98.

12. The crown owned the seabed and subsoil of the English seas and the resources thereof. Br. 98-117.

13. The flag salute was insisted upon as an attribute of English sovereignty in the English seas. Br. 117-20.

14. Other aspects of maritime sovereignty dealt with navigation and neutrality. Br. 120-24.

15. British law and practice in the eighteenth century did not change substantially with respect to maritime sovereignty and dominion. Br. 124-39.

16. The British seas continued to be regarded as subject to British sovereignty and a part of British territory. Br. 126-29.

17. The claim to exclusive fisheries in the British seas was not abandoned, and indeed was extended to new British possessions. Br. 129-32.

18. The admiralty jurisdiction in the British seas remained unchanged. Br. 132-33.

19. Crown ownership of the seabed and subsoil and of the resources thereof continued to be fully recognized in law. Br. 133-35.

20. The flag salute continued as a recognition of sovereignty in the British seas. Br. 135-36.

21. Other attributes of sovereignty and jurisdiction involved neutrality and smuggling. Br. 136-39.

22. The American colonial charters created territorial seas and conveyed maritime sovereignty and dominion. Br. 140-216.

23. Given the legal and political climate in which the colonial charters were issued, it would have been incredible if the colonies they created had stopped at low-water mark. Br. 140-70.

24. The issuance of the colonial charters and important acts of maritime sovereignty in British waters were closely correlated in time. Br. 141-48.

25. The persons involved in acts of maritime sovereignty in British waters were largely the same persons as those responsible for the chartering and establishment of the American colonies. Br. 148-62.

26. The English discoveries and symbolic acts of taking possession were sufficient in law to establish maritime sovereignty. Br. 162-64.

27. The common law of England, including the law of maritime sovereignty and dominion, became law in this country. Br. 164-66.

28. The exploitation of fisheries and other marine resources was of paramount importance as an objective of American colonization. Br. 167-70.

29. Britain claimed maritime sovereignty in North American waters. Br. 170-78.

30. The colonial charters, construed in light of contemporary legal usage, conveyed extensive rights both of sovereignty and of property in the marginal seas. Br. 178-210.

31. The record is sufficient to establish a uniform territorial sea 100 miles in width off the coasts of the Common Counsel States. Br. 210-16.

32. Rights of sovereignty and dominion were exercised over the American territorial sea during the colonial period. Br. 216-60.

33. The fisheries were subjected to extensive regulation and licensing, and foreigners were excluded. Br. 217-40.

34. The colonies asserted and exercised control and jurisdiction over the seabed and its resources whenever the occasion arose. Br. 240-46.

35. The territorial jurisdiction of admiralty existed in the American seas just as in the English seas. Br. 247-49.

36. Other aspects of sovereignty, ownership and jurisdiction confirm that the American seas were regarded as subject to the same law as the English seas. Br. 249-51.

37. Several maps made in the colonial period provide additional evidence for the American territorial seas. Br. 251-54.

38. There was no curtailment of colonial rights in the marginal sea between 1752 and 1776, and if there had been such a curtailment it would never have been recognized in American law. Br. 255-60.

39. The English law of maritime sovereignty and dominion was not inconsistent with international law in the period 1606-1783, and no British or American court could or would have so held. Br. 261-83.

40. No British or American court would have questioned its government's territorial claims on the basis of alleged contrary doctrines of customary international law. Br. 261-62.

41. Plaintiff's contentions regarding international law cannot be sustained. Br. 263-83.

42. Broad claims to territorial seas were fully sanctioned by state practice. Br. 265-71.

43. The views of publicists recognized the right to territorial seas with virtual unanimity, and no consensus had developed restricting such seas to any limit less than 100 miles. Br. 271-80.

44. No narrow-limit rule was applied to seabed claims. Br. 281-83.

45. At the American Revolution the States individually succeeded to the maritime territorial sovereignty and dominion both of their predecessor colonial governments and of the British crown. Br. 283-336.

46. The States were individually sovereign in the revolutionary and Confederation periods. Br. 286-314.

47. The States, whether "externally sovereign" or not, succeeded individually to the territorial boundaries and property rights both of the crown and of the colonial and proprietary governments, including rights in the marginal sea and seabed. Br. 314-29.

48. The Peace of Paris of 1783 and the negotiations preceding it demonstrate American awareness of maritime rights, and show no American disagreement with territorial seas 100 miles or 30 leagues in width. Br. 329-33.

49. The Peace of Paris established for at least some purposes, including exclusive fisheries, a twenty-league maritime boundary off the coasts of the defendant States. Br. 333-36.

50. The exclusive right of the States to explore and to exploit the resources of the continental shelf were not transferred to the United States by the Constitution. Br. 337-75.

51. The Constitution expressly preserves State territorial boundaries and property rights. Br. 337-39.

52. Several other provisions of the Constitution and the debates at the Federal Convention indicate the intention not to change or to affect State boundaries or the ownership of property. Br. 339-41.

53. The great weight of Supreme Court authority has recognized State sovereignty in the period 1776-1789, and State succession to all territorial and property rights of the crown and the colonial governments was uniformly upheld until the *California* case. Br. 341-75.

54. The exclusive rights of the States to the continental shelf have not been abandoned or extinguished since 1787. Br. 376-427.

55. It was well understood throughout our history down to 1947 that under the Constitution the States retained their rights in tide waters, including the marginal sea, and in the bed and subsoil thereof, and Congress has repudiated the *California* Court's decision to the contrary. Br. 376-88.

56. The United States did not abandon or relinquish the rights of the States by adoping the three-mile limit. Br. 389-407.

57. No renunciation can be inferred from mere silence. Br. 391-93.

58. The United States' adherence to the three-mile limit has not been consistent or unqualified. Br. 393-401.

59. The three-mile limit was not applied by the United States to the seabed and subsoil. Br. 401-07.

60. The States' continental-shelf rights were not extinguished by any obligatory rule of international law in the period 1783-1945. Br. 407-27.

61. Even if plaintiff were otherwise correct, the international law against which the States' claims should be judged is present law, not past law. Br. 408-09.

62. The three-mile limit never became an obligatory rule of international law. Br. 409-14.

63. No obligatory rule of international law prior to 1945 barred the States' seabed and subsoil claims. Br. 414-27.

64. The federal foreign-affairs and defense powers do not require federal ownership of the exclusive right to exploit the resources of the continental shelf, but merely the same paramountcy which the Federal Government enjoys on land. Br. 428-43.

65. The *California* Court's view that exclusive federal proprietary rights in the continental shelf are required by the foreign-affairs and defense powers was always unsound and has been repudiated by the State Department, by Congress, and by subsequent decisions of the Court. Br. 428-39.

66. The record demonstrates that no foreign-affairs or defense difficulties would result from recognition of State property rights in the seabed and subsoil of the continental shelf. Br. 439-43.

67. The Submerged Lands Act and the Outer Continental Shelf Acts are unconstitutional if they purport to deprive the Atlantic States of territory or property. Br. 444-49.

68. The defendant States should prevail even if exclusive rights to part or all of the continental shelf are deemed to have sprung into existence *de novo* in 1945. Br. 449-60.

69. The Atlantic States are entitled to the shelf as residual sovereigns and owners of property of their land territories, to which continental-shelf rights are an "inherent" appurtenance. Br. 449-55.

70. At the very least, the Atlantic States are entitled to prove historic boundaries out to three leagues under federal legislation. Br. 455-60.

71. The crown's ownership of the seabed and subsoil of British waters has continued unchanged and has been applied to the continental shelf. Br. 465-72.

72. Vis-a-vis foreign nations, British adherence to the three-mile limit has not been consistent and has not been generally applied to the seabed and subsoil. Br. 472-77.

73. The Canadian and Australian cases turned on the allocation of powers in late 19th-century British constitutional law between the imperial crown and unchartered imperial provinces, and thus have no relevance to the issues in the present litigation. Br. 477-85.

74. The Common Counsel States are entitled to judgment. Br. 1-485.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, Plaintiff,

v.

STATE OF MAINE, ET AL., Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY THE COMMON COUNSEL STATES

SUPPLEMENTAL BRIEF FOR THE COMMON COUNSEL STATES

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue in this case is whether it is the United States or the defendant States which possess the exclusive right to explore and to exploit the natural resources of the seabed and subsoil underlying the Atlantic Ocean, extending seaward more than three miles from the ordinary low-water mark and from the outer limit of inland waters on the coast to the outer edge of the continental shelf. The issue was so stated in the Complaint of the United States which initiated the litigation (paras. II and III). The Complaint sought to establish that exclusive right on behalf of the United States and to defeat any conflicting "right, title or interest" claimed by the States (paras. IV, VI). The answers of the States varied in language, but generally claimed "some interest" in the area in question, denied plaintiff's claimed exclusive right, and asserted exclusive rights to explore and to exploit on behalf of themselves. See, *e.g.*, Answer of the State of Maine, paras. IV, VI, Affirmative Defense.

It is important to be clear about the issue, because plaintiff's witnesses and plaintiff's brief have repeatedly asserted that various arguments and evidence adduced by the Common Counsel States, while admittedly demonstrating some State interest in the seas and the seabed and subsoil of the continental shelf, are not sufficient to establish that the States or their predecessor sovereigns possess or ever possessed "full territorial sovereignty" or "general rights of property" (by which ownership in fee simple absolute is apparently meant) in the sea, the bed of the sea or the subsoil. *E.g.*, Plaintiff's Brief to the Master (hereinafter Pl. Br.) 30, 32, 35-37, 41, 48, 52-57, 66, 82, 93.

These contentions are difficult to understand in view of the undisputed fact (Tr. 2611) that the United States does not, even today, take the position that it possesses full territorial sovereignty or fee simple title to the seabed and subsoil of the continental shelf, let alone in the superjacent waters, either against the defendant States or against foreign nations; and plaintiff took no such position in its Complaint herein. Rather, the right asserted by the Truman Proclamation of 1945, and confirmed by the Continental Shelf Convention of 1958, is a more limited right: precisely the exclusive right to explore and to exploit which is at issue in this proceeding.[1] It is curious that the United States should take the position that to prevail in this litigation the States need to establish full territorial sovereignty or fee-simple ownership, in view of the fact that the United States itself has never claimed and does not now claim such things.

Historically, the right at issue in this litigation has been variously defined and established. Obviously, the States

[1] "The rule . . . gives to a state jurisdiction in the continental shelf off its coast only for the purpose of exploring and exploiting its natural resources." Restatement (2d), Foreign Relations Law of the United States § 23 (1965).

must prevail here if they can demonstrate that prior to 1776 they or their predecessor sovereigns had the precise right at issue here—the exclusive right to explore and to exploit—and that they have not lost it since that time. Plainly full territorial sovereignty or fee-simple ownership would embrace that right; therefore if we find that at a certain time the defendant States or their predecessors did lawfully claim and exercise such sovereignty or ownership, the right at issue here is established as a part thereof. But the United States can hardly prevail by showing that at a particular historical moment the continental-shelf rights claimed by the States or their predecessors fell short of full territorial sovereignty or fee-simple ownership. Rather, the United States must demonstrate that the States and their predecessors did not and do not possess the right at issue here: the exclusive right to explore and to exploit. Thus, evidence that at a particular time the continental shelf or the superjacent waters were regarded as within the boundaries or territories of the States or their predecessors, or belonged to them in property, is *sufficient* but not *necessary* to sustain the States' position as of that time. If some aspect of territorial sovereignty or fee-simple ownership was then lacking which today adheres to those terms, that avails the United States nothing unless the United States can show that what was lacking was the right at issue here. We have emphasized this point because of what appears to be a misunderstanding by the United States of the fundamental issue in this proceeding.

It is unnecessary to determine whether the right here at issue is to be described as a right of sovereignty *(imperium)* or a right of ownership or property *(dominium)*. Whatever it be called, the issue is whether the States and their predecessors have lawfully possessed it and now lawfully possess it. In general, the Common Counsel States subscribe to the analysis by Dean Pound (Pound, "Rights Involved in *United States v. Texas*," U.S. Exhibit 17, Ap-

pendix), who views the right as essentially one of property. The question of sovereignty becomes relevant, first, because of the doctrine that the sovereign owns all unallocated or ungranted property within its territorial boundaries. Thus if the States can show that in the critical periods here at issue their boundaries extended to the continental shelf or that the shelf was within their territories, they must prevail as a matter of course, unless they had granted or ceded the resulting right of property to the plaintiff. If they cannot show that, but can show that at the critical periods they were sovereign over the land areas and coasts adjacent to the Atlantic continental shelf, and that that land sovereignty entailed rights over the shelf which included the right at issue here, then also they prevail.

Very briefly, the position of the Common Counsel States is that the record establishes that under the law and practice of England prior to and during the 17th and 18th centuries the seabed comprising the continental shelf of England and of English possessions was subject to an exclusive right of exploitation in favor of the English crown. In that period no generally recognized principle of international law prohibited or denied that exclusive right to the English crown. During the period 1492 to 1776, England acquired by right of discovery and the performance of symbolic acts of sovereignty the territories now comprising the defendant States and the adjacent continental shelf. During that period the crown granted its right of exploitation over part or all of that continental shelf to colonial proprietorships and governments. At American independence those rights passed individually to the successor independent States. If any portion of the Atlantic continental shelf was not granted to the colonial proprietorships and governments by the crown prior to 1776, then such portions were retained by the crown until they passed to the adjacent coastal States individually at independence.

Nothing has occurred since 1776 which has divested the defendant States of the right of exploitation of the continental shelf which they had thus acquired. The States preserved their respective rights when they entered into the Articles of Confederation and into the Constitution of the United States. Nor have those rights been divested by any acts of abandonment or renunciation on the part either of the United States or of the States from 1776 down to the present, or by operation of international law. Thus they still exist in their full force and vigor.

Finally, even if it should be held, contrary to our submission, that the exclusive right here at issue did not exist on behalf of any one prior to 1945, but came into existence as a wholly new right between 1945 and 1958, then it is the position of the Common Counsel States that it came into existence as a right of the States rather than of the Federal Government, because of the allocation of powers and property incorporated in our Constitution, and particularly because of the status of the defendant States as residual sovereigns of their land territory and as owners of the unallocated or ungranted public lands within their territories or appurtenant thereto.

We dispute plaintiff's argument (Pl. Br. 25-29) that the defendant States bear "a heavy burden" in this proceeding. Plaintiff relies for that contention on (1) the *California* line of cases, (2) the legislation of 1953, (3) the States' alleged "acquiescence," and (4) purported "property rights" which "will not be lightly overturned." Pl. Br. 25.

(1) Both the result and the reasoning of the *California* line of cases have, as we shall show (pp. 382-88, 433-39, *infra*), been repudiated both by Congress and by subsequent decisions of the Supreme Court. These decisions were based on mistakes of fact; they had the benefit of no evidentiary record, and they treated the issues here involved only in the most cursory and superficial manner. The Court plainly in-

dicated its willingness to view the issues with a fresh and open mind by granting the States' motion herein for proceedings before a Special Master.

(2) Congress in 1953 had the benefit of neither an adjudication nor an evidentiary record concerning the title of the defendant States. Congress repeatedly made clear its underlying intent to affirm the historic title of any State having such a title (pp. 382-88, *infra*). If Congress inadvertently acted in a fashion inconsistent with vested territorial and property rights of the defendant States, such action is plainly unconstitutional (pp. 444-49, *infra*).

(3) The defendant States have never in any fashion "acquiesced" in any surrender of their title. Even if they had, no more weight should be given to that than was given by the *California* Court to the uniform failure by the United States to claim the marginal sea and the bed thereof, and its uniform acquiescence in State ownership, from the beginning of the nation to the year 1937. *United States v. California*, 332 U.S. 19, 39-40 (1947); see pp. 376-88, *infra*.

(4) Plaintiff has not asserted that it has, by lease or otherwise, created any private property rights in any of the submerged lands in dispute here; and we know of none. Hence there are no "property rights" to be "overturned" other than plaintiff's own asserted title, which is purely theoretical, abstract and undeveloped, and is the very title at issue in this proceeding. No reason has been or can be suggested why that should create any heavy burden for the States. In *California* and subsequent cases, to the contrary, the Court was willing, without finding that the United States had sustained any "heavy burden," to extinguish a great body of State and private property rights on the development of which large amounts of money had been spent. 332 U.S. at 40.

Nothing plaintiff has brought forward absolves it of the normal burden of proof which rests upon a party instituting litigation.

I.

ENGLISH LAW AND PRACTICE PRIOR TO THE SEVENTEENTH CENTURY RECOGNIZED THE SOVEREIGNTY AND OWNERSHIP BY THE CROWN OF THE ENGLISH SEAS AND THE SEABED AND SUBSOIL THEREOF.

Professor Horwitz briefly summarized (App. 24-30) the great body of law and practice, down to the accession of James I in 1603, affirming the sovereignty and dominion of the English crown over the four seas surrounding the British isles. The tradition is an ancient one; 17th-century writers customarily traced it back to the reigns of the early Saxon kings (*e.g.*; Exhibit 695,[2] pp. 25, 34) or even earlier. *E.g.*, Selden, *Mare Clausum* 118-259. The ancient English doctrine, including both sovereignty and property of the seas, has recently been reviewed and restated by D.P. O'Connell, Chichele Professor of Public International Law at Oxford University, in "The Juridical Nature of the Territorial Sea," 45 British Year book of International Law 303-24 (1971).

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[2] For brevity, Maine et al. Exhibits are cited herein simply as "Exhibit __." Exhibits of other parties are preceded by the name of the party offering them. All quotations are modernized and made consistent as to spelling, punctuation and capitalization, but not otherwise. The transcript of the hearings is cited as "Tr.". Footnotes are usually omitted from quotations. "State" is capitalized when it means a State of the United States, but not otherwise.

A. THE ENGLISH SEAS WERE WITHIN THE REALM OF ENGLAND.

In view of England's geographical position, it is not surprising that from earliest times we find constant and intense preoccupation with control and regulation of the sea and its resources. Potter briefly summarizes the evidence as follows:

> "Culminating in the British claims to sea dominion, this long and extensive body of state practice found here its most vigorous expression. A document of Alfred extended the King's power to the middle of the surrounding seas, and Edgar styled himself 'king . . . of the ocean lying round about Britain.' After the Conquest this claim was maintained and considerably extended. John required (1200) the striking of sails to all British ships at sea. Edward I (1272-1307) instructed his naval officers to maintain firmly 'the sovereignty which his ancestors the kings of England were wont to have in the sea so far as concerns the amendment, declaration, and interpretation of the laws by them made to govern all manner of nations passing through the said sea.' Henry IV (1399-1413) granted leave to a certain Spaniard to sail 'freely from the port of London through our dominions to the town of Rochelle,' and Elizabeth (1588-1603) was besought by the king of Sweden to grant permission to one Wormaeus to sail to Spain 'through the sea-dominions of the Queen,' as the king wrote.

* * *

"Much more evidence of the same type might be exhibited here. Admirals' commissions were based on the proposition that the British kings were 'lords of the English sea on every side.' Parliamentary records contain similar allusion to the 'sovereigns of the sea,' 'lords of the sea,' and so on . . . .

"It will be observed that there are two elements present here. There is a great body of state practice, and there is some considerable comment upon it by observers." App. 695-98.

Another impartial modern summary is found in Colombos, *The International Law of the Sea* 48 (6th rev'd ed.):

"§56. English claims to the sovereignty of the sea. —The first recorded claim of the English kings to sea power goes back to the tenth century when Edgar the Peaceful styled himself 'sovereign of the Britannic Ocean.' Edward III after the Battle of Sluys exacted a salute from all foreign vessels as being due to him as 'King of the Seas.' This claim however, 'to the guardianship or Admiralty of the sea' had already been advanced by his father, as appears from an official letter written in 1322 to Edward II by the King of France, who complained of the depredations committed upon French ships by English mariners 'who call themselves the custodians of the sea on your behalf.' In 1372, a Petition to Parliament contained the statement that 'then and in times past' all countries held and called the King of England 'King of the Sea.' A similar title, 'lord of the English sea on every side,' appears in a Patent of 1337, and in the Parliament Roll of 1420. As a price of their acquiescence in this acknowledgement of

> sovereignty, the Hanseatic merchants looked to the Kings of England to keep a passage for their ships free from the depredations of pirates. The right to 'the Sovereignty of the Seas' was thus coupled with the duty of the preservation of law and order therein."

See also Exhibit 723, p. xxxiv.

It has frequently been pointed out that the English claims became even more explicit, consistent and systematically enforced after Edward III's great naval victory of Sluys in 1340. Exhibit 715, pp. 165-66; App. 25, 658, 701; Selden, *Mare Clausum* 375 *ff.*

While plaintiff herein has argued that these mediaeval English assertions of sovereignty over the sea were for "protective" purposes only, and that any notion of "territorial" sovereignty came much later, there are very explicit mediaeval authorities which demonstrate that the English seas were regarded as part of the realm, within the territorial sovereignty and dominion[3] of the crown. Selden demonstrated that as early as the reign of Henry I banishments were made out of England and "out of the sea belonging to the king of England." *Mare Clausum*, p. 391; Exhibit 695, p. 149. As Professor Thorne conceded (App. 544), Bracton declared that the four seas around England were parts of the realm. App. 700. Gould likewise concludes, "the narrow seas were thus considered to be within the realm of England." *The Law of Waters* 19 (3d ed. 1900).

The famous document *Prerogativa Regis*, included in the the law books as a statute of Edward II, in defining the right

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[3] Today *dominion* means ownership in property. In the mediaeval period the term generally meant political lordship (the closest concept then existing to the modern *sovereignty*) with property rights as a concomitant thereof. We shall use the word in the modern sense, except of course when quoting.

to royal fish provided that the king shall have them when "taken in the sea or elsewhere within the realm" (App. 872; Exhibit 194, p. 40), thus clearly and directly expressing the conviction that the seas themselves were within the realm. Callis pointed this out in the 17th century, App. 778, and plaintiff's witness Professor Thorne agreed that this was the necessary meaning. App. 545. Britton, along with Bracton[4] the most authoritative of the English mediaeval civilians, likewise regarded the crown's right to royal fish as territorial, applying to fish caught in the English seas but not elsewhere. He wrote that "sturgeons taken within our dominions shall belong to us" (the crown), and likewise "whales caught within our jurisdiction." Nichols (ed.), *Britton* 57 (1901). (Britton's obvious use of "dominions" and "jurisdiction" as coextensive is significant.) The royal prerogatives of flotsam, jetsam and lagan were likewise territorial in the English seas only; outside their bounds such items belonged to the first finder. Exhibit 194, p. 41. The statute 17 Edw. 2, c. 11, provided that "the king shall have wreck of the sea throughout the realm."

Hale, in *De Jure Maris*, stated the "royal fish" doctrine as follows:

> "Touching royal fish, therefore called so, because of common right such fish, if taken within the seas parcel of the dominion and crown of England or in any creeks or arms thereof, they belong to

[4] Bracton said nothing as to whether he regarded the right to royal fish as territorial or not. As to wreck, he regarded the royal right as applying to a wreck found on shore, or close to shore, or far out at sea providing it could be proved that the wreck would have floated to shore in England, but not otherwise. Thorne (ed.), 2 Bracton on the Laws and Customs of England 339 (1968). This gropes for, but has not yet reached, a fully territorial concept of the crown's maritime rights. It was Britton's more advanced formulation, not Bracton's more primitive one, which survived.

> the crown; but if taken in the wide sea, or out of the precinct of the seas belonging to the crown of England, they belong to the taker . . . . But salmon or lamprey are not royal fish. By the common right of the king's prerogative these belong to the king, if taken within his seas or the arms thereof. Anciently the entire sturgeon belonged not to the king, but only the head and the tail of the whale, according to Bracton, cited by Stamford upon this chapter of the prerogative. According to the custom used in the admiralty, these great fish, if taken in the salt water within the king's seas, they were divided, and a moiety was allowed to the taker, the other moiety to the admiral in right of the king." Exhibit 194, pp. 42-43.

Modern writers likewise agree that the ownership of royal fish was territorial, operating only within the English seas where the crown possessed rights of sovereignty and property. Chitty, *A Treatise on the Law of the Prerogatives of the Crown* 144 (1820); Jerwood, *Dissertation on the Rights to the Sea Shores* 85-86 (1850); Gould, *op. cit.* at 20 n. 2.

Robert Belknap, an eminent judge in the reign of Richard II, declared that "the sea is subject to the king, as a part of his English kingdom or of the patrimony of the crown." Selden, *op. cit.* at 385. Selden also demonstrated that in common mediaeval usage the terms "within the four seas" and "within the realm" were used synonymously and interchangeably, as were the terms "without the four seas" and "without the realm." Selden, *op. cit.* at 387-89. Many other 17th-century writers made the same point.

A somewhat mysterious and not always reliable legal treatise entitled *The Mirror of Justices*, apparently written by Andrew Horn, Chamberlain of London, about 1290, declared that the prerogatives of the crown included "sovereign jurisdiction, sovereign seigniory over all the land

as far as the mid-stream of the sea around the land." Whittaker (ed.), *The Mirror of Justices* 8 (1895).

The requirement that within the English seas foreign ships strike their flags to English ships, so important in the 17th and 18th centuries, can be traced back to an ordinance of King John as early as 1201. Exhibit 693, pp. 39-40; Fulton, *The Sovereignty of the Sea* 6-7 (1911).[5] Modern writers have recognized that the flag salute was required by the English crown as a recognition of territorial sovereignty, jurisdiction and dominion over the English seas; see, *e.g.*, 1 Halleck, *International Law* 134 (4th ed. 1908). The doctrine that an island rising in the sea belonged to the crown, while contrary to the views of Roman lawyers, was established in English law as early as the reign of Edward I (Exhibit 728, p. 53); thus Diggs' reassertion of the same principle in Elizabeth I's reign (Tr. 325) was no new doctrine.

Collectively, all the rights of the crown in the English seas, rights both of government and of property, were regarded as among the *jura regalia*, *regalia* or *royalties* of the crown. This point of terminology is important because of the conveyance of "royalties" in the American colonial charters. Since plaintiff's witnesses have conceded that these terms were the standard English legal usage for whatever rights the crown possessed in the English seas, App. 555-58, extended citations are unnecessary. Gould, citing authorities ranging from Bracton down to the 19th century, describes the conventional usage: "the rights of the Crown in tide waters are classed among the *regalia* or prerogative rights . . . ." *Op. cit.* at 34.

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[5] In the course of this brief we quote frequently from Fulton's *The Sovereignty of the Sea* (1911) and Moore's *A History of the Foreshore* (3d ed. 1888). Substantial portions of these works have been included in the record as Exhibits 693 and 728, respectively. References to those portions will be cited by the exhibit numbers. References to portions of these works not included in the exhibits are cited as "Fulton, *op. cit.*" and "Moore, *op. cit.*"

The term *tide waters*, frequently encountered in the literature, may require some definition. As used in English and American legal writings, it normally and properly means all those waters in which a perceptible tide ebbs and flows, including the seas, bays and other coastal waters, the foreshore, and tidal rivers up to the fall line. The legal distinction invariably made as to underwater land is between the land under tide waters, as thus defined (which belonged to the sovereign out to whatever was regarded as the limit of sovereign dominion at the time) and the land under non-tidal lakes, rivers, creeks, etc., which belonged to the adjacent proprietor. English law, as we shall see, has never made any distinction with respect to rights of property between what under current international-law usage would be termed internal waters (bays, rivers, etc.) on the one hand and the territorial or marginal sea on the other. *Accord*, O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 367 (1971). In this country the distinction has generally been defined as between navigable and non-navigable waters, which if applied to England would produce virtually the same result; in England, unlike this country, there are almost no waters which are navigable but non-tidal.

Plaintiff's witness Professor Wroth contended (Tr. 2507) that a statute of 1389, 13 Richard 2, c.5, 2 *Statutes of the Realm* 62 (1816), was inconsistent with the proposition that the English seas were regarded as part of the realm. The statute provided that the admiral should "not meddle from henceforth with anything done within the realm, but only of a thing done upon the sea." On cross-examination, Tr. 2750-51, it was pointed out to Professor Wroth that the words "but only" could well have been used in the sense of "except," in which case the statutory language would be clear support for the proposition that the English seas *were* regarded as within the realm. Professor Wroth's attention was also called to the fact that an eminent admiralty

authority had so construed the statute, App. 748; but the professor maintained his previous position.

Since cross-examination we have found a Latin text of the formula in question, and it makes it wholly clear that in the English version "but only" was used in the sense of "unless" or "except." The Latin version is "quod admiralli et eorum deputati se de aliqua re infra regnum Anglie facta *nisi solomodo* de re super mare facta, ..." Coram Rege Roll, No. 569 (Trinity 1403), m.68, 7 Sayles (ed.), *Select Cases in the Court of King's Bench* (88 Publications of the Selden Society) 136 (1971). (Emphasis added.) The Latin word *nisi* means *unless* or *except*, and means *but* only in its meaning which is synonymous with those words. The use of *solomodo* further confirms the meaning; *nisi solomodo* means *except only with respect to.* If Professor Wroth's interpretation were correct, the formula would not have read *nisi solomodo* but rather *sed solum.* Thus, the formula was framed in such a way as to leave no doubt that the English seas were within the realm. The English translation in Sayles' edition agrees: "admirals and their deputies are in no way to intermeddle with anything done within the realm of England *save only* what is done upon the sea." *Ibid.*[6] (Emphasis added.)

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[6] Professor O'Connell believes, quite incorrectly in our submission for the reasons stated, that the 1389 statute used the word *realm* as excluding the English seas. But he correctly points out that if used in that sense *realm* included only the bodies of counties, which were far from coextensive with the territory and property of the crown, which as he observes included Wales, the Channel Islands, and the English seas, none of which were within the body of any county. O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 372-73 (1971). O'Connell's view is that *realm* has been used in two senses: one meaning only the bodies of counties, the other including all the territories and property of the crown, including the English seas. O'Connell has no doubt that the crown had full rights of territory and property in the English seas.

The same document describes the Earl of Huntingdon as "the late admiral . . . in the western and southern regions of the realm of England." *Id.* at 137. Since everyone concedes that the admiral had jurisdiction only in the sea, this title is yet further confirmation that the seas of England were regarded without question as being "regions of the realm."

In the French text of the 1389 statute, the words corresponding to the English "but only" and the Latin "nisi solomodo" were "mes seulement." The word *mais* (mediaeval *mes, mez*) is derived from the Latin *magis,* which means *more;* and *more* is the original and primary meaning of mais, though its use in this sense is generally now archaic. At the period in question *mais* had not yet acquired its usual modern meaning (*but* in the conjunctive sense) at all, but *always* meant *more* or a meaning immediately derived therefrom, specifically including, when combined with *ne (ne mais, i.e., no more* or *not more),* the meaning *except, unless.* Greimas, *Dictionnaire de l'Ancien Français jusqu'au milieu du XIVe siècle 382;*[7] see also 4 Littré, *Dictionnaire de la Langue Française* 1855-57 (1957); Robert, *Dictionnaire Alphabetique et Analogique de la*

The only authority in the record who used *realm* as meaning only the bodies of counties appears to be Sir Henry Finch, writing in 1613. Finch's text (p. 69, *infra*) makes it clear that the realm, as he used the term, was far more limited than those areas over which the crown had sovereignty and dominion.

Two years after the 1389 statute, Parliament again acted on the subject of the admiralty jurisdiction. 15 Richard 2, c. 3, 2 Statutes of the Realm 78-79 (1816). The new act declared that the admiral had no jurisdiction over "things rising within the bodies of counties, as well by land as by water." The term *realm* was not used.

[7] The synonyms given by Greimas for *mais* in this sense are *excepté* and *sinon,* the modern French words for *except* and *unless.*

Langue Française 211 (1970). Thus the literal meaning of the statutory language in mediaeval French ("les admiralx et lour deputees ne soi mellent desore enavant de null chose fait deinz la roialme mes soulement de chose fait sur le meer," 2 *Statutes of the Realm* 62 (1816)) is: "the admirals and their deputies shall not meddle from henceforth of any thing done within the realm more than only of a thing done upon the sea," that is, *except for* a thing done upon the sea. Here, then, *mais* is *but* in the sense of *except*— indeed at that period *mais* was synonymous with *but* in that sense only—and the French text confirms our construction as does the Latin.[8] The statute is proof that the English seas were *inside* the realm, not *outside* it.

Professor Wroth made the astonishing statement that his interpretation of the 1389 statute was supported by "several generations of English lawyers." Tr. 2751. When asked what "lawyers" he had in mind, he named only one, Lord Coke. Tr. 2752. In point of fact Coke held explicitly that the English seas were within the realm; see pp. 65-66, *infra*. All Professor Wroth could say about his other alleged supporters is that they were "those lawyers who interpreted the statute . . . of Richard II as imposing limitations upon the admiralty's jurisdiction." Tr. 2751-52. In fact a typical representative of that class, Sir John Bramston, in a speech in Parliament in 1663 advocating further limitations on the

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[8] The above sources give many examples of the use of *mais* in this sense. Another example, which likewise makes the usage clear, is found in a rather ribald context in a mediaeval tale of Charlemagne's legendary journey to Jerusalem. See Koschwitz (ed.), Karls des Grossen Reise nach Jerusalem und Constantinopel 40-41 (1923). The old French text is "li coens ne li fist mais la nuit que trente feiz" (another version: "li quens ne li fist la nuit mes q:XXX feiz"). The literal English translation is "the count did not do it (during) the night more *[mais]* than 30 times." whereas he had boasted that he would do it 100 times. A 14th-century Englishman would probably have translated, "the count did not do it during the night but 30 times."

admiralty, construed the 1389 statute precisely as we have done:

> "From the body of the Act you may likewise observe: 1. The Act proceeds negatively. The Admiral shall not meddle with things done within the realm . . . . Then it goes on affirmatively and says *but only with things done upon the high sea*, else they had been excluded from the sea, because the sea is parcel of the realm." 2 Yale (ed.), *Nottingham's Chancery Cases* (79 Publications of the Selden Society) 942-43 (1961).

Blackstone well understood that the statute used *but* in the sense of *except;* he paraphrased the statute as providing "that the Admiral and his deputy shall not meddle with any thing, but only things done upon the sea." 3 Blackstone, *Commentaries* 106 (1765).

B. THE CROWN'S RIGHTS IN THE ENGLISH SEAS INCLUDED CONTROL OF THE FISHERIES.

It is hardly surprising that the doctrine of crown sovereignty and dominion over the sea was applied to fish, the chief resource of the sea; it would be astonishing if it had not been so applied. There is no dispute that royal fish found within the English seas were the property of the crown *(e.g.,* Exhibit 690, pp. 72-73; 1 Twiss (ed.), *Black Book of the Admiralty* 149, 153, 165 (1871)), or that the right to royal fish, as to wreck, flotsam, jetsam and lagan, in particular parts of the English seas or shore could be and were granted to subjects from the earliest times. App. 859-60; Exhibit 194, pp. 17-18, 37-44; Exhibit 728, pp. 20, 40-41, 51-52, 70, 96, 139-40, 233, 754-58.

But the royal right to grant exclusive fisheries in portions of the English seas was far from limited to royal fish.

"Grants and confirmations of fisheries in the sea by King John are very numerous." Exhibit 728, pp. 20-21. In Henry III's reign "there are very numerous entries on the records relating to fisheries and weirs in the sea all around the coasts of the kingdom." *Id.* at 41. Records of the reign of Edward I show that "sea fisheries and ports and the soil of the foreshore were parcel of many manors around the coast." App. 855.

Many cases prior to the 17th century "show that oyster grounds, which are below low-water mark, passed by grant." Moore, *op. cit.* at 418, n. 1;[9] App. 26. Plaintiff's witness Professor Thorne conceded that exclusive rights to fisheries in the sea could be and were granted by the crown prior to the 17th century. App. 545. See also Exhibit 157, p. 40.

The evidence as to the mediaeval English law and practice on this point is summarized by Moore as follows:

> "In whatever way the right to create several [*i.e.*, exclusive] fisheries in tidal waters arose, it is clear that in early times before the reign of Henry II the power was extensively exercised, and several fisheries which are now in existence almost completely cover the whole of the tidal estuaries and many parts of the coasts of the kingdom. Text-writers deriving their knowledge only from decided and reported cases have considered that these fisheries so granted were exceptional and few in number. This is a fallacy, for it can be shown by records that they existed in almost every piece of tidal water round the coasts which was naturally available for the profitable exercise of an exclusive fishery. Numerous several fisheries in tidal waters were in existence before the date of

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[9] See p. 13, n. 5, *supra*.

> Domesday, and in non-tidal waters the fisheries appear to have been all appropriated to the lords of the manors." App. 865-66.

Moore lists (App. 863-65; Exhibit 728, pp. 908-15) many ancient exclusive fisheries all around the coasts of England, both in the estuaries and "upon the open sea-coast [where] it is clear that they have existed from the earliest time." App. 864.

One of the recognized causes of action of the mediaeval common law, for which forms are given in the law books, was an action for trespass upon an exclusive fishery. Shanks (ed.), *Novae Narrationes* (80 Publications of the Selden Society) 76 (1963). Other forms existed for actions to assert a common right of fishery, that is, "to fish in another's water." *Id.* at lxxxiv-v, 22, 77, 192-93, 337. The royal writ of mort d'ancestor, providing for inquisitions post mortem to establish the seisin of decedents in real property and the right of heirship thereto, could and did issue with respect to a fishery as well as to land. Royal writs could and did also issue to protect an exclusive fishery from encroachments by others. Van Caenegem, *Royal Writs in England from the Conquest to Glanvill* (77 Publications of the Selden Society) 177, 188, 190, 243, 248, 316 (1959).

The state of the English common law and practice on this point—that one of the ancient royalties or royal rights of the crown was the right to grant or to lease exclusive fisheries in portions of the English seas—is not open to question. The doctrinal basis for this right is more complicated, because of the persistence to a degree, in the writings of those English lawyers who were trained in the Roman or civil law, of certain vestiges of the ancient Roman-law doctrine that the sea and its resources were free to all. To the extent that such vestiges are found in the

works of Bracton, Britton and Fleta,[10] they were clearly out of tune with the actual state of English law and practice, and they form one of the principal bases on which these writers have been criticized for following academic Roman-law notions rather than the English law as it existed. See, *e.g.*, Exhibit 157; Jerwood, *Dissertation on the Rights to the Sea Shores* 89, 92 (1850).

Even the theoretical Roman-law writers, however, made crucial concessions to the actual state of English law and practice. Fenn has pointed out that the feudal lawyers conventionally numbered the *ius piscandi* as among the *regalia* (royalties) of the crown. Exhibit 690, pp. 70, 76, 136-39. An exclusive right to a sea fishery was a property right, and could be acquired by grant from the sovereign. App. 791-97; Exhibit 690, pp. 73-80.

There is a long-standing textual controversy as to whether Bracton said that *all* animals and fish, which by natural law were *res nullius*, now belong to the sovereign, or whether the better text indicates that only *some* animals and fish (all of which were previously *res nullius*) had been appropriated to the sovereign by man-made law. Tr. 2685-88. Either version of the text shows that even Bracton recognized that the law in fact had moved in the direction of eroding the old Roman law on the subject. Bracton wrote of "the four seas of England" as places in which English jurisdiction existed, Gould, *The Law of Waters* 7 (3d ed. 1900), and regarded that jurisdiction as including the

[10] The description by Bracton and others of fish as ownerless apart from the king's prerogative carries no implication, as plaintiff claims, that the sea and seabed were not crown property. These authorities treated fish exactly as they did wild beasts, which were ownerless although the land on which they were present of course had owners. See, *e.g.*, 2 Thorne (ed.), Bracton on the Laws and Customs of England, 167, 293, 339, (1968). Surely plaintiff does not contend that the ancient doctrine of *ferae naturae* means that all land is *res nullius;* yet this is where its argument leads.

king's right to levy tolls on fishermen for the use of the sea. App. 544, 700. Fenn has shown that the Roman-law doctrine of freedom of the seas was everywhere on the defensive in the mediaeval and post-mediaeval period and by the end of that period had decisively given way to the doctrine of territorial sovereignty and dominion in adjacent seas. Exhibit 690, *passim*. Moore believes it clear that Bracton, in saying that fisheries were common, meant only that they were common except where the crown had placed them under exclusive ownership. Exhibit 729, p. xxxix.

By the late middle ages, even those continental Roman lawyers who denied a right of property in the sea asserted the right of the sovereign to lay servitudes on it, to tax its use, to create exclusive sea fisheries, and to impose the national laws and statutes on activities therein. App. 794-96, 803-04; Exhibit 690, pp. 105-08, 117, 135 *ff*., 145. In these conditions, a denial that the sea and seabed could themselves be owned was plainly an academic vestige of a superseded legal attitude; and legal theory moved inexorably towards the conclusion that full ownership was possible. App. 811-12. In this instance as in many others, legal theory lagged behind practice; and the evidence of record demonstrates that there was no time during the middle ages at which the common law had any question about the right of the sovereign to grant exclusive fisheries or to license or to tax fishing, whether by English subjects or by foreigners, in the English seas.

Regulation of the English sea fisheries dates back at least to Magna Carta, which included a provision against the erecting of new weirs. That provision was enforced. Exhibit 728, p. 50.[11] Frequent inquisitions were made to discover

[11] A reading of the actual text of the Magna Carta provision in question indicates that it did not apply to weirs in the sea, but only in rivers. However, either Magna Carta or subsequent statutes appear to have been construed as applying to the sea. Exhibit 728, pp. 741-42. In

wrongs or encroachments *(purprestures)* upon the king's prerogative rights in the sea as well as on the land. *Id.* at 69. Persons were summoned and prosecuted for wrongfully claiming wreck or royal fish "in the waters of the lord king." *Id.* at 139. A statute of 1571, in order to protect fishing nets at sea, prohibited ships from anchoring "on the main sea" in the areas of fisheries during the fishing season. App. 867.

Selden shows that during the reign of Richard II a tax was imposed by act of Parliament on every ship, whether English or foreign, passing through the English seas or fishing therein. Selden, *Mare Clausum* 297-302; the text of the statute itself is set forth in Exhibit 710, pp. 156-57. Evidence to the same effect is found in many other reigns. Selden, *op. cit.* at 355-62. A statute of Edward IV prohibited all foreigners from fishing in the Irish Sea without license. *Id.* at 436-39; see also 1 Halleck, *International Law* 134 n.2 (4th Ed. 1908). That tolls for sea fishing were imposed and collected by the English crown was conceded by plaintiff's witness Professor Thorne. App. 544.

What the English kings claimed in their own seas, they accorded to other sovereigns in theirs. By treaties of 1490 and 1523, England acknowledged the sovereignty of Denmark in its northern waters, and agreed to take licenses for fishing there. Fulton, *op. cit.* at 112.

Fulton points out, *op. cit.* at 75, that the English kings by treaty and otherwise on many occasions permitted fishing by foreigners without charge in the English seas. See also Exhibits 558, 559, 560, 561, 563, 564. Such permission, of course, is in no way inconsistent with the assertion by the crown of sovereign rights which included the prohibition of

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any event, there is no doubt that weirs in the sea were in fact proceeded against as encroachments upon the king's rights, and that the law prohibited such encroachments.

fishing if and when the crown so chose. Obviously there could be many reasons for the crown to permit fishing—*e.g.*, reciprocal benefits received from foreign sovereigns; the general interest of good will and friendly relations—especially when, as was true throughout these early times, the volume of fishing was never such as to interfere with the ability of English fishermen to take as much as they wanted. With respect both to fishing and to navigation by foreigners, the 17th-century writers were fully aware that the English kings had not infrequently permitted these without charge, but quite reasonably pointed out that sovereignty includes the right to permit as well as the right to forbid. See, *e.g.*, Exhibit 710, pp. 129, 146-58.

The situation in the reign of Mary I (1553-1558) is described by Elder, *The Royal Fishery Companies of the Seventeenth Century* 4-5 (1912), as follows:

> "That this claim to sovereignty was much more than a mere idle assertion is clear from the fact that in the reign of Mary when the fishermen of the Low Countries wished to seek new fishing grounds, there was granted to King Philip's subjects in Flanders a twenty-one years' lease of the fishings about the North Coast of Ireland, this lease being granted in consideration of a fine and £1000 paid annually to Sir Edward Fitton, Treasurer for Ireland. A like privilege to fish in the Irish seas was granted under similar conditions by the same queen to 'The Company of the old Hans.' Foreigners desirous of fishing in English waters were, at this time, regularly granted licenses at Scarborough Castle.[1]
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> [1] *Cal. S.P. Dom. Car. II. vol. 339.*"

While Fulton doubts these assertions, *op. cit.* at 140-41, there is substantial evidence for them, and it is beyond

question that they were regarded as authoritative legal precedents by the writers of the 17th century. Exhibits 565, 595, 596 (p. 6).

C. THE ENGLISH MARITIME JURISDICTION WAS TERRITORIAL IN THE ENGLISH SEAS, AND INCLUDED BOTH LEGISLATIVE POWER AND CRIMINAL JURISDICTION OVER FOREIGNERS.

Plaintiff's position apparently is that, both before and after 1603, English admiralty jurisdiction was in no sense territorial, but extended over English subjects, and no others except pirates, anywhere at sea. If we understand plaintiff correctly, it contends that the admiralty jurisdiction was, and was understood to be, precisely of the same nature and extent in the Mediterranean, in the South Pacific, and two miles from the cliffs of Dover. The Common Counsel States submit that, to the contrary, the evidence of record demonstrates that the admiralty jurisdiction was regarded as an attribute of sovereignty or lordship over the English seas and extended to foreigners as well as to English subjects in those seas. We think the record on this point is quite conclusive; we shall simply summarize the principal evidence briefly.

One of the most important records is the document *De Superioritate Maris*, dating from about 1305, in which the attorneys for England and several other nations asserted the "sovereign lordship of the Kings of England" over the "sea of England," and used that sovereign lordship as the foundation for the jurisdiction of the English admiralty to the exclusion of the rival jurisdiction of a French admiral. See App. 650-55; Exhibits 176, 177; *Mare Clausum*, pp. 403-28; Tr. 2761 *ff.*; Fulton, *op. cit.* at 741-49. While plaintiff has attempted to belittle the document as merely a "draft complaint," there is no serious dispute that at the very least

it represented the official position of the English government at the time, and therefore is an authoritative statement of that government's view of the nature and basis of its admiralty jurisdiction.

There cannot be the slightest question that 17th and 18th century admiralty writers regarded *De Superioritate Maris* as authoritative and that it played a major part in shaping their view of English maritime sovereignty and of the admiralty jurisdiction. *E.g.*, App. 25-26; Exhibit 693, p. 43; Selden, *Mare Clausum* 403-28. Modern writers have likewise regarded the document as authoritative. See, *e.g.*, Hall, *Treatise on International Law* § 40 (7th ed. 1917), republished in Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* 66 (1919); Halleck, *International Law* 134 (4th ed. 1908); La Pradelle, 5 *Revue Generale du Droit International Public* 264 (1898), translated in Crocker, *op. cit.* at 187 n. 5. Even Fulton[12] concedes that the document was submitted "on behalf of England." Exhibit 693, p. 45. Justice Story quoted it extensively as evidence for "the immemorial right of the King of England to the sovereignty of the British seas, and the right to make laws to regulate navigation, and to keep the peace, in those seas." *De Lovio v. Boit*, 7 Fed. Cas. 418, 420 n.5 (D. Mass. 1815).

Marsden regarded the origin of the admiralty jurisdiction as "intimately connected with the claim made by Edward III and his progenitors to be sovereigns of the sea." Exhibit 200, p. xv; App. 25. The various statutory definitions of the admiralty jurisdiction read in terms which leave no doubt that the jurisdiction was conceived as territorial. *E.g.*, App. 747-48; Exhibit 667, pp. 362; see also pp.

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[12]For the "revisionist" nature of Fulton's views, see App. 104-05. Fulton wrote in the period when devotion to the "freedom of the seas" was at its height, especially in England; and he approached the traditional law and practice in more of a polemical than a historical spirit, even though his work contains much of great value.

14-18, *supra*. And these statutes make no distinction between English subjects and foreigners as subjects of the admiralty jurisdiction within the English seas.

Fenn declared that for purposes of the admiralty jurisdiction in feudal law "the sea . . . is a district of the kingdom." Exhibit 690, p. 76. Baldus and the other continental feudal lawyers who were heavily relied on in England plainly regarded the admiralty jurisdiction as territorial. *Id.* at 107-08. In the 16th century, Thomas Craig wrote that crimes committed within the territorial waters of the king are tried in the waters of that king, as being within his jurisdiction. *Id.* at 172.

Envoys of England and Flanders declared in a formal convention of 1320 that the King of England was lord of the sea and that certain robberies had occurred "on the sea of England" and thus were "committed upon his sea within his power." Exhibit 723, p. xxii; Fulton, *op. cit.* at 54-56. The location of these robberies is believed to have been about 120 miles south of the southwestern tip of England. *Ibid.*

An ordinance of Edward III, probably dating from 1339, specified that the admiralty jurisdiction was to extend to all ships of any nation traveling through the English seas. Exhibit 715, pp. 165-66.

The commissions of the English admirals expressly founded their jurisdiction upon the proposition that the English kings were "lords of the English sea on every side." App. 697. The usual form of commission in Selden's time, which he said had endured for "very many years past," appointed the admiral "governor general over all our fleets and seas of our said kingdom of England and Ireland," and gave him jurisdiction over those fleets and seas. *Mare Clausum*, pp. 305-06. Particular admirals were given command and jurisdiction over particular portions of the English seas.

Id. at 396. One form gave the admiral "custody" of the sea. Exhibit 562.

Of what did this territorial jurisdiction in the English seas consist? Certainly it included, as plaintiff's witnesses have emphasized, the power and duty of protection and the prevention of piracy. However, the notion that jurisdiction over piracy is non-territorial, because a pirate may be seized and punished anywhere by anyone, is a crude anachronism when applied to this mediaeval period. No distinction appears from the mediaeval records between piracy and other crimes so far as the admiralty jurisdiction is concerned. While in the earlier middle ages there is some evidence that rulers regarded the suppression of piracy as a cooperative venture, certainly by the 15th and 16th centuries piracy, like other crimes, in the adjacent waters of a state was tried in the courts and by the law of that state and no other. App. 806-07.

Further, the English maritime jurisdiction was far more extensive than plaintiff concedes. It included, as Justice Story held, "the peculiar custody of the rights, prerogatives, and authorities of the crown, in the British seas." *De Lovio v. Boit*, 7 Fed. Cas. 418, 419 (D. Mass. 1815). There can be no question that it included the right of the English kings to make and to enforce substantive law, both civil and criminal, applicable to the English seas as within the dominions of the crown. While the alleged origin of the famous laws of Oleron in a promulgation by Richard I, Exhibit 715, p. 168, has been questioned, there is no doubt that the laws of Oleron, while "founded upon well-recognized customs of the sea," were regarded as deriving their authority in the English seas from their adoption by the English crown. *Ibid.*; Jerwood, *A Dissertation on the Rights to the Sea Shores* 15 (1850). "But it was not alone from this source [the laws of Oleron] that the maritime law in England was derived . . . ; as time passed there also grew

up in England a body of precedents preserved in the ancient volume The Black Book of the Admiralty. This old register contains the admiralty laws, decisions, ordinances, proceedings and acts of the King, the Admiral and the courts of admiralty of England from the earliest time." Exhibit 715, p. 168. Edward I instructed his naval officers to maintain "the sovereignty which his ancestors, the Kings of England, were wont to have in the sea so far as concerns the amendment, declaration, and interpretation of the laws by them made to govern all manner of nations passing through the said sea." App. 695-96. The document *De Superioritate Maris* expressly affirmed the crown's right of "making and establishing laws and statutes," as well as "all other things which may appertain to the exercise of sovereign dominion" over the English seas. App. 651. The jurisdiction included the right of visit and search of all vessels passing through those seas. Exhibit 469, p. 47.

The record of an admiralty inquisition held in 1376, App. 746-47, illustrates the comprehensive range of criminal offenses with which the jurisdiction was concerned. So far from being limited to piracy, the list extends to murder, manslaughter, petty felony, aiding the enemy, exporting goods without license, false weights and measures, unauthorized claim of wreck or other royalties of the seas, disobedience of maritime regulations and many others. Of particular interest are items demonstrating that at this early date sea fisheries, including sedentary fisheries, were regulated under English law:

> "9. Of such as take salmons at unreasonable times.
>
> "10. Of such as spoil the breed of oysters, or drag for oysters and mussels at unreasonable times.
>
> "11. Of such as fish with unlawful nets.

"12. Of taking royal fishes, *viz.*, whales, sturgeons, porpoises, etc. and detaining one half from the King." App. 747. See also Exhibit 679, p. 243.

There is no hint or suggestion that the crimes listed were to be ignored if committed in the English seas by foreigners. Indeed it is apparent that the purpose of much of the admiralty criminal jurisdiction, including regulation of fisheries, would have been wholly defeated had foreigners been exempt therefrom.

Failure to observe the flag salute in the English seas was, from the time of King John (Fulton, *op. cit.* at 6-7), punished as a criminal offense and by criminal remedies. And no one disputes that the flag salute was required of foreign ships, and that it was "a token of the superiority of the British sovereign over the adjacent seas." *De Lovio v. Boit*, 7 Fed. Cas. 418, 419 (D. Mass. 1815) (Story, J.). Here, then, is an undeniable area of application of English criminal law and jurisdiction to foreigners in the English seas.

Professor Horwitz has summarized (App. 51-55) a considerable body of additional evidence that the admiralty jurisdiction was territorial and extended to foreigners. Such is the necessary implication of the statute of 1536, which provided that offences committed at sea shall be tried "as if any such offences had been committed or done in or upon the land" (App. 51), since obviously crimes committed by foreigners on land in England were subject to the jurisdiction of the English courts. Much earlier, a commission of 1361 expressly provided for the trial of crimes committed at sea "by certain of our subjects and others," that is foreigners. App. 664. While the early records of actual cases and trials in admiralty are sparse, Professor Horwitz found one clear case and another highly probable case of trials of foreigners in admiralty for offences other than piracy committed on the English seas. App. 53-54. As we shall see later,

the record contains conclusive and incontrovertible records of such trials and convictions of foreigners in the 17th century (pp. 93-94, *infra*). There is no doubt that the flag salute was at all times enforced against foreigners.

D. THE CROWN'S OWNERSHIP OF THE SEABED OF THE ENGLISH SEAS WAS RECOGNIZED FROM VERY EARLY TIMES.

While the doctrine that the king owned the bed of the sea did not achieve its most elaborate articulation until the reign of Elizabeth I, there is ample evidence that from a very early date English law accepted without question the common-sense proposition that the seabed under adjacent waters, and its resources, were proper subjects of ownership and belonged to the crown unless lawfully acquired by a subject.

As early as 1286 a dispute arose regarding the right to take stone from the bottom of the sea opposite Portland, and the case was litigated like any other question of title to real property. Exhibit 728, pp. 95-96. Neither party is seen claiming that the seabed is *res nullius* or that the right to take stone belonged to the first comer. The action was in trespass and the issue was whether title was in the lord of the manor fronting on the seacoast in question or in the earl as feudal lord.

At about the same time, the *Toppesham* case established prescriptive ownership by the earls of Devon of an exclusive fishery and of the soil under the port of Exeter. Jerwood, *Dissertation on the Rights to the Sea Shores* 49-50 (1850). It can hardly be doubted that other cases of this type would be discovered if the mediaeval records were thoroughly examined for that purpose. Gould, one of the leading modern authorities on the law of waters, declares that "the ancient municipal law of England" is that "the Crown had a property in the adjacent seas both as against foreign

nations and its own subjects." Gould, *The Law of Waters* 6 (3d ed. 1900).

In the reign of Edward III it was declared "that not only the dominion of the sea, but the very soil, belongeth unto the king." Jerwood, *op. cit.* at 91. A substantial number of cases during the reigns of Edward I, Edward II and Edward III (1276-1377) involved exclusive fisheries in the sea or other tidal waters, carried on by subjects under grant from the crown, which involved the placing of weirs on the seabed. Some of these cases were those of the Abbot of Tichfield, the Abbot of Furneys, the Earl of Devon, the Abbot of Benet Hulm, the Earl of Lancaster and the Manor of Burnham. Since the weirs involved the right to the soil, Hale regarded these cases as holding that title to the soil had passed along with the grant of the fisheries. Exhibit 194, pp. 18-22. In the 19th century Hall disputed that interpretation, Exhibit 728, pp. 727-31. Moore's position is that "Mr. Hall's averment that the cases quoted by Hale do not assume an ownership of the soil is wholly wrong." *Id.* at 730, n. *(k).* Large parts of both of Moore's works are devoted to discussions of when grants of exclusive fisheries should be construed as passing the soil of the seabed and when they should not. Exhibits 728, 729, *passim;* see especially Moore, *op. cit.* at 658-59.

On this technical point, Hale and Moore appear to have the better of the argument as against Hall. For our purposes, of course, it does not matter; the significant fact is that all three disputants agree without question that the soil of the sea and other tidal waters is susceptible of ownership and was so regarded as early as the 13th and 14th centuries by the English common law, and that title thereto was in the king unless a subject had acquired it by grant or prescription.

Gould does not consider that the doctrine of crown property in the sea was any sudden or new development:

"Prior to the decision in *Regina v. Keyn*, the open seas around the coasts of Great Britain were considered to be the property of the Crown, and it was commonly said that the sea is not only under the king's dominion, but that it is his proper inheritance. According to Selden and the writers of his time, the king is lord of the great waste, both land and water. Lord Hale says that the king is owner of this waste, and that the narrow sea adjoining the coast of England is 'part of his dominions, whether it lie within the body of any county or not.' In ancient times, it was declared that the sea is within the legiance of the king, as of his crown of England; and in the Rolls of Parliament, in the reign of Henry V., it appears that the Commons prayed that whereas the king and his progenitors have always been lords of the sea, and now it happens that the king is lord of the coasts of both sides of the sea, that therefore the king will lay an imposition upon strangers passing over the sea. Coke, Bacon, Blackstone, Chitty, and Woolrych, writing at different periods, reassert the same doctrine; and Callis considers that, by the common law, the king has, in the English seas, possession and rights of property as well as of jurisdiction." Gould, *op. cit.* at 18-19.

E. IN THE REIGN OF ELIZABETH I THE LAW OF MARITIME SOVEREIGNTY AND DOMINION WAS EXTENDED AND ELABORATED IN SEVERAL IMPORTANT RESPECTS.

Plaintiff has made much of Elizabeth I's two well-known assertions of freedom of the seas, made in opposition to cliams by Spain and Denmark to prohibit navigation and to license fishing in large portions of the seas. Elizabeth's

statements are not altogether inconsistent with the English legal tradition of crown sovereignty and dominion over the English seas, since the right of free navigation through territorial waters (today called the right of innocent passage) has usually been recognized as a qualification on maritime sovereignty. Moreover, it has been observed that Elizabeth's position on these occasions was inconsistent with her claims and actions at other times, as well as being quite out of tune with the international and English law and practice of the day. Colombos, *The International Law of the Sea* 50-51 (6th rev'd ed.); Hall, *A Treatise on International Law* § 40 (7th ed. 1917), reprinted in Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* 67 (1919).

"Queen Elizabeth, in 1600, stamped a portcullis on those dollars destined for the East Indian trade, to signify the right of closing navigation in her seas." Halleck, *International Law* 134 n.2 (4th ed. 1908), reprinted in Crocker, *op. cit.* at 84; see also Exhibit 726, pp. 125-26. "Queen Elizabeth seized upon some Hanseatic vessels lying at anchor off Lisbon for having passed through the sea north of Scotland without her permission." 1 Phillimore, *Commentaries upon International Law* clxxi (3d ed. 1879), reprinted in Crocker, *op. cit.* at 366; see also App. 854. Elizabeth's admirals issued licenses to Dutch ships to pass through the English Channel. 1 Marsden, *Law and Custom of the Sea* 332 (1915).

Elizabeth insisted on the flag salute in her seas, as her sister had done, and enforced it even against ships carrying foreign sovereigns through English waters. Colombos, *op. cit.* at 52. In 1576 the queen ordered ships to sea to clear pirates from the narrow seas, declaring that in those seas "she and her predecessors have been accounted to have always held supreme sovereignty." Exhibit 457, p. 210. In 1598, in allying herself with the Dutch against Spain and Portugal, Elizabeth envisioned not securing the freedom of

the seas to all, but "that England and the Netherlands would together hold the empire of the seas." Davenport, *European Treaties Bearing on the History of the United States and Its Dependencies to 1648*, p. 240 (1917); Swarztrauber, *The Three-Mile Limit of Territorial Seas* 16 (1972).

It was during Elizabeth's reign that Dutch fishing first became obtrusive in English coastal waters, and Elizabeth was subjected to considerable pressure from her subjects to exclude the Dutch. The fact that she refrained from doing so was clearly due, not to any fixed views on her part about the freedom of the seas (as we have seen, those were views which she reserved for occasions when their expression was in England's interest), but to the fact that the Dutch and English were allies in a desperate war against Spain; quite obviously, to raise the fisheries issue would have been counterproductive so far as the essential cooperation between the allies was concerned. Exhibit 693, pp. 135-38; Beaujon, *The History of Dutch Sea Fisheries* 464 (1883).

Major doctrinal developments occurred under Elizabeth's aegis in the further refinement of the law of maritime sovereignty and dominion. Albert Gentili, an Italian who lived in England and wrote in defense of both English and Spanish maritime claims, appears to have been the first to apply the term *territorium* to the adjacent seas, and his usage is said to have been the origin of the modern term territorial sea or waters. Swartztrauber, *The Three-Mile Limit of Territorial Seas* 17, 24 (1972). Gentili, as counsel for Spain in the English prize courts, argued that the belt of territorial waters of 100 miles in breadth[13] was within the "dominions" of England within which, under the Anglo-Spanish treaty of 1604, England owed the duty of

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[13] In Gentili's time, and for more than a century thereafter, the 100-mile limit was favored by most of those international lawyers who believed there was any limit to the territorial sea which nations might lawfully claim. See pp. 276-77, *infra*.

protection to Spanish ships. While the prize courts refused to extend the duty of protection beyond the "king's chambers" (pp. 121-24, *infra*), the English government early in James' reign embraced the 100-mile limit as the criterion for territorial waters and exclusive fishing in the absence of historic vested rights to a greater limit. See p. 58, *infra;* Exhibit 693, pp. 358-61; Fulton, *op. cit.* at 122.

Dr. John Dee, writing in 1577, asserted royal ownership of sea fisheries and urged that foreigners be taxed for fishing in English waters. App. 103-04; Fulton, *op. cit.* at 99-104. Dr. Dee relied on no special English right or occupation, but on the doctrine that every coastal sovereign had sovereignty and ownership over its adjacent seas up to the midline between its coasts and those of the opposite state. Dee modified this doctrine in the case of the English Channel, which he asserted belonged in its entirety to the English crown on the ground of the queen's claim to the French throne, and the oceans around Scotland, on the ground that Scotland was in English law regarded as no full sovereign but merely an English tributary state. Fulton, *op. cit.* at 101-04. He was also intensely concerned with American exploration and was a backer of colonial enterprises. On commission from the queen, to whom he was well known, he wrote in justification of the English title to North America at the time of the Gilbert patent (p. 41, *infra*). He himself owned part-interests in the Gilbert ventures. Rowse, *The Elizabethans and America* 17-21, 41, 182-83 (1959).

The most important of the Elizabethan common-law writers was Thomas Diggs. While as we have seen (pp. 31-32, *supra*), the seabed and the resources thereof had been recognized as a subject of ownership as early as the 13th century, it was apparently Diggs, in 1568 or 1569, who first elaborated a systematic theory of that ownership by the crown. App. 27-28; Exhibit 203; Exhibit 690, pp. 171-72;

Exhibit 728, pp. 180-84. Diggs originated new law in asserting crown *prima facie* ownership of the foreshore; he took crown ownership of the sea and seabed as established and noncontroversial. O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 307 (1971).

Diggs was wholly clear that the bed of the English sea belongs to the crown while covered with water. "As the sea of all waters is the chief, . . . so the property thereof ought unto the chief the king himself to be attributed." Quoted at Moore, *A History of the Foreshore* 185. If what was formerly land territory is inundated by the sea and becomes submerged, that submergence "by continuation of time giveth the property to the prince." *Id.* at 188. "If any man doubt of the prince's interest in the sea let him consider the statute in 18 Ed. 3, where he licenseth his sea shall be open to all merchants for traffic." *Id.* at 190. See also the long passage, *id.* at 203, in which Diggs declares that the kings have always owned the seas "about this island," and the resources thereof, in property. "And also to make it manifest that the soil of the seas is also entirely the king's, no man can let fall any anchor in any road about this realm but he payeth for breaking the king's ground to the officers of the king." *Ibid.*

While Diggs' theory of the foreshore has been criticized, notably by Moore (Exhibit 728, *passim*), that criticism has nothing to do with the issues in the present proceeding. The dispute between Moore and Diggs went to the question whether, as Moore contended, the foreshore had been so extensively granted out by the crown, either expressly or by implication, to the owners of the adjacent upland that they should be presumed to have it unless specific proof showed the contrary—or whether, as Diggs had maintained, the presumption was in favor of the crown unless an express grant could be shown. Moore never questioned that both the foreshore and the seabed are proper subjects of owner-

ship, nor did he question that title thereto ultimately derived from the crown. Similarly, none of the cases, either in Elizabeth's reign or later, in which the crown's claim to the foreshore or derelict lands was defeated stands for the proposition that the seabed cannot be owned or that the crown was not the original owner. In every such case, the crown lost because the court found a grant, a presumed grant or prescription.

As Professor Thorne recognizes (Tr. 2446-47), Elizabeth and her government warmly embraced Diggs' theory. Inquisitions to recover submerged and derelict lands were promptly undertaken. App. 41-42; Exhibits 213, 643. The *Dulinge* case combined Diggs' theory on the foreshore with the ancient legal tradition that the crown is "owner and proprietor" of the English seas and with the equally ancient tradition (see pp. 22-23, *supra*) of crown surveillance against illegal weirs, which dated at least back to Magna Carta. App. 125-27; Exhibit 201.

In *Sir John Constable's Case* of 1575, which involved a dispute between the crown and the owner of the adjacent manor as to the right of wreck on the foreshore, Plowden argued that, while the boundaries of England included the entire English Channel and one-half of the seas on every other side, the crown did not own the sea and seabed. Moore, *op. cit.* at 224-32. Professor Horwitz' assertion (Tr. 311) that Plowden is the only English authority who has ever denied crown ownership of the seabed has not been disputed by plaintiff herein. While Plowden's client won the case, the court's decision was based not on Plowden's theories but on the holding that the foreshore in question and the right of wreck thereon had been granted by the crown to Constable's predecessor in title. Moore, *op. cit.* at 233; see Tr. 2714-15. Moreover, Plowden based his assertion that the crown did not own the seabed on the observation that the bed "is of no value" (Pl. Br. 51), implying

that if the state of technology had given it value he would have been of a quite different opinion.

During Elizabeth's reign, in 1571, Parliament enacted a statute asserting regulatory jurisdiction over fishing practices in the main sea off the coasts of Norfolk and Suffolk. Because of interference with fishing nets, the statute prohibited any ships from anchoring in fishing areas of the sea during the fishing season. App. 867.

Another legal development during the reign of Elizabeth is of critical importance in understanding the legal climate in which the American colonial charters were issued. This was the law of monopolies. As new portions of the world were rapidly opened up to English navigation, trade, fishing and other exploitation, it became customary for the crown to vest these new commercial opportunities in particular persons or companies by charters or patents of monopoly. The late 16th-century and early 17th-century colonial charters were instruments of this type; but they were not the only ones, or the earliest.

The prototype was the charter of 1555 to the Muscovy or Russia Company, which, as confirmed by act of Parliament in 1566, prohibited all Englishmen other than the company from trading to any country lying north, northwest, or northeast of London where English trade had not been commonly carried on prior to 1553. Exhibit 777, p. 41. Such monopolies proliferated throughout the reign of Elizabeth and in the succeeding reigns. They had a double purpose: first, the encouragement of trade and economic exploitation; second, the production of revenue for the crown.

One of the economic opportunities discovered and developed by the Muscovy Company was the whale fishery in the seas covered by its charter. As a matter of English law, there is no doubt that the company had a monopoly of that fishery, to the exclusion of all others. Exhibit 776, p. 127.

Towards the end of Elizabeth's reign, the crown's right to create such monopolies was called into question, both in Parliament and in the courts. Elizabeth vehemently maintained that the right was an attribute of her prerogative, which might not be challenged. Exhibit 776, p. 106. About 1600 Sir Edward Coke, then Attorney General, rendered a careful legal opinion on the subject. He held that monopolies were legitimate when justified for the advancement of trade, for the exploitation of new inventions or for new trading voyages, but not otherwise. *Ibid.* While questions continued to arise from time to time in Parliament as to whether particular monopolies were sound policy, Coke's opinion established a legal test which endured: that a monopoly was valid if it covered some new discovery, venture or economic opportunity, but not if it attempted to exclude Englishmen from particular economic activities in places in which they had previously engaged in them.[14] See also 1 Scott, *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720* 118-25 (1912). As we shall see (pp. 234-38, *infra*) this standard was invoked by both sides during the New England fishing-monopoly controversy of the 1620's, where the issue really boiled down to the question of fact of whether English fishermen had customarily frequented the New England fishing grounds prior to the New England charters of 1606 and 1620 which created the monopoly.

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[14]The theory implied limitations on the crown's right to grant exclusive fisheries. Eventually the doctrine grew up, though long disputed, that an exclusive fishery in English waters must antedate Magna Carta to be valid. Interestingly, that doctrine was not applied in this country, on the ground that a limitation on a personal sovereign (the king) did not bind the people acting through their legislature. In this country it was therefore generally held that the legislatures had the power to grant exclusive fisheries or sedentary fisheries in tide waters, and many such grants were made. See Commonwealth v. Newport News, 158 Va. 521, 164 S.E. 689, 698 (1932), and authorities there cited.

As a matter of English law, then, the situation was quite clear on the eve of American colonization. The application of the established doctrine to the issues in the instant proceeding is obvious. There can be no doubt that, if during Elizabeth's reign some newly exploitable mineral resource had been discovered in the seas or seabed adjacent to England, the crown would have asserted and exercised the right to license such exploitation or to create a monopoly to exploit it.

The letters patent granted by Elizabeth to the Gilberts and Raleigh, which are the precursors of the American colonial charters of the next century, were typical grants of monopolies in this legal context. As Professors Horwitz and Smith have testified, these patents vested their recipients with royal or palatine rights both in the lands to be discovered and settled and in the seas adjacent thereto. App. 99-101, 250-58. Sir Humphrey Gilbert's patent of 1578 conveyed "all commodities, jurisdictions and royalties both by sea and land," and "the rights, royalties and jurisdictions, as well marine as other, within the said lands or countries or the seas thereunto adjoining. . . according to the order of the laws of England." Exhibit 139; App. 253, 255. The issuance of the patent was preceded by a legal opinion on the queen's title by Dr. John Dee, whose views on maritime sovereignty have already been described (p. 36, *supra*); Dee was instrumental in procuring the patent, and had an interest therein. *The Private Diary of Dr. John Dee* 4, 8, 18-19 (Halliwell ed.).

Raleigh's patent of 1584, which was confirmed by act of Parliament, contained similar language. App. 257-58; Exhibit 140; Rowse, *The Elizabethans and America* 48 (1959). Adrian Gilbert's patent, also of 1584, included all profits, jurisdictions and royalties both by sea and land, and the right to exclude others from both the territories and the seas to be settled by Gilbert; the rent to be paid to the

queen included the tenth part of, among other things, pearls, demonstrating that the possibility of exploitation of the resources of the seabed was well understood and avidly anticipated. App. 256-57. One of the first activities of the Raleigh colonists in what is now North Carolina was to search for pearl fisheries, and they were elated when they believed they had discovered signs of them. Stebbing, *Sir Walter Raleigh* 46 (1891).

It is beyond serious question that these patents were intended to convey monopolies both by sea and by land; that is, to authorize the patentees to exercise the exclusive right of exploitation of the resources of the seas and the seabed as well as those of the land. There seems no reason to doubt, given the state both of legal doctrine and of governmental practice at the time, that the patents were also intended to convey title to the seabed.

It is not difficult to reconcile such creations of monopolies with Elizabeth's occasional assertion, some years later, of the freedom of European waters for fishing. Even if it be supposed that Elizabeth was serious, and not merely expedient, in those assertions, it must be remembered that the English law of monopoly drew a sharp distinction between an attempt to monopolize a previously known and exploited resource, which was regarded as impermissible, and the monopoly of a newly discovered territory, opportunity or resources, which was valid. Elizabeth and her lawyers regarded an exclusive charter for a newly discovered territory, or a newly discovered fishery, or a newly discovered sedentary fishery or mineral resource of the seabed, in exactly the same terms as they regarded, and as we still regard, a patent vesting in the inventor an exclusive right to the exploitation of a new invention. Thus it is possible that Elizabeth might have regarded an attempt to monopolize established fisheries in European waters as illegal, without in any way implying that exclusive

rights could not be created for the exploitation of the resources of the sea and seabed in the new world. As we shall see, in the next century the English crown and government adopted the position that English sovereignty and dominion in its territorial seas overrode any right of foreigners to fish there, which was regarded to have been a mere revocable liberty or license when it had been allowed by the English crown. The two theories had somewhat different implications for crown rights in English waters; but the crown right to exclusivity in the waters and resources of the seas adjacent to newly discovered lands was common ground between them.

Indeed, it can be demonstrated that the intention to monopolize the North American fisheries, to the exclusion of foreigners, preceded and in principal part caused the earliest colonial ventures in Elizabeth's reign. In 1578, the same year Sir Humphrey Gilbert received his patent, Anthony Parkhurst, a merchant of Bristol, wrote a "Report of the True State and Commodities of Newfoundland." Parkhurst argued in favor of an English settlement at Newfoundland in order that the English might "be lords of the whole fishing." Rowse, *op. cit.* at 162. "The same year Sir Humphrey Gilbert advocated the scuppering of the Spaniards and their extrusion from the fishery there." *Ibid.* According to the 18th-century American lawyer William Bollan, Gilbert taxed all ships, English and foreign, fishing on the Newfoundland coasts. App. 769-70. "Apparently the English held the right to exclude the vessels of all other nations from the fishing grounds." App. 833, 884-85.

Even before Gilbert's settlement in 1583, English assertion of power over the fisheries had begun:

> "Sir Thomas Hampshire was sent out by Queen Elizabeth with five ships in 1582 with a commission to subject the fishery to proper

> regulation. It is known . . . that Sir Thomas did in fact lay down the bases of the fishing rules which were subsequently observed, and that before his voyage England was recognized by the fishermen of various countries, including France, who then frequented the island, as having a right of some sort, probably founded on discovery, to exercise jurisdiction among the adventurers from Euorpe. By 1580 it had become the practice, by common accord of the fishermen of all nations, that the captains of the English fishing vessels should act as judges and arbitrators, notwithstanding that at this time their numbers were relatively few. Shortly after that date English superiority was planted on a surer footing. In 1583 Sir Humphrey Gilbert, acting under a due commission, formally took possession of the island on behalf of his sovereign, in the presence of various persons, subjects of other nations, who happened to be there in pursuit of the fishery, and from whom he exacted tribute in acknowledgement of the queen's right. The fact that possession was taken was recorded by setting up a pillar of wood, upon which the Arms of England were carved." Lobster Fisheries on the Coasts of Newfoundland: Case of Her Majesty's Government (1892), quoted in Parry (ed.), 2b *British Digest of International Law* 420 (1967).

Although Gilbert's attempted settlement at Newfoundland in 1583 was unsuccessful, two years later Sir Bernard Drake "was sent to round up the Spanish fishing fleet in Newfoundland. This was a very profitable enterprise and six hundred fishermen were brought back to be taken care of. Henceforth no Spanish fishing fleet went to Newfoundland, and 'out of the whole number of fishing vessels England had more than double the fleet of her rivals and

all quietly submitted to her control.' " Rowse, *op. cit.* at 164; App. 832-33. So much for Queen Elizabeth's dedication to the freedom of the seas and of the fisheries.

Throughout the 17th and 18th centuries, England based its claim to Newfoundland and its fisheries on the Cabot discovery and on Gilbert's ceremonial taking of possession. App. 885.

F. EXCLUSION OF FOREIGNERS FROM COASTAL FISHERIES WAS FIRMLY ESTABLISHED IN SCOTTISH LAW AND PRACTICE.

While Scottish law as such never became law in this country, it is relevant to the issues in this proceeding as showing the legal climate in which James VI and I was educated and operated for most of his life, and which he brought with him on his accession to the English throne in 1603.

As early as the reign of David I (1124-1153), both Scots and foreigners were prohibited from exploiting the important sea fishery at the mouth of the Firth of Forth without obtaining licenses and paying tithes. Fulton, *op. cit.* at 59-60. As to the Scottish seas generally, "restrictive measures were in force from an early period." *Id.* at 75. The Scots fiercely resisted any intrusion of foreigners into what they called their "reserved waters," and sea battles were fought to vindicate that right in the 15th and 16th centuries. *Id.* at 77-79. The Scots "reserved waters" were generally defined as extending to a "land-kenning" of the coast, that is, the distance from which the land could be seen from the tops of masts. This distance was usually defined as either 14 or 28 miles, although the Scottish lawyer Welwood wrote that the Scots had asserted the right to exclusive fisheries for 80 miles from the coast and the Dutch had acquiesced therein. *Id.* at 77, 84. Sometimes two

"land-kennings" were claimed, Exhibit 777, p. 363, which probably explains the claim to 28 miles. No treaty entered into by Scotland ever sanctioned any foreign right to fish in Scottish waters. Acts of Parliament regulated the sea fisheries and excluded foreigners. Fulton, *op. cit.* at 82-83; Exhibit 756, pp. 290-93; Exhibit 464, pp. 34-36. The crown rights included the "assize-herring", an ancient tax levied on the herring fishery. Fulton, *op. cit.* at 82; Exhibit 693 at 152-53. An act of Parliament in 1424 fixed the tax as four shillings for each last (an old unit of weight) of herring caught by Scots and six shillings for each last caught by foreigners. Fulton, *op. cit.* at 171, n.1.

According to Professor Elder, Dutch fishermen first came into Scottish waters in 1594, pursuant to a Scottish license which kept them at a distance of 28 miles from the shore. App. 38; see also Exhibit 596.

Given this tradition, it is hardly surprising that the eminent Scottish lawyer Sir Thomas Craig, in a work published in the year of Elizabeth's death, affirmed that a sovereign is the proprietor of the fisheries in his adjacent seas and may permit or prohibit foreign fishing there according to custom. Exhibit 690 at 172-73; Exhibit 693 at 357. See also Exhibit 447. Likewise, William Welwood's *Sea Laws of Scotland*, published in 1590, affirmed the crown's exclusive right to enjoy sea fisheries and to grant them out to subjects. Exhibit 690, pp. 174-75.[15]

[15] But see Fulton, *op. cit.* at 352. We have not been able to obtain a copy of Welwood's 1590 work and thus cannot establish whether Fenn's assertion that the paragraph he quotes is from the 1590 version is correct or not.

II.

SEVENTEETH-CENTURY ENGLISH LAW AND PRACTICE FULLY RECOGNIZED THE CROWN'S SOVEREIGNTY AND DOMINION IN THE ENGLISH SEAS, SEABED AND SUBSOIL.

During the reign of James I (1603-25), English law became even more fixed and definite as to the rights of sovereignty and property of the crown in the adjoining seas, and had several very important practical applications. The English seas were regarded as part of the realm, just as much as the land, and therefore subject to the legislative, executive and judicial power of the state. The crown possessed and exercised the right to exclude or to license foreign fishermen and the right of admiralty jurisdiction, both civil and criminal, including criminal jurisdiction over foreigners for crimes committed in the English seas.

The English seas were regarded on historical grounds as extending all the way across both the North Sea and the English Channel, and for considerable distances into the Atlantic. Except where special circumstances operated (as in the English Channel, all of which was claimed on the basis of the English kings' claim to the French throne), the usual doctrine was that English sovereignty extended either for 100 miles or midway to the opposite coasts. Within the English seas, the right to the fisheries was exclusive, the admiralty jurisdiction was territorial, and the flag salute was required for foreign ships. As to the seabed and subsoil, the law of England was that the crown owned them and the resources thereof. These legal doctrines were subjected to further definition and elaboration throughout the 17th century.

The overwhelming body of evidence supporting these conclusions is summarized by Professor Horwitz at App. 30-102. The facts are largely conceded by plaintiff's witnesses.

Most of the evidence speaks quite well for itself, in spite of plaintiff's attempt to introduce subtleties and distinctions which never occurred to those who were making and interpreting the law in the 17th century. In this section we shall simply refer to the most important evidence broken down into appropriate categories. First we shall collect the evidence showing that as a general proposition, under English law throughout the 17th century, the crown was sovereign in the English seas and those seas were part of the realm of England. We shall then set forth the evidence in the four most important areas in which that sovereignty was exercised and implemented: the crown's exclusive right to the fisheries in the English seas, to exclude or to license foreign fishermen, and to regulate fisheries; the territorial admiralty jurisdiction in the English seas, including jurisdiction over foreigners; crown ownership of the seabed and of the resources thereof; and, finally, the requirement of the flag salute as a recognition of maritime sovereignty.

A. THE CROWN POSSESSED TERRITORIAL SOVEREIGNTY OVER THE ENGLISH SEAS.

Plaintiff's witnesses cannot and do not deny that England claimed and exercised sovereignty over the English seas in the 17th century. One of the plaintiff's witnesses, Professor Wroth, has attempted to explain that away by contending that the term *sovereignty* was regarded as entailing only some sort of "protective" jurisdiction over the seas, amounting perhaps to no more than a special English duty to prevent piracy in the seas adjacent to England. To the contrary, the evidence shows that English law in the 17th century had a fully developed doctrine of territorial waters entailing sovereignty in the complete modern sense over what were regarded as the English seas.

1. Court Cases

In the *Case of the Royal Fishery of the Banne*, in 1610, the Privy Council, the highest judicial body in England, declared that "the sea is of the legiance of the king as of his crown of England." Exhibit 157, p. 38; App. 93.

In *Rex v. Oldsworth*, a decision of the Exchequer in 1637, it was declared that "as the king is supreme upon the land, so he is upon the sea"—a clear expression of the view that the crown's sovereignty in the English seas was of the same nature as its sovereignty over the land territory of England. App. 39-40.

Also in 1637, all the judges of England joined in the decision of the great *Ship Money Case (Rex v. Hampden)*. At issue was whether the king had authority, without the consent of Parliament, to levy an impost on his subjects to build ships for the defense of the English seas. One of the principal contentions of the crown was that the English seas were within the realm, and that subjects were obligated to contribute for the defense of the realm, in contradistinction to expeditions and ventures outside the realm, where no such obligation existed. By a vote of 7 to 5, the court held in favor of the crown. 3 Howell, *State Trials* 825-1254 (1816).

The ship money writs, whose lawfulness was at issue, declared that the kings of England had always been "masters of the aforesaid sea" and "lords of the sea aforesaid." *Id.* at 830, 848, 1191. Before issuing the writs, the king had obtained an advisory opinion, affirming their lawfulness, from the Chief Baron of the Exchequer and the Chief Justices of the Courts of Kings Bench and Common Pleas. In the subsequent prosecution of Hampden for refusing to pay, the Solicitor General, Sir Edward Littleton, based his argument in principal part on the duty of subjects to fight (or to contribute money for fighting) within the realm, as opposed to conquest or conservation of foreign

countries or territories beyond the sea. *Id.* at 924. "The kingdom of England consists of land and sea"; "the king is as much lord of the sea as land"; "if the king could command for land, he may for sea, for both are one kingdom"; "the sea and the land make but one kingdom"; the king is "lord of the narrow seas." *Id.* at 928, 932, 937, 947. Sir John Banks, the Attorney General, likewise arguing for the crown, was to the same effect:

> "This dominion is not only upon the land, but it is upon the sea. And so the king he hath not only a dominion at sea, but he is 'dominus maris Anglicani,' he is both owner of the sea and of the soil under the sea. And so it was resolved lately, by my Lord Chief Baron, and the rest of the barons in the Exchequer, in the case of Sutton Marsh, Mich. 13 Car. That the soil of the land, so far as the sea floweth is the king's, and the king is seized thereof, *jure corona.* Mirror 8, Bract, fol. 8, temps Edw. 1, Avowry, 46 Ed. 3, Com. 3, b. That not only the dominion of the sea, but the very soil belongeth unto the king.
>
> "In the next place he hath, besides his supremum dominum, a sovereign jurisdiction, and that extends both by sea and land.
>
> "First, for creation of all his great officers and judges; creation of the Admiralty, time out of mind. 20 Hen. 7, fol. 8, 12 Hen. 7, fol. 17, power to make justices could not be granted; and all these powers resumed in the statute, as inherent in the crown. 12 Hen. 7, fol. 17, there it is said by Fineux, that at the beginning all administration of justice was in one hand, that is, in the crown. And surely this jurisdiction did not begin in the time of Ric. 1, when those laws were renewed by

him at his return from the Holy Land; but there were admirals in England, and the admiral law by sea long before. 27 Ed. 1, a famous record in the Tower, that the commissioners for the emperor, Spain and France, did appear before the king's commissioners, and did acknowledge the sovereignty of the king of England upon the sea did belong unto him time out of mind. And for further proof of this, it likewise appeareth in that learned book of Mr. Selden's called Mare Clausum." *Id.* at 1023.

As stated, the court held for the crown by a vote of 7 to 5.[16] The opinions of the majority fully accepted the crown's argument. Sir John Finch, Chief Justice of Common Pleas, held as follows:

"By the fundamental laws and policy of this kingdom, the sole interest and property of the sea, &c. is in the king.

* * *

"Sea and land make but one kingdom, and the king is *sponsus regni;* Magdalen College Case, sir Joh. Davies' Reports, stat. 24 Hen. 8, 1 Eliz. and 1 Jac. The soil of the sea belongs to the king, who is lord and sole proprietor of them; and good reason why he should, as is well maintained by Mr. Selden, that worthy and learned author of Mare Clausum; and I hope shall be by his majesty maintained, with the sovereignty of the sea: and without a navy this authority can do but little good.

* * *

[16]Two of the dissenters, Bramston and Davenport, disagreed with the majority only on the purely technical ground that by the record it did not appear to whom the money assessed was due.

> "[I]t cannot be denied but originally the king had the sovereignty of the whole kingdom both by sea and land, who hath a power of charging the whole kingdom.
>
> * * *
>
> "Then if sea and land be but one entire kingdom, and the king lord of both, the subject is bound as well to the defence of the sea as of the land; and then all are bound to provide ships, men, ammunition, victuals, and necessaries for that defence." *Id.* at 1225-27.

Judge Crawley's opinion referred, though more briefly, to the dominion of the sea, *id.* at 1086, as did Baron Weston's, *id.* at 1067.

Notably, none of the judges in the minority in any way questioned the holding that the English seas were within the realm; their disagreement was entirely on other matters. In fact Chief Baron Davenport of the Exchequer went out of his way to agree with the majority on that point:

> "[T]he king is lord of the sea; as it was argued at bar, in a cause brought before us the barons of the Exchequer, where we did unanimously agree, and adjudge that the king was, and is in my conscience, rightly the lord of the very propriety and ownership of the seas. The occasion upon which this grew a question was as I conceive, upon the writing of two books: the one called Mare Liberum, that no ownership of the sea should belong to the king; whereas it is the sea of our sovereign, and defence by sea, under Almighty God, that is our protection; and if we should suffer any else to have an interest in it, it would hazard the whole kingdom. But in answer to this book, Mr. Selden hath wrote very learnedly a

> notable book called Mare Clausum, approved of by his majesty, and enrolled in the Exchequer by command from his majesty, there to remain. But since there is another book written, which I had at my argument, by one Pontanus, directed to the great chancellor of the king of Denmark; and he undertaketh herein to make an answer to every particular chapter in Mr. Selden's book; and truly, as I think in my opinion though weak, Mr. Selden hath a judgment in law against him upon a *nihil dicit.*" *Id.* at 1210.

Sir John Bramston, Chief Justice of King's Bench, was in accord:

> "Thus much for defence upon the land; now for defence upon the sea. In the statute 18 Ed. 3, cap. 7, that they who serve the king out of the kingdom, serve for wages; but in case of necessity, without the realm, in times past, by no precedents, saith my brother Crooke, can it be proved it was done before.—I answer, that the sea is within the kingdom; see 2 Ed. 3, cap. 10, protect. 46 Bract' lib. 2, fol. 365, there the sea is made part of the kingdom. Doctor and Student, cap. 51. It is the ancient custom of England, that the king is lord of the narrow seas." *Id.* at 1246.

Counsel for the defendant likewise had no quarrel with the crown's argument on the question relevant here. Indeed, one of the defendant's arguments was that the king owned all the profits of the seas, not only royal fish but also "all other profits of the sea, if the king would take them," *id.* at 1004, and therefore had no need to make exactions of his subjects for the defense of the sea. Again the defendant argued:

> "For though the king be lord of both sea and land, and hath in them both the sole dominion; yet in the sea he hath the whole property, and in a manner all the considerable profit and privilege; the subject hath but the passage of the sea, and the *minima* to take fish, not considerable in point of benefit." *Id.* at 1010-11.

Thus we see that in this great case, surely one of the most famous and important in all the history of the English-speaking peoples, both parties and all the judges of England were in accord that the English seas were part of the realm. As is well known, the holding that ship money could be levied without the consent of Parliament was immensely unpopular, was denounced in Parliament, and was one of the major causes of the Civil War. However, in the parliamentary denunciation no trace of criticism can be found of the case with respect to its holding that the seas were within the realm. See *id.* at 1254, 1305.

An indictment in the High Court of Admiralty in 1674 of foreigners for failing to give the flag salute declared that "the British seas are, and from the time beyond the memory of man have been, within the sovereignty and of the dominion of the kings of England for the time being as a parcel of the kingdom of England." App. 721. Since this indictment was deemed legally sufficient and resulted in a conviction (App. 725), it has undoubted legal authority. Similar indictments are found at App. 726, 731. One of those convicted subsequently obtained a royal pardon for the crime of failing to give the flag salute "within Our British Seas." App. 737.

While Professor Wroth has sought to deprecate (Tr. 2501-03) the charges to admiralty juries of the great admiralty judge Sir Leoline Jenkins, the authoritative legal force of those charges can hardly be questioned. In his 1668 charge, Jenkins twice referred to the sovereignty of the

crown in the British ocean. App. 895-96. In another charge, Jenkins declared that "his majesty hath an undoubted empire and sovereignty in the seas that environ these his kingdoms, which by the ancient statute laws are called the quatuor maria, by foreigners, and by our modern treaties, the British seas." App. 897; see also App. 901.

2. Acts of Parliament

As Professor Thorne has conceded (App. 549), during the Commonwealth period the Council of State was the highest law-giving authority in England. In 1650, "whereas the dominion of these seas has time out of mind undoubtedly belonged to this nation," the Council directed the admirals "to preserve the dominion of the sea." Exhibit 224.

In 1652 Parliament adopted a resolution requesting the Council of State "to prepare a declaration to assert the right of this Commonwealth to the sovereignty of the seas, and to the fishery." Exhibit 693, p. 409. The Council's response was to order the translation and republication of Selden's *Mare Clausum*. *Id.* at 410.

In 1654 the Council of State granted a licence to a fishing captain of Dieppe "to enter those our seas between the coasts of England and France." Exhibit 586.

On the outbreak of the second Dutch War during the reign of Charles II, Parliament, in the preamble of an act granting money for the equipment of the fleet, declared it to be "for the preservation of his Majesty's ancient and undoubted sovereignty and dominion in the seas." Fulton, *op. cit.* at 458.

In 1681 the Scottish Parliament, in a statute defining the jurisdiction of the Scottish admirals, specified that it extended to all maritime and seafaring causes "within this realm," indicating Parliament's understanding that the Scottish seas were within the realm of Scotland. App. 647-48.

In 1699 the English Parliament enacted a statute directing the Lord High Admiral to appoint certain ships to cruise on the coasts of England and Ireland to seize smugglers. Masterson, *Jurisdiction in Marginal Seas* 3 (1929). The act specified no seaward limitations for this jurisdiction, a fact which Masterson explains as follows:

> "It is unnecessary, however, to determine those limits at this early period; for the English Government was then claiming and maintaining sovereignty over the entire four bodies of water known as the 'English Seas,' which would embrace the limits of all ports. Hence, there was nothing novel or unusual in the exercise of jurisdiction over smuggling craft for an indefinite distance, as provided by the Act of 1699." *Id.* at 3-4.

3. Legal Opinions

James I's fishing proclamation of 1609 was preceded by an exhaustive legal inquiry as to the juridical basis for the crown's assertion of sovereignty over the sea and the right to exclude foreign fishermen. This inquiry culminated in a favorable opinion to the Privy Council from a committee of five persons, of whom at least three (Caesar, Dun and Crompton) were lawyers. Exhibit 693, pp. 138-47.

In 1610 Sir Julius Caesar, a noted admiralty judge and later Master of the Rolls, delivered, in connection with the fishing negotiations with the Dutch, an opinion confirming English sovereignty over "the four great seas" and the right to exclude foreign fishermen therefrom. App. 712-14; Fulton, *op. cit.* at 158-59.

In 1617, Caesar delivered another legal opinion, asserting the duty of the Dutch to extradite, for trial and punish-

ment in England, Dutch citizens who had seized Captain Browne in the sea off the English coast while he was selling fishing licenses to Dutch fishermen. Caesar regarded the Dutch crime as having been committed "within the territory" of England. App. 715. Before rendering his opinion, Caesar had obtained the opinions of three other eminent lawyers. Exhibit 693, p. 174. On the basis of this opinion, diplomatic representations were made to the Dutch (Exhibit 567), who acquiesced and surrendered the culprits as demanded. Exhibit 693, p. 174.

Charles I, like his father, commissioned extensive legal research prior to issuing, in 1636, his proclamation asserting maritime sovereignty. Exhibit 679, pp. 230, 243-46; Exhibit 693, pp. 211-13, 364-65.

Similarly, the parliamentary government during the interregnum, before confirming the position of the Stuart kings regarding maritime sovereignty, commissioned William Ryley, the Keeper of the Records in the Tower, to provide proofs of the English sovereignty of the sea; Ryley did so. Exhibit 558; Exhibit 693, p. 409.

Charles II, when embroiled with the Dutch over the flag salute, requested the eminent admiralty judge Sir Leoline Jenkins for a legal opinion. Jenkins' response was that "the king of England for the time being is lord of those seas, where he hath the right of his flag acknowledged; and that those seas are, as much as that watery element is capable of being so in its nature, no less a domain of the crown, than the Honour of Greenwich, or the Manor of Eltham." Exhibit 211, p. 698; Exhibit 693, p. 484.

In 1671 Trinity House, in response to an inquiry from the crown, gave an opinion that the British seas included the entire English Channel and the North Sea all the way to the coast of the low countries, and in the south extended to Cape Finisterre. Uncertainty was expressed as to how far northward the British seas extended. App. 739-40.

In 1699 Sir Charles Hedges, admiralty judge, gave a report affirming that the British seas included the entire Bay of Biscay, as far as the Spanish coast. App. 667-68.

4. Other Official Pronouncements and Acts of State

As Professor Thorne has recognized (App. 548), the courts and Parliament were by no means the only law-making bodies in England in the 17th century; formal acts by the king in Council likewise had the force of law. In matters touching the prerogative, the ordinary law courts were rarely involved, and pronouncements by the king in Council—which indeed was the highest judicial body in England—are the best authority.

James I's fishing proclamation of 1609 (App. 675-77), made in Council and, as we have seen, after elaborate legal research, referred to the "sovereign power" of the English crown in the adjacent seas, declared that crown rights in those seas were a part of the prerogative, and described those rights as "regalities." The proclamation prohibited foreigners from fishing without license "upon any of our coasts and seas of Great Britain, Ireland and the rest of the isles adjacent."

In the years following James' proclamation, innumerable formal pronouncements by official bodies and high officers of the state reaffirmed the English sovereignty in the seas. We shall mention only a few of the most important. The great Earl of Salisbury, Lord Treasurer and prime minister, writing to the English Ambassador at Madrid, declared that by the civil law every state has sovereignty over its adjacent seas at least 100 miles out, and affirmed also the English claim to the entire channel between England and France on the basis of a special historic right. Exhibit 693, pp. 360-61.

Naval instructions of 1632 ordered the recipient " to preserve the king's regality in the narrow seas." App. 777. The use of this term—regality or royalty—for the collective sovereign rights of the crown in the English seas was altogether customary and habitual in this century as previously.

Among the long series of official papers preceding Charles I's fishing proclamation, the "Propositions for Fishing" of 1633, by Secretary of State Sir John Coke, asserted the crown's sovereignty and command at sea. App. 91, 656-57; Exhibit 693, pp. 211-13.

In 1633 the Lords Commissioners of the Admiralty requested Sir Henry Martin, admiralty judge, and the Attorney General to draft a "reglement" relating to the protection of the king's "ancient right, honours and sovereignty in the narrow seas, and in his chambers and ports." Exhibit 568. The reglement composed by them, and issued as a royal proclamation in 1634, asserted sovereignty over "the four English seas." Exhibit 569; Fulton, *op. cit.* at 251-52, 759-61. While measures for the enforcement of neutrality were prescribed only within certain limits, careful reservation was made that "his majesty doth justly challenge sovereignty and property in all those his seas far beyond the limits hereafter to be described and might with like justice require from all persons using those his seas a forebearance from injuries and all hostile actions." Exhibit 569, p. 760.

Charles I's ship money proclamation, also of 1634, based the levying of ship money on a declaration that English kings had ever been lords of the English seas. App. 697.

In 1635, one of the English complaints against France was that the French "challenged a joint sovereignty on the sea with his majesty." Exhibit 678, p. 402.

Charles I's fishing proclamation of 1636 was made "by the advice of our Privy Council," the highest court in England. Like his father's proclamation of 1609, it asserted sovereign rights over "the coasts and seas of Great Britain, Ireland, and the rest of the isles adjacent." Exhibit 222.

In 1639 Secretary Windebank, at the command of the king, gave directions for naval voyages "to preserve his majesty's sovereignty in those narrow seas." Exhibit 610. Innumerable other official documents similar to this one could be cited.

Under the Commonwealth and Protectorate, the English claims to maritime sovereignty were not diminished in the slightest. In 1644 the parliamentary committee for the Admiralty gave instructions to maintain "the kingdom's sovereignty and regality in the seas." Exhibit 693, p. 380. One of Cromwell's first directions was to the naval officers, that they "maintain the sovereignty of the commonwealth in the seas." App. 91.

Nor was there any change at the restoration. Charles II's declaration of war on the Dutch in 1672 was based primarily on their refusal to recognize English sovereignty and dominion in the English seas. Exhibit 693, pp. 482, 487-88.

Similarly, William III's declaration of war on France in 1689 gave, as one of the reasons for hostilities, French violations of the flag salute, which was stated to be an attribute of "our sovereignty of the narrow seas, which in all ages has been asserted by our predecessors, and which we are resolved to maintain, for the honour of our crown and of the English nation." Exhibit 693, p. 518. Another *casus belli* was declared to be French encroachments on the Newfoundland fisheries in the American seas. App. 893; Exhibit 741, p. 242; see pp. 229-30, *infra*.

5. Legal Treatises of the Period

William Welwood, writing in 1613 and 1615, asserted English sovereignty in the adjacent seas, and referred with approval to Bartolus' doctrine that the sovereignty of a coastal state extends 100 miles into the sea. App. 674; Exhibit 693, pp. 354-55. Welwood, like Selden, pointed out that the rules for acquiring title to sea are the same as those for the acquisition of land, and that "it is not needful for him who would possess himself in any part of the land to go about and tread over the same; but it is sufficient to enter in upon any part thereof with a mind to possess all the rest thereof, even to the due marches. And what can stay this to be done on sea, as well as on land? And thus far concerning the validity." Welwood, *An Abridgement of All Sea Laws* 67 (1613), App. 673.

Robert Callis, writing in 1622, is wholly specific that the English seas are within the realm, and that the crown is sovereign there by the common law of England. App. 30-32, 50, 777-83. Callis' purpose was to establish that the statute law of England, and specifically the Statute of Sewers, were in force in the English seas. Callis makes very clearly the distinction between the realm and the bodies of counties, which comprise only part of the realm. App. 780.

Professor Wroth argues (Tr. 2510), on the basis of Callis' statement that the intent of the statute of 1389 (pp. 14-18, *supra*) was rather to "limit the Admiral how far he should extend his jurisdiction than in any way set forth the bounds of this Realm," that Callis did not believe that the realm included all areas where the admiralty jurisdiction may be exercised. The argument is quite demonstrably specious. When read in context (App. 780-81), Callis' statement plainly means that the admiral's jurisdiction was limited on the *landward* side, not that the realm was more limited on the *seaward* side than was the admiral's territorial jurisdiction.

Of course the admiral's jurisdiction was different from the extent of the realm, since it did not extend to areas within the bodies of counties. This was the whole point of the statute of 1389, which Callis was expounding. On the seaward side, it is plain that Callis regarded the boundaries of the realm and the limits of the admiral's territorial jurisdiction as coextensive, since he relies heavily on the latter to establish the former. App. 777-78.

John Selden, of course, asserted full territorial sovereignty and dominon of England over the four English seas, including the entire English Channel and North Sea up to the opposite coasts, and also including very large expanses of the seas to the north and west of Great Britain.

> "[I]t is not to be conceived that any other kind either of causes or effects of sea dominion are here admitted, than such as have been of the dominion of an island, continent, port, or any other territory whatsoever . . . ." *Mare Clausum*, preface, p. e3.

Excellent summaries of Selden's views are found in Exhibit 188 and at App. 33-36, and some of the most important passages from *Mare Clausum* are included in Exhibit 204; see App. 670-71. *Mare Clausum* was republished in 1972 by the Arno Press, New York, as part of "The Evolution of Capitalism" series, and today is readily available.

While *Mare Clausum* was not published until 1635, it was written in 1618 and was read at that time by King James. Fulton, *op. cit.* at 366; Potter, *The Freedom of the Seas* 58 (1924); Swarztrauber, *op. cit.* at 20. Professor Thorne agrees that it was the "approved embodiment of British public policy." App. 551. The official status given the book is graphically illustrated by the famous entry of March 26, 1636, in the minutes of the Privy Council:

> "So satisfactory and so important was the work considered by the Government that the following

> entry, dated March 26, 1636, was made in the minutes of the Privy Council: 'His Majesty, this day in council, taking into consideration a book lately published by John Selden, Esq., entitled *"Mare Clausum, seu de Dominio Maris,"* written by the King's command, which he hath done with great industry, learning and judgment, and hath asserted the right of the Crown of England to the dominion of the British seas; the King requires one of the said books to be kept in the Council chest, another in the Court of Exchequer, and a third in the Court of Admiralty, as faithful and strong evidence to the dominion of the British seas.'" Fletcher, "John Selden (Author of *Mare Clausum*) and His Contribution to International Law," 19 Transactions of the Grotius Society 1, 8-9 (1962).

For other comments on the official status of *Mare Clausum*, see Exhibit 693, pp. 302, 356-65; Swarztrauber, *op. cit.* at 22; Crocker, *op. cit.* at 187; Potter, *The Freedom of the Seas* 61 (1924); Beaujon, *The History of Dutch Sea Fisheries* 471 (1883); Fulton, *op. cit.* at 365-67, 369, 374.

The Commonwealth regarded Selden as no less authoritative than King Charles had done. *Mare Clausum* was translated and republished in 1652 by the direction of the Council of State, which ordered 200 copies for its own use, declaring that the work "'learnedly asserted the rights and interests of the commonwealth in the adjacent seas and would be of good use for these and future times.'" Exhibit 693, p. 410. Charles II confirmed the official status of the work by commissioning a new translation and publication.

In his testimony, plaintiff's witness Professor Wroth accused Selden of inconsistency by attributing to him certain passages (Exhibit 692) from the 1741 edition of Fortescue's

De Laudibus Legum Angliae, in particular the statement that the high sea was "*mare liberum, nullius in bonis.*" Tr. 2489-92. Professor Wroth was later compelled to admit that he was in error concerning Selden's authorship of this language. U.S. Exhibit 400. However, Professor Wroth continued to maintain that in 1616, at the time Selden wrote his footnotes to Fortescue, Selden held only a "protective" view of admiralty jurisdiction and believed that the English seas were outside the realm.

These contentions are utterly without foundation. Selden's footnote (Exhibit 691) was appended to Fortescue's statement that the admiralty jurisdiction concerned things done upon the sea without the body of any county of the realm. Selden's footnote deals entirely and exclusively with the controversial question of the boundary between admiralty jurisdiction and the jurisdiction of the common law courts on the landward side. There is not a word in the footnote inconsistent with anything in *Mare Clausum*, written two years later, which dealt with a far broader subject matter. Nor is there a word in the footnote which lends any support to Professor Wroth's assertion that Selden in 1616 believed that the English seas were outside the realm. As in the case of Callis, so with Selden, Professor Wroth's entire argument rests on an attempt to regard as synonymous the phrases "without the realm" and "without the body of any county of the realm." It is impossible to read Callis, Selden, Coke, Hale or any other authoritative writer of this period without concluding that the distinction between the two terms was entirely clear to them.

Sir John Boroughs, keeper of the Records, after an exhaustive inquiry, in 1633 wrote the first of the treatises commissioned for Charles I to demonstrate the sovereignty of the crown in the English seas. App. 32-33, 649-50. Boroughs asserted full maritime territorial sovereignty, including law-making power, criminal and civil jurisdiction, and owner-

ship of the resources both of the surface of the sea and of the seabed. Like Selden, he observed that a child born upon the king's sea is an English subject, not an alien, by the common law.[17] App. 650. In view of all this it is difficult to understand Professor Wroth's contention that "Boroughs' position is consistent with the earlier concept of sovereignty as a kind of protective jurisdiction having at most incidental and specific attributes of property." Tr. 2494. A fair reading of Boroughs can leave no doubt that he believed the king was sovereign in the English seas in the same sense that he was sovereign on land. And certainly there can be no doubt that Boroughs regarded the crown as having the exclusive right to exploit or to license any valuable resources found on the seabed of the English seas.

Sir Edward Coke declared unequivocally in his *First Institute*, published in 1628, that "if a man be upon the sea of England, he is within the kingdom or realm of England, and within the legiance of the king of England, as of his crown of England." App. 33, 655. He further clarifies his meaning, if any clarification were needed, by stating that "intra quatuor maria" means "within the realm of England." In his *Fourth Institute*, written after the discovery of the document *De Superioritate Maris*, Coke accepted that document as authoritative and as illustrative of the nature and basis of the admiral's jurisdiction "in the seas of England." App. 656.

Coke was the principal proponent of the common-law courts in their jurisdictional dispute with the admiralty court regarding the landward demarcation between them, and much of his discussion is devoted to that subject. Coke is crystal clear that the seas are without the body of any

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[17] International law was to the same effect: "as to children born at sea, if they are born in those parts of it that are possessed by their nation, they are born in the country . . ." Vattel, The Law of Nations 101 (6th American ed. 1844).

county of the realm, but are within the realm itself. There is nothing inconsistent or particularly subtle or difficult in this position. There is not a shred of support in evidence or in reason for Professor Wroth's strained, indeed preposterous, contention that every time Coke or other writers speak of the English seas as without the bodies of counties they are implying that the seas are outside the realm. Tr. 2508-09, 2751-53, 2788-90. Professor Wroth was unable to cite any authority who has ever interpreted Coke as he does. Tr. 2790. His interpretation, it is submitted, is palpably wrong and does violence both to the very words which Coke used and to the entire legal context in which those words were written.[18]

Selden, Coke and Hale formed a triumvirate who were doubtless the most eminent and influential authorities on English law during the 17th century. Like the other two, Sir Matthew Hale—Chief Baron of the Exchequer and Lord Chief Justice of England—was unequivocal as to English sovereignty in the English seas. "The narrow sea," he declared, "adjoining to the coast of England, is part of the waste and demesnes and dominions of the king of England, whether it lie within the body of any county or not." Exhibit 194, p. 10; App. 50. Here again we see the familiar and straightforward distinction between the realm, which included the English seas, and the counties of the realm, that is, the land area, ports and bays which comprised the counties. Hale believed that English sovereignty extended to "at least so much . . . [of the sea] as adjoins nearer to our coast than to any other foreign coast." Moore, *op. cit.* at 358. In

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[18] Plaintiff claims (Pl. Br. 79) that "Coke apparently meant to include within the realm only those portions of the adjacent seas which were considered at common law to be within the bodies of the counties," that is, "a roadstead or arm of the sea." This is ludicrous. What Coke said was within the realm was "the sea of England," and the "quatuor maria"—thoroughly familiar terms at that time which designated the four English seas as traditionally defined.

his *Pleas of the Crown*, vol. 1, p. 154, Hale declared that an attack on a royal ship in the narrow seas is a levying of war against the king within the realm, and therefore treason.

Gerard Malynes, writing in 1622, asserted that all princes possess "a distinct dominion of the seas adjoining to the territories and jurisdiction of their countries"; cited with approval Bartolus' view that territorial waters were 100 leagues *(sic)* in width, and gave historical documentation for England's territorial waters. App. 32, 663-64, 850.

Richard Zouche, writing in 1663 on the admiralty jurisdiction, founded the territorial jurisdiction of the admiral on the sovereignty and dominion of England over the English seas. Exhibit 212, pp. 19-20; App. 45-46. Zouche (1590-1661) was a noted lawyer, parliamentarian, regius professor of civil law at Oxford, judge of the High Court of Admiralty, and the most eminent civil-law authority of his time. 21 *Dic. Nat. Biog.* 1332-35. He was "much respected, even by his enemies." Mathiasen, "Some Problems of Admiralty Jurisdiction in the 17th Century," 2 American Journal of Legal History 215, 218 n.13 (1958).

To the same effect was John Exton, writing in 1664, who was judge of the admiralty court both under the Commonwealth and in the reign of Charles II. App. 46; 6 *Dic. Nat. Biog.* 962; Exhibit 187.

Identical views were stated in John Godolphin's work of 1661, which distinguished between sovereignty and dominion over the British seas and the admiralty jurisdiction therein, while arguing that the latter was an important consequence and attribute of the former. App. 46; Exhibit 191, pp. 30-31; Exhibit 695, p. 24. Godolphin was a doctor of civil law and judge of the High Court of Admiralty from 1653 to 1659.

To precisely the same effect is Robert Codrington, writing in 1665. App. 42-43; Exhibit 181.

Charles Molloy affirmed the full territorial sovereignty of England in the British seas extending from Cape Finisterre to Van Staten. Molloy regarded the seas as fully within the realm, pointing out, as many others had done, that persons born there are not aliens since they are born within the realm. App. 854. Molloy's work was long considered the standard work on the maritime law of England, and went through many editions extending through the 18th century. App. 43; Fulton, *op. cit.* at 514; 13 *Dic. Nat. Biog.* 577.

Sir Philip Medows, writing in 1689, affirmed the full doctrine of territorial waters, including sovereignty, property, exclusive jurisdiction and exclusive fishing. Exhibit 202; Exhibit 725; Colombos, *The International Law of the Sea* 63 (6th rev'd ed.). He pointed out, entirely accurately, that in his day everyone agreed that each state was sovereign in its adjacent sea by virtue of sovereignty over the land, but that there was disagreement as to how far that territorial sea extended. App. 668-69. While affirming England's historic right to the entire seas claimed by it, Medows believed that it would be wise for England to restrict its claims to a more reasonable scope.

Professor Wroth is inaccurate (Tr. 2496) in alleging that Medows urged that England's territorial sea be limited only to the bodies of counties plus the king's chambers and royal ports. To the contrary, Medows advocated English sovereignty not only over those areas but over a uniform maritime belt surrounding the entire coast. In discussing the possible width of that maritime belt, Medows mentioned four possibilities: the 100 miles asserted by Baldus, the 60 miles of Bodin, the 80 miles previously agreed between Scotland and the Dutch, and the 14 miles suggested in James I's reign in 1604 and 1618. App. 669; Exhibit 202, pp. 43-45. Medows is quite clear that in his view a 14-mile limit would be entirely reasonable, *id.* at 45, though he is not necessarily averse to a broader limit. Finally, he

suggests that England and the Netherlands should agree on a fixed limit to avoid future controversy. Exhibit 725, pp. 46-47. See also Tr. 2772-76, 2777-80. In view of all this, Professor Wroth's assertion (Tr. 2497) that "Medows makes clear that the concept of sovereignty as property was in the case of England limited to the waters of the King's Chambers or those within the bodies of the counties" is utterly without foundation.

The only English legal writer of the entire 17th century whom we have encountered who denied that the English seas were within the realm was Sir Henry Finch in his *Law, or a Discourse Thereof*, first published in 1613. Finch's entire discussion of maritime matters reads as follows:

> "And under the name of the realm of England, it is plain that Scotland and Wales, much less Ireland, are not included; neither is the main sea that is to say, beneath the low water mark, parcel of the realm; for there the admiral's jurisdiction (which hath nothing to do of things within the realm) doth only meddle, and not the common law: but between the high water mark and the low water mark, where by ordinary and natural course the sea ebbs and flows, the common law and the admiralty have *divisum imperium;* one upon the water, when it is full sea, the other upon the land, when it is an ebb." *Id.* at 77-78 (1759 ed.); Tr. 2508.

Finch was concerned solely with the dividing line between the jurisdiction of the common law and that of the admiralty; and plainly the above passage (the terminology of which is based on a misreading of the statute of 1389) cannot be taken as meaning that the crown had no dominions, rights of property or jurisdiction outside the "realm" in the narrow, and unconventional, sense in which Finch used the term.

6. Modern Commentators

Every modern commentator we have encountered who deals with the subject recognizes that as a matter of English law in the 17th century the crown held sovereignty and dominion over the English seas. We shall mention only a few of these commentators.

Fulton, after demonstrating at great length the 17th-century English position on maritime sovereignty and the official status of Selden's work, observes that that work, "apart from its extreme doctrines as to the sovereignty of England in the seas [that is, the doctrine that English territorial waters extended all the way to the coasts of the countries opposite England], . . . more correctly represented what are now the admitted principles as to the appropriation of the adjacent sea than did most of the works written on the other side, not excepting even those of Grotius." Fulton, *op. cit.* at 370.

As Professor Horwitz testified,

> "Professor Fulton, in his work on The Sovereignty of the Sea (1911), Maine, et al., Ex. No. 189, observes 'that Mare Clausum became in a sense a law-book, an authoritative work to which eminent lawyers, as Lord Chief-Justice Hale and Hargrave, appealed as proving the existence and the legality of the rights of the crown of England to the dominion of the British seas. Even as late as the year 1830,' he concludes, 'this doctrine held its place in certain recognised treatises on the law of England, together with Selden's definition of the extent of those seas.' *Id.* at p. 374." App. 36.

Fletcher, pointing out the soundness of *Mare Clausum* as a work both of the common law and of international law, states that "Selden based his treatise on the positive practice of his day. He stated the law as he found it . . . ." "John

Selden (Author of *Mare Clausum*) and His Contribution to International Law," 19 Transactions of the Grotius Society 1, 11 (1962).

Potter holds that "as argument attempting to prove the legal validity of maritime dominion or maritime liberty in the period prior to 1650, Selden's work is incomparably superior to that of Grotius in the opposite capacity." Exhibit 739, p. 64.

Fenn, among others, has pointed out that it was recognized and established in the 17th century that adjacent waters were under the full territorial sovereignty and ownership of coastal states; the controversial question was how far out those territorial waters extended. App. 809-11; Exhibit 690, p. 133. Again, Fenn recognizes that "the basic principles maintained by Selden, apart from his extreme claims, more nearly approximate the principles of modern international law touching territorial waters, than do those advanced by Grotius." *Id.*, at 196 Fenn's summary analysis of the 17th-century situation, App. 813-18, is well worth reading in its entirety. He demonstrates conclusively that the full doctrine of territorial waters, including both political sovereignty and ownership, was well recognized and virtually universally accepted more than a century before the American Revolution.

See also 1 Kent, *Commentaries on American Law* 26 *et seq.* (14th ed. 1896), reprinted in Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* 179-80 (1919); Masterson, *Jurisdiction in Marginal Seas* 3-4 (1929); Tr. 2671-72.

James Jerwood's *A Dissertation on the Rights to the Sea Shores* (1850) restated the 17th-century doctrine of English maritime sovereignty and regarded it as fully in effect in his own day. Other eminent 19th-century English writers, including Chitty (Exhibits 445, 446), Hall (Exhibit 449),

Schultes (Exhibit 451) and Woolrych (*A Treatise on the Law of Waters* 4-6 (1830)), wrote to the same effect. App. 687-92.

7. Acquiescence by Other States

Obviously, acquiescence by other states is unnecessary to establish the law of England. Nonetheless, it is not wholly without significance that in 1637 the Spanish government expressly recognized English sovereignty in the English seas. App. 721. Other foreign acquiescence in specific attributes or corollaries of English maritime sovereignty, such as ownership of the fisheries and the flag salute, will be discussed under those headings.

In the Treaty between England and Sweden, signed at Upsala in 1654, it was provided (Article XIV) that "the present treaty shall derogate nothing from the rights of dominion either claim in their respective seas, straits, etc." 3 Parry, *Consolidated Treaty Series* 257, 269. Again, the Treaty of Friendship and Commerce between Great Britain and Sweden, signed at Whitehall in 1661, provided (Article XV) that "this present treaty and confederation shall in nothing derogate from any pre-eminence, right or dominion of either confederate within any his own seas, channels, or waters, but that they have and retain the same in as full and ample manner as they have hitherto had, or as of right belongs to them." 6 Parry, *op. cit.* at 469, 493-94.

The Treaty between Great Britain and Denmark, signed at Whitehall in 1661, gave the subjects of each party the right "to pass through the seas and territories whatsoever of either king respectively (doing no damage or prejudice), not only with merchant ships, but also with men of war" up to the number of six (Article XX). In Article XXII, England recognized the duty of English ships to pay the tolls levied for passage "through the sound appertaining to the king of Denmark and Norway," 6 Parry, *op. cit.* at 235, 250-51.

The treaties made by Great Britain with Algiers in 1682 and 1688, and with Tripoli in 1662 and 1675, gave the ships of those Barbary states a limited right of visitation of British merchant ships "not being in any of the seas appertaining to his majesty's dominions." Exhibit 674, pp. 355, 361, 711, 714. Here are four explicit recognitions by other states of British sovereignty in the British seas. The extent of those seas was apparently regarded as so well recognized as to require no definition.

The above treaties with Algiers were still fully in effect in 1800, being confirmed by a treaty of that year. *Id.* at 373. The treaties with Tripoli were likewise confirmed as being in full force and effect by a treaty of 1812. Exhibit 674, p. 732.

B. THE CROWN POSSESSED THE LEGAL RIGHT TO EXCLUDE OR TO LICENSE FOREIGN FISHERMEN IN THE ENGLISH SEAS AND THE RIGHT TO CREATE MONOPOLIES OF NEWLY DISCOVERED FISHERIES; AND ALL FISHERIES IN ENGLISH WATERS WERE SUBJECT TO REGULATION.

The law of England with respect to fishing rights in the English seas throughout the 17th century may be simply and categorically stated. *Prima facie*, the crown owned the sea fisheries as one of its principal *regalia* or royalties. That ownership was full and unabated with respect to the royal or great fish. As to lesser fish, English subjects had a common right to take them, except in areas of the sea where that right had been superseded by a royal grant of an exclusive fishery. Any newly discovered or developed fishery was a proper subject for an exclusive right or monopoly created by the crown.

As to foreigners, they had no right recognized by English law to fish within the seas of England; the crown could allow them, exclude them or license them at its pleasure.

and its decisions were enforced by the admirals and in the admiralty courts. Both as to English and as to foreign fishermen (to the extent they were permitted at all), England possessed law-making authority in the English seas; that is, England could and did regulate the times, places and manner of fishing. Such fishing regulations derived in part from the old common law of the sea, traceable ultimately back to the laws of Oleron; in part from acts of Parliament, and in part from acts of the king in Council. This body of English regulatory law of sea fishing was likewise policed by the navy and enforced judicially in the admiralty courts.

1. Court Cases

In the *Case of the Royal Fishery of the Banne* in 1610, the Privy Council, the highest court of England, held that a salmon fishery in a navigable river belonged to the crown as part of its prerogative. The *ratio decidendi* was that navigable rivers participate of the nature of the sea, and since the king owns the fisheries in the English seas he owns those in navigable rivers also. Exhibit 157. The crown right to fisheries the court called a "royalty." *Id.* at 41. And the court authoritatively reconciled the exclusive royal right to the fisheries with the common practice of permitting free fishing by subjects: while by right the king has the "sole interest" in all fisheries, "the profit of it is not commonly taken and appropriated by the king, if it be not of extraordinary and certain value." *Id.* at 40. Here, at the very outset of the period of American colonization, is the full-blown doctrine, promulgated by the highest judicial authority in England, of crown ownership of sea fisheries as a "royalty" pertaining to the crown by its prerogative. The court was well aware of the civil-law rule, reflected in Bracton, that fisheries are common, but expressly declared that the common law of England is to the contrary.

In *Rex v. Oldsworth*, in 1637, Baron Weston's opinion declared, "as to fishing, none will admit that the sea is free for every foreigner to fish there." Moore, *op. cit.* at 300.

In the *Ship Money Case*, also in 1637, all were agreed that the crown was not only sovereign but owner in property of the sea, and was entitled to all the profits thereof (pp. 49-54, *supra*).

One of Judge Jenkins' charges to an admiralty jury in Charles II's reign reviewed the existing regulatory law regarding sea fisheries which the jury was directed to enforce:

> "You are to enquire of all nuisances and abuses upon our salt-waters and navigable rivers, beneath those bridges that are next the sea; by erecting of water-mills, weirs, stakes, or kiddles, whereby the free course and passage of boats and vessels is hindered, or the young fry of fish destroyed, and you are to present as many as are within the limits of this commission.
>
> * * *
>
> "You are to enquire of all such as use any unlawful arts, engines, nets, or means, to catch fish withal upon the sea, or below the lowest bridges, contrary to the statutes in that behalf provided, and contrary to the ancient ordinances of the admiralty, likewise such as do destroy fish out of proper seasons, or while they are of an unsizeable growth, and particularly such as dredge for oysters, between the 3d of May and the 14th of September, that is, out of the seasons prefixed by the ancient statutes of the admiralty." App. 902-03.

Jenkins' charge of 1668 furnishes authoritative judicial recognition both that foreign fishermen could not lawfully fish in the English seas without license from the crown, and

also that, if licensed, they were subject to English fishing regulatory law:

> "You are to enquire, whether any fishermen, subjects of the French king, do presume to fish upon this Coast, without special license from his Royal Highness; and if they have license, whether they fish with any other nets than such as are of the English size? The offenders and their boats are to be seized on, in any port where they happen to come." App. 895.

2. Acts of Parliament

An act of the English Parliament of 1605, still in force three centuries later, prohibited the erection of any new weir along the seashore or within five miles of the mouth of any haven or creek, or the willful taking of any spawn, fry or brood of sea-fish in any weir without geographical limitation. App. 867-68; Exhibit 693, pp. 608-09; Exhibit 716, p. 394.

In 1630 the Scottish Parliament, appointing commissioners to treat with the commissioners of England regarding Charles I's projected association or company for fishing, instructed the commissioners "that the seas on the coasts of this kingdom and of the isles thereof and all that is interjected between them and that midline in the seas which is equally distant and dividing from the opposite land, are the Scottish seas properly belonging to the crown of Scotland, and that the English have no right nor liberty to fish therein, nor in any part thereof, but by virtue of the association and not otherwise." Exhibit 693, p. 225.

In 1632 the Scottish Parliament approved a royal charter for a fishing society to control the fishing "within his majesty's seas" and to enjoy the exclusive right to export

abroad any sea-fish taken within, or brought within, his majesty's dominions. *Id.* at 240.

The famous Navigation Act of 1651 has been construed as prohibiting foreign fishing in British waters, Exhibit 775, pp. 154-55; and the English insistence that the Dutch pay arrears of tolls due for fishing on the British coasts was one of the causes of the first Anglo-Dutch War in 1652. *Id.* 155-57.

A parliamentary resolution of 1652 called for preparation of a declaration to assert the English right both to the sovereignty of the seas and to the exclusive fishery therein. Exhibit 693, p. 409. (As shown previously, the Council of State thereupon ordered the translation and republication of *Mare Clausum.)*

In 1654, the Council of State granted a fishing license to a French fishing boat. Exhibit 586. Exhaustive research would doubtless reveal other licenses thus issued by the Council of State, the highest law-making power in England during the Commonwealth.

In 1660 the House of Commons passed a bill declaring the English right to control fishing in the English seas and adopting a number of regulatory measures, including the prohibition of trawling, whether by subjects or by foreigners, within eight miles of certain parts of the coasts. The bill failed to become law because of the dissolution of Parliament two days after it was sent to the Lords. Exhibit 693, pp. 443-44. Other clauses of the bill prohibited the use of certain types of nets on the coast "or within half seas over," or the use of seines by foreigners within 10 miles of any part of the coast to the hindering of English subjects in their fishing.

An act of the Scottish Parliament, passed in 1661, provided for the erection of fishing societies composed of

Scottish subjects and enjoying an absolute monopoly of the export of fish. *Id.* at 444-45.

An act of the English Parliament in 1662 prohibited the use of certain types of nets between June 1 and November 30 within one and one-half leagues of the coasts of the counties of Devon and Cornwall. App. 868; Exhibit 693, p. 609; Exhibit 716, pp. 394-95.

3. Legal Opinions

As stated previously, James I's proclamation of 1609, excluding unlicensed foreigners from fishing in the English seas, was preceded by an exhaustive legal inquiry culminating in a formal opinion of a committee of the Privy Council. Exhibit 693, pp. 145-48.

The opinion of Sir Julius Caesar, admiralty judge, likewise affirmed the crown's right to exclude or to license foreign fishermen. App. 712-14.

Similarly, Charles I's exclusive fishing proclamation of 1636 was preceded by an exhaustive legal inquiry and the collection of legal precedents supporting the crown's right. Exhibit 679, pp. 230, 243-46; Exhibit 693, pp. 364-65.

In 1636 Charles I received a formal opinion from the Lords Commissioners of the Admiralty as to both the lawfulness and the expediency of his proposed fishing proclamation. The admiralty lords, after having received and studied an elaborate legal opinion of Sir Henry Martin, admiralty judge, declared their opinion "that the right and royalty of that fishing upon your majesty's coasts doth undoubtedly belong unto your majesty by inheritance, so you may justly prohibit or license all strangers at your royal will and pleasure." The lords made it clear that in their opinion the crown right of exclusive possession pertained not only to the domains inherited by Charles from his father but also to

"any other your dominions," that is, to possessions in the new world acquired during Charles' own reign. App. 719; Exhibit 693, pp. 288-289, 726-64; Exhibit 223.

Also in the 1630's Thomas Wentworth, Earl of Strafford, who was a famous lawyer and parliamentarian as well as a privy councillor and minister of the crown, rendered a legal opinion vindicating the king's exclusive right to the English sea fisheries, relying both on traditional English practice and on the contemporary practice of Russia, Sweden, Denmark and Spain. Strafford also pointed out that exclusive fisheries in England were owned by the proprietors of the adjacent coastal lands, and that ordinary fishermen bought licenses from those proprietors for fishing in their waters. Exhibit 595.

The Commonwealth also, before embracing the traditional doctrine of English ownership of the sea fisheries, commissioned a legal study and opinion, which came to be known as the Ryley Treatise. Exhibit 693, pp. 409-10; Exhibit 558.

In 1674 the Earl of Shaftesbury, who as Lord Chancellor was the highest legal and judicial officer in England, declared to Parliament the king's "dominion and property of his own seas," including the right to exclude or to license foreign fishermen, which Shaftesbury called "a royalty . . . inherent in the crown of England." Exhibit 693, pp. 506-07.

4. Other Official Pronouncements and Acts of State

In 1604, at the outset of his reign in England (and three years prior to the first American settlement at Jamestown), King James caused to be prepared a treaty of union between England and Scotland, which contained a provision preserving to each nation the fisheries to a distance of 14 miles from the coast.

"This treaty was drawn up by commissioners appointed by the respective Parliaments, the most active of whom were Secretary Lord Cecil (afterwards Earl of Salisbury) and the illustrious Sir Francis (afterwards Lord) Bacon on the English side, and Lord President Fyvie and Sir Thomas Hamilton (later Earls of Dunfermline and Haddington) on the part of the Scots. It was signed by thirty-nine of the forty-four English and by twenty-eight of the thirty Scottish commissioners; it was approved by the king and adopted by the Scottish Parliament, and it was thus an instrument of high authority with respect to the delimitation of the waters of exclusive fishing. The clause in the treaty dealing with freedom of commerce contained the reservation referred to, which was as follows: 'Excepted and reserved to Scottishmen their trade of fishing within their lochs, firths, and bays within land, and in the seas within fourteen miles of the coasts of the realm of Scotland, where neither Englishmen nor any stranger or foreigners have use of fish, and so reciprocally in the point of fishing on behalf of England.' " Exhibit 693, p. 223.

The treaty never came into force, having been rejected by the English Parliament for reasons wholly unrelated to the reservation of fishing rights. *Ibid.* The draft treaty is an authoritative statement of what in 1604 was regarded as a reasonable limit of exclusive fisheries as between two nations of subjects of a single crown. It in no way implies, of course, that James or his governments believed that the right to exclude foreign fishermen, such as the Dutch, was limited to 14 miles.

In 1609—two years after Jamestown—the king in Council issued the famous proclamation asserting the English

right to exclude or to license foreign fishermen in the English seas. App. 675; Exhibit 693, pp. 139-55. Plaintiff's witness Professor Thorne was unaware of the 1609 proclamation, but conceded that such an act taken by the king in Council had legal force. App. 548. Professor Thorne was aware that the exclusion of unlicensed foreign fishermen was established English state practice in the 17th century. Tr. 2694.

The 1609 proclamation gave rise to a critical and protracted dispute with the Dutch, which brought forth many further official articulations of the British legal position in diplomatic negotiations and otherwise, as well as actual enforcement of the British claims, to the extent militarily possible, through patrolling the British seas and requiring foreign fishermen to accept licenses, which many of them did. See Exhibit 693, pp. 155-208; Exhibit 186, pp. 4, 12; Exhibits 596, 599, 600, 601, 602, 603; Selden, *Mare Clausum*, 469, 471. In 1616, for example, the Privy Council of Scotland gave detailed instructions for the collection of the assize herring from foreign fishermen "in his majesty's seas." Fulton, *op. cit.* at 757-58.

French as well as Dutch fishermen requested and received licenses. Exhibits 600, 603. In 1618 the Dutch asked whether the British rights could not be liquidated by a lump sum payment, to which the British ambassador answered that this would be inappropriate since the right to exclusive fisheries in the British seas was a "royalty" of the crown. Exhibit 601, p. 4. In 1619 the dispute in its most aggravated form was put to rest when the Dutch government agreed to order Dutch fishermen not to come within sight of land of the British coasts, a distance which under Scots law, as we have seen, was reckoned as 14 miles. Exhibit 693, pp. 193, 604; Fulton, *op. cit.* at 201; Beaujon, *The History of Dutch Sea Fisheries* 470 (1883). Since the principal fisheries were located just off the British coast,

the Dutch withdrawal beyond the line of sight represented a major triumph for the British position.

In 1618, at the request of the King of Denmark, the king and Privy Council of Scotland issued a proclamation forbidding Scottish fishermen to fish in the waters of the Faeroe Islands and directing them to leave those fisheries to the subjects of the king of Denmark as sovereign of those islands, "conform[ably] to the law of nations." Fulton, *op. cit.* at 175-76. This episode demonstrates that the British insistence on exclusive fisheries in British waters was no mere power-play but was based on a principled view of a legal right which the crown was willing to accord to other nations in their waters just as the crown insisted on it in British waters.

Early in his reign, Charles I conceived a project of a great fishing corporation, comprising both Scots and English, which would have a monopoly of fishing in all the British seas. This project led to a fascinating dispute between England and Scotland, deriving from the Scottish government's insistence that the "reserved waters" of Scotland should not be shared with English subjects. Scotland claimed an exclusive right not only out to the 14 or 28 miles which we have so frequently encountered, but to the middle of the seas between Scotland and each opposite shore. England, of course, heartily agreed that foreigners should be excluded from all the British waters, but maintained that the right to charter or to license fisheries in those seas belonged to the crown, not to the Scottish Parliament or burghs. The dispute gave rise to many official declarations and acts on both sides, all of which held in common that the sea fisheries were British property to the exclusion of foreigners. Eventually the crown claim prevailed on most points, though certain limited waters remained reserved to the Scots, and the fishing society was chartered and approved by the Scottish Parliament. Exhibit 679, pp. 237-38,

384; Exhibit 693, pp. 216-40; Exhibit 777, pp. 363-65; Exhibit 779.

In 1636 Charles I, by formal proclamation of king in Council, confirmed and reiterated the crown right to exclude or to license foreign fishermen in the British seas. Exhibit 222. (A draft of the proclamation referred to the crown's right to exclusive fisheries as a "regality." (App. 716.) Thereafter, until necessarily diverted by the outbreak of the civil war, the navy systematically patrolled the fishing grounds, primarily in the North Sea, and required foreign fishermen to accept and to pay for licenses. Exhibit 186, pp. 24-27, 70-73; Exhibits 574, 575, 576, 577, 578, 579, 583, 605, 606, 607, 608, 676; Exhibit 679, pp. 51-52, 303; Exhibit 693, pp. 288-89, 300-03.

The Commonwealth and Protectorate governments insisted, no less than had the Stuart kings, on the ownership of the fisheries in the British seas. In 1653 the Commonwealth proposed that the individual licenses to Dutch fishermen be replaced by regular semi-annual payments by the States General of the Netherlands. Exhibit 598. The Council of State issued licenses to French fishermen in 1652, Exhibit 620, and to Swedish fishermen the following year. Exhibit 693, p. 427.

The restoration brought no change of policy regarding the fisheries in the British seas. Exhibit 693, pp. 441-45. Charles II licensed a royal fishery company as his father had done, being careful to exclude it from areas where the fisheries were "already granted appropriate or belonging to some other particular or private person or persons bodies politic or corporate." Exhibit 179, pp. 196, 200; see also Exhibit 444. Licenses were issued to the Dutch, Exhibits 587, 588, 589; to the fishermen of the Spanish Netherlands, Exhibits 591, 611, 612; and, in James II's reign, to the French. Exhibits 593, 594. Foreign fishermen not

possessing licenses were driven off. Exhibit 592; Exhibt 673, pp. 40-41 n. [c.].

We must now return to the beginning of the 17th century for a brief discussion of the "Greenland" whale fishery, which was practiced in waters far to the north of Britain, principally around the islands now called Spitzbergen, but also westwards from there as far as the coasts of Greenland itself and North America. It will be remembered (p. 39, *supra*) that the exclusive fishery in these waters fell within the charter rights of the Muscovy or Russia Company, chartered by Mary I and confirmed by act of Parliament under Elizabeth I. The English and the Dutch began whale fishing in "Greenland" waters at about the same time and each claimed an exclusive right therein—the Dutch on the ground that a Dutch admiral had discovered Spitzbergen in 1596, the English on the basis of a claim to sovereignty and possession of the Spitzbergen Islands and on the ground that English ships had first fished for whales in those waters. Exhibit 693, p. 193; Exhibit 775, pp. 43-44; Beaujon, *The History of Dutch Sea Fisheries* 465-67 (1883); Fletcher, "John Selden (Arthur of *Mare Clausum*) and His Contribution to International Law," 19 Transactions of the Grotius Society 1, 8 (1962).

The Greenland fisheries dispute occasioned Grotius' visit to England as a commissioner on the part of the States General, and according to Fletcher furnished the occasion for Selden's writing *Mare Clausum* in 1618. The controversy is of particular interest for the present proceeding in that most or all of the "Greenland" waters would not have been regarded as part of the English seas prior to the 16th century. England's claim to these fisheries on the basis of alleged sovereignty of the nearest land mass, the Spitzbergen Islands, and on the ground of discovery and initiation of the fishery there, is obviously closely analogous to the contemporaneous English assertion of sovereignty

and exclusive fishery in the waters adjacent to the English discoveries and colonies in North America. Indeed, as stated, the "Greenland" waters themselves extended to the North American coast. 2 Stock, *Proceedings and Debates of the British Parliaments Respecting North America* 40 n. 65 (1927).

In 1613 the Muscovy Company applied for and received a charter from James I specifically confirming its monopoly of "this new trade of whale-fishing," to the exclusion of both English and foreigners. Exhibit 777, p. 53. The company, when it could, cleared the whaling grounds of intruders, both English and foreign. Exhibit 775, p. 44. At times the company's income appears to have included fees from foreigners licensed to enter the whaling grounds. Exhibit 777, p. 54. The whaling rights were sold by the company in 1622 to a new enterprise known as the Greenland Adventurers. *Id.* at 58-59. The monopoly was questioned in Parliament in the 1620's as to its exclusion of other Englishmen, but was maintained nonetheless, and was enforced by the requirement and forfeiture of bonds by non-members of the company entering the Greenland whaling grounds without license. *Id.* at 70-71; Exhibit 750, pp. 81-83. The monopoly was confirmed by the navy committee of Parliament in 1645, Exhibit 777, p. 72, and again in 1657 as to the most desirable fishing grounds, though certain less desirable grounds were opened to others. *Id.* at 73-74; Exhibit 776, p. 250. The monopoly was abolished by act of Parliament in 1672, but was restored by the same authority in the reign of William III. Exhibit 777, pp. 74-75.

The Tobago Company, in the reign of Charles II, had as one of its assets two-thirds of the benefit of a patent "for taking up wrecks out of the sea and fishing for pearl and ambergris." Exhibit 778, p. 416.

Admiralty instructions during the reign of Charles I demonstrate that among the duties of the navy were not only the seizure of foreign fishing boats lacking licenses but also the enforcement of regulatory measures for the better preservation of fish, such as prohibition of trawling. Exhibit 679, pp. 51-52, 303.

Throughout the century, the navy patrolled the Enlish coast to prevent foreigners from taking any oysters or lobsters from the coastal waters. Exhibit 677, pp. 282, 289, 291, 299, 312, 313, 318, 324, 493; Exhibit 678, pp. 127-28; Exhibit 679, p. 479.

5. Legal Treatises of the Period

Most of the important writers of the period have already been discussed in connection with their general statements on sovereignty of the seas, and we need do little more than list here the principal writers who asserted and justified the crown's exclusive right to the fisheries in the British seas.

William Welwood. App. 673; Exhibit 209; Exhibit 690, pp. 174-75; Exhibit 693, pp. 352-55. Welwood justified his position not on the basis of any particular English or Scottish tradition or prescription, but on the general doctrine that coastal sovereigns have exclusive rights in the fisheries of their adjacent seas. That doctrine, in turn, he justified by what remains today the principal and most persuasive reason for the exercise of control by coastal states over marine and seabed resources: the risk of exhaustion of the resources from promiscuous and unregulated use.

Sir John Boroughs, App. 649; Exhibit 175. Boroughs, like so many others, referred to the crown's prerogatives in the English seas, including the exclusive right to the fisheries thereof, as "royalties." App. 649. Boroughs emphasized the need for jurisdiction in the seas in the sense of legislative authority, and made it clear that in his view the legislative

authority in the English seas was no less extensive than on land.

Lord Hale. Hale's work *De Jure Maris* is probably the most authoritative and most often-cited authority on the English law of fisheries and the seabed of all time. The essence of his doctrine may be briefly quoted:

> "The king's right of propriety or ownership in the sea and soil thereof is evidenced principally in these things that follow.
>
> "1st. The right of fishing in this sea and the creeks and arms thereof is originally lodged in the crown . . . .
>
> "But though the king is the owner of this great waste, and as a consequence of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty." Exhibit 194, p. 11.

See also Moore, *op. cit.* at 347, quoting Hale's draft treatise: the king may impose "restraints of fishing by proclamation upon the sea, . . . but until such inhibition it is free for every subject to fish there." Hale gives various examples of exclusive fisheries created by the crown in portions of the sea. *Ibid.*

John Selden, also, wrote at length in support of the crown ownership of the fisheries in the English seas, with primary emphasis on the crown's right to exclude or to license

foreign fishermen. Selden relied heavily on the historical evidence showing that England had maintained and exercised that right in the past, and based his position largely on a doctrine of prescription, appropriation or occupation. It was necessary for him to do this because of his insistence that the English ownership extended all the way to the coasts of the opposite countries, at least to the south and the east. Obviously no general claim of territorial waters as a necessary concomitant of the land sovereignty of any state could justify giving England the entire English Channel and North Sea and nothing to France or Holland.

In that sense Selden's doctrine, as has often been pointed out, was "extreme"; but it was not extreme in any other sense, and certainly not in its insistence that territorial waters were part of the realm and that the sovereign exercises there all the powers which he has on land. Among the writers of this period, Selden is unusual in the emphasis which he placed on prescription or appropriation. The more common tendency, and that which eventually prevailed, was to regard territorial waters as belonging to any coastal state, by virtue of its land sovereignty. It is natural, therefore, to find that those British writers who did not insist on ownership of the entire English Channel or North Sea, but who rather spoke in terms of ownership to the midpoint of those seas, or to a fixed distance (usually 100 miles), said little of appropriation and spoke much more of the doctrinal and practical reasons for territorial waters as a corollary of sovereignty and ownership of coastal land. Many writers combined the two themes: general considerations are used as the basis for a uniform belt of territorial waters which every sovereign could claim; superimposed on those considerations is the special English title based on tradition, prescription or occupation. Indeed Selden himself took this view; he asserted English sovereign rights in North American waters on the basis of discovery and symbolic acts of sovereignty over the land, and ex-

pressly denied that possession or occupation was necessary (pp. 172-74, *infra*).

Gerard Malynes. App. 663-64; Exhibit 197. Malynes affirmed the crown's ownership of the fisheries in the four seas of England, as opposed to those of the "main ocean seas." Exhibit 197, pp. 185-86, 190.

Charles Molloy. App. 850; Exhibit 726. That influential writer (see p. 68, *supra*) gave the following concise definition of a prince's rights over fisheries in his adjacent seas:

> "not only the regality of the fishing for pearl, coral, amber, etc. but likewise the advantage of all fish royal, as whales, sturgeon, etc. and not only those, but also the direction and disposal of all other fish, according as they shall seem to deserve the regards of the public." App. 852.

Sir Philip Medows. App. 668; Exhibits 202, 725. Medows relied primarily not on any prescription by England, but on the general doctrine that a coastal sovereign has, by virtue of that sovereignty, rights both of sovereignty in his adjacent seas and property in the fishing thereof. Medows defined the right to the fishery as follows:

> "All foreigners are excluded by virtue of such dominion [of the coastal sovereign] . . . from a right of fishing within those seas, without special license first obtained from the lord of the seignory, and under such conditions and considerations as he shall think fit. The reason is, because this is the patrimonial property of his crown, and the fishery is in a manner all the profit that his great sea territory yields him. The dominion of the sea, without an appropriate fishing, is as if a vineyard should be a property, but the grapes common. Or like an estate or

possession of land, vested in one, to the use of another, and such we had many here in England, till a good statute executed the possession to the use, and so conjoined what ought not to have been divided. Nor can it be alleged that a promiscuous fishing in the sea is of no damage to the proprietor, for admitting the multitude of fish to be so great, as to suffice all men's use, which is not always true, yet this will abate the price of the market for sale, nor can the fishery be farmed out, if occasion be, at so good advantage." Exhibit 202, pp. 7-9.

Henry Stubbe, Exhibit 693, pp. 496-97. Stubbe (a political rather than a legal writer), writing in 1672 under a commission from the crown, mentioned the regality of fishing for pearl, coral and amber as among the exclusive crown rights of property in the British seas.

6. Modern Commentators

No modern authority whom we have encountered has denied the crown ownership of the English sea fisheries under 17th-century English law and practice. Among the principal writers who have affirmed and documented that ownership are Fulton, Moore, Elder, Chitty, Potter and Fenn, all of whose works have frequently been cited in this proceeding.

In this proceeding, Professor Thorne, one of the witnesses for the United States, agreed that "the law of England in the 17th century was that the crown had the ownership or the exclusive right to the fisheries in the English seas." App. 550.

7. Acquiescence by Other States

In 1637 the Spanish government conceded both English sovereignty in the English seas and the crown's right to license foreign fishermen therein. App. 721. As we have already seen, nationals of many countries accepted and paid for English licenses to fish throughout the 17th century. While the Netherlands government contested the English right to exclude or to license Dutch fishermen in principle, in practice that government acquiesced in major part to the English position by agreeing to keep its fishing boats away from the coastal areas where the principal fisheries were located (p. 81, *supra*).

A number of modern writers believe that in 1636 the Dutch government purchased an exemption from licenses by paying £30,000 to the English crown. *E.g.*, La Pradelle, 5 *Revue Generale de Droit International Public* 264 (1898), reprinted in Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* 187 (1919); Colombos, *The International Law of the Sea* 55 (6th rev'd ed.); Sabine, *Report on the Principal Fisheries of the American Seas* 224 (S. Doc. No. 22, 32d Cong., 2d Sess. 1853). Though Fulton doubted this, *op. cit.* at 311, he admitted that the Dutch themselves later acknowledged having paid 20,000 or 30,000 florins. *Ibid.*

A treaty of 1656 between Sweden and England granted to Swedish subjects the liberty "to fish and catch herrings and other fish in the seas and on the coasts which are in the dominion of this [the English] republic, provided the ships employed in the fishery do not exceed a thousand in number." 4 Parry, *Consolidated Treaty Series* 127, 149.

A treaty of 1661 between Great Britain and Denmark, signed at Whitehall, gave to the subjects of each country most-favored-nation treatment with respect to fishing in the waters of the other and tributes, tolls and duties levied

thereon. 6 Parry, *Consolidated Treaty Series* 234, 247-48 (Article XIII).

C. THE ADMIRALTY JURISDICTION WAS TERRITORIAL IN THE ENGLISH SEAS, WAS AN ATTRIBUTE OF SOVEREIGNTY, AND INCLUDED JURISDICTION OVER FOREIGNERS.

1. Court Cases

It is beyond rational dispute that in the 17th century the English admiralty jurisdiction was regarded as territorial in the English seas and as an atribute of English sovereignty over those seas. The realm consisted of the bodies of counties and of the territorial sea; the common law courts had jurisdiction over the first, and the admiralty courts, in exactly the same sense, over the second. Parliament had legislative jurisdiction, and the crown executive jurisdiction, over both. The civil and criminal jurisdiction of admiralty in the English seas extended to foreigners in those seas as well as to English subjects, just as the jurisdiction of the common-law courts did on land.

These propositions are fully documented by Sir Leoline Jenkins' charges to admiralty juries which comprise Exhibit 762; excerpts are found at App. 894-903. The admiralty territorial jurisdiction is squarely based upon, and deemed coextensive with, the "sovereignty of our kings in the British ocean." App. 895. No distinction is made between English subjects and foreigners with respect to those whose activities in the English seas are to be investigated and regulated. Foreigners are singled out for special scrutiny and prosecution with respect to the crimes of fishing in the English seas without license and refusal to give the flag salute. App. 896. At App. 897-99 a clear distinction is made between the territorial jurisdiction of the admiralty in the four English seas, which is exclusive, and the non-

territorial jurisdiction over piracy anywhere in the world, which is non-exclusive. See also App. 47. At App. 899 the king's "ancient right of the flag upon his four seas" is again specified as a subject of the admiralty's territorial jurisdiction over foreigners. At App. 901-02 jurisdiction is asserted over foreign men of war breaking the king's peace within the four seas, and all these attributes of territorial jurisdiction are identified as "emanations of his majesty's sovereignty in these seas." Finally, mention is made of enforcement of the various statutes and ordinances regulating the fisheries, prohibiting or restricting certain methods of fishing, establishing seasons both for surface fish and for oysters, and prohibiting the taking of young fish. App. 903. See also O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 312 (1971).

In the nature of things the admiralty jurisdiction over foreigners was exercised only infrequently, since the English government would have no practical concern, for example, with crimes committed by foreigners against one another on foreign ships passing through the English seas. However, the available evidence is sufficient conclusively to establish that foreigners were prosecuted and convicted in admiralty, for crimes having nothing to do with piracy, when the occasion arose, and that this was considered in no sense irregular or unusual. Professor Horwitz has gleaned from Jenkins' papers one clear case, and one probable case, of prosecution of foreigners during the 17th century. App. 56-57. In addition, research commissioned by the Common Counsel States during this proceeding has unearthed hitherto unpublished documents demonstrating the indictment, trial and conviction of a number of foreigners for crimes other than piracy committed in the English seas. App. 721-38. See also 2 Yale (ed.), *Lord Nottingham's Chancery Cases* (79 Publications of the Selden Society) 464 (1961).

If Lord Cockburn had known of these documents in the 19th century, he could never have taken the position he did in his opinion in *Queen v. Keyn*. Professor Wroth cannot make the same excuse, since the documents were made available to him. His insistence on turning a blind eye to the evidence (Tr. 2786-88), and maintaining in spite of everything that he knew of nothing to show that the admiralty jurisdiction was ever exercised over foreigners, was hardly calculated to enhance respect for his testimony in general.[19]

2. Acts of Parliament

It does not appear that there were any acts of the English Parliament during the 17th century dealing with the admiralty jurisdiction.

However, in 1681, the Scottish Parliament enacted a jurisdictional statute making it clear that as to maritime causes, whether civil or criminal, the high admiral had jurisdiction over both "natives and strangers" in the seas "within this realm." App. 55, 647-48.

3. Other Official Pronouncements and Acts of State

The forms of admiralty commissions make the territorial nature of the jurisdiction clear. The title "admiral of the narrow seas" was used during Charles I's reign. Exhibit 679, p. 51. The record contains a number of admiralty commissions from later in the century, conveying jurisdiction over "our seas" and specifying particular British possessions, including those in North America, to whose seas the jurisdiction also extended. Exhibits 641, 642.

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[19]Plaintiff continues to maintain a deafening silence concerning these conclusive records. Plaintiff's discussion of the evidence for criminal admiralty jurisdiction over foreigners in the 17th century (Pl. Br. 71-77) simply ignores their existence.

Evidence in the record confirms that throughout the century the duties of the admiralty included the exclusion of unlicensed foreign fishermen from the British seas, the enforcement of regulatory measures with respect to both surface and sedentary fisheries against subjects and foreigners alike, and the policing of improper conduct by foreign ships, including warships, in English waters. App. 776; Exhibits 676, 677, 678, 679.

4. Legal Treatises of the Period

Lord Coke plainly believed that the admiralty jurisdiction was territorial, since in the fourth part of his *Institutes* he set forth the document *De Superioritate Maris* and accepted it as authoritative. App. 656. It cannot be denied that that document states a territorial and exclusive view of the English admiralty jurisdiction in the English seas, since the whole question at issue was whether a French admiral had the right to exercise any jurisdiction there. App. 650-55. See also Exhibit 160, p. 155.

Hale plainly regarded the admiralty jurisdiction as territorial: "the narrow sea, adjoining to the coast of England, is part of the waste and demesnes and dominions of the king of England, whether it lie within the body of any county or not"; "in this sea the king of England hath a double right, viz. a right of jurisdiction which he ordinarly exerciseth by his admiral, and a right of propriety or ownership." Exhibit 194, p. 10. See also Exhibit 160, pp. 86-88, 147.

The United States will presumably not deny that Selden viewed the admiralty jurisdiction as territorial, exclusive and extending to foreigners; so we shall refrain from documenting the point unless it should be denied.

John Exton, who was an admiralty judge, regarded the admiralty jurisdiction, civil and criminal, over the British

seas as identical to the jurisdiction of land governors over the land. Exhibit 685, p. 10; App. 46.

Godolphin, also admiralty judge, regarded the admiralty jurisdiction as one of the *regalia* (Exhibit 695, p. 38), and described its subject matter at considerable length (*id.* at 43-48). He declared that the jurisdiction was both civil and criminal (*id.* at 48) and extended to foreigners in the British seas (*ibid.*) and that England possessed legislative as well as judicial and executive authority over the British seas (*id.* at 57).

Molloy declared, "as it is incumbent on a prince duly to execute justice in his kingdoms by land, so the sea being his territory, it is requisite and a necessary effect of his dominion, that he cause justice to be administered in case of maritime delinquency." App. 853.

Molloy specified that, while piracy committed in seas belonging to no one could be punished by anyone, piracy committed in the English seas could be punished only by the crown of England. App. 850.

Medows, likewise, regarded the crown as possessing "the sole marine jurisdiction within those seas", that is, "the seas of England." Exhibit 202, p. 7.

Zouche, admiralty judge, made a clear distinction between the territorial jurisdiction of admiralty in the English seas and the nonterritorial jurisdiction over English subjects elsewhere: the jurisdiction "over the seas of England, and Ireland, and the dominions and isles of the same . . . are limited and determined in those seas," while the jurisdiction over English seamen and over persons "hath no bounds, but extends to the Mediterranean, African and Indian seas, or any others far remote." App. 675.

Even plaintiff's witness Professor Wroth admitted at one point during cross-examination, Tr. 2757-58, that the admiralty jurisdiction was regarded as territorial, each sovereign exercising it in his own sea.

Plaintiff conceded in its Reply Brief to the Master (P.R.B.) that "the admiral had at least a limited jurisdiction over foreigners," but claims that it "existed . . . only for the protection of British subjects and property, including the keeping of the peace on British ships, and to prevent piracy" (P.R.B. pp. 25-26). Plaintiff did not say in which of these categories it proposed to place our Exhibits 621 through 629, which show the conviction of foreigners for failure to give the flag salute. Obviously plaintiff's categories cannot encompass such an offense, which (as the exhibits make very clear) was punished in England law as a matter of principle, as an insistence on foreign recognition of English sovereignty in the English seas.

Not one of the authorities cited at P.R.B. p. 26 contains a word which, as plaintiff alleges, supports the proposition that English maritime sovereignty "did not embrace matters of exclusively foreign concern," whatever that may mean. Jenkins, Exhibit 762, p. xc, defines the purpose of the admiralty criminal jurisdiction as to punish offenses "either against the dignity of the king, against the peace and good government of the kingdom, or against the rights and security of the subject." Molloy, App. 853, says that the prince exacts justice on the sea because it is his territory, and he has a general duty to exact justice in all his territories, whether land or sea. An act of piracy by, say, a French against a Spanish ship would be a matter "of exclusively foreign concern"; yet even plaintiff concedes that admiralty would have punished such a crime. Plaintiff's point thus seems to be limited to the fact that there is no recorded case of admiralty's taking jurisdiction over a crime by one foreigner against another involving only one

foreign ship, not two. While the formulations of the admiralty jurisdiction, and the basis therefor, cited by plaintiff itself would probably warrant the taking of such jurisdiction.[20] It is hardly surprising that this rarely if ever occurred. The admirals would be most unlikely even to know of the existence of such a crime. Does plaintiff seriously mean to infer that admiralty would have declined to take jurisdiction of the extraction of minerals by foreign ships from the seabed of the English seas? Even on plaintiff's theory, such conduct is hardly "of exclusively foreign concern."

D. THE CROWN OWNED THE SEABED AND SUBSOIL OF THE ENGLISH SEAS AND THE RESOURCES THEREOF.

1. Court Cases

In the *Case of the Royal Fishery of the Banne* in 1610, England's highest court, the Privy Council, took it as established law that the crown owned the English seas and

[20]There are, however, at least two theories on which admiralty might have refused such jurisdiction even in principle, without any inconsistency with the established view that the seas were within the realm. One such theory is that the right of innocent passage through territorial waters entails immunity from such jurisdiction as long as the acts in question have no effect outside the ship. The other theory is that a ship is part of the territory of the sovereign of its flag, and carries its own territoriality with it, resulting in immunity from the jurisdiction of the state through whose territorial waters it passes — again, so long as no effects outside the ship are produced. Both these theories are good law today; we have not investigated the extent to which they were known and accepted prior to and during the 17th century.

Admiralty demonstrably exercised jurisdiction within the English seas of civil cases involving collisions between two foreign ships, with no English involvement whatever except for the location of the incident. See The Johann Friederich (1839), 1 Robinson, Cases in the High Court of Admiralty 35, 40 (1842), where such jurisdiction was founded, among other reasons, on the fact "that the collision took place on the high seas close to the English coast."

the seabed thereof as property, and reasoned from that established law that the crown also owned the waters of navigable rivers and the soil thereof.[21] The court declared as follows:

> "The reason for which the king hath an interest in such navigable river, so high as the sea flows and ebbs in it, is, because such river participates of the nature of the sea, and is said to be a branch of the sea so far as it flows; *22 Ass. p. 93. 8 Ed. 2. Fitz. Coron. 399.* and the *sea is not only under the dominion* of the king (as is said *6 R. 2. Fitz. Protect. 46. The sea is of the ligeance of the king as of his Crown* of England;) *but it is also his proper inheritance; and therefore the king* shall have the land *which is gained out of the sea. Dyer 15 Eliz. 226 b. 22 Ass. p. 93.* Also the king shall have the grand fishes of the sea, whales and sturgeons, &c. which are royal fishes, and no subject can have them without the king's special grant, *Praer. reg. c.* 11. *Stamf.* 37, 38. *Bract. lib.* 3. c. 3. 39 *Ed.* 3. 35. a. and the king shall have wild swans, as royal fowls, on the sea and branches of it; the *case of swans.* 7 Co. *So* wreck of the sea is a royal perquisite, 5 *Co.* 107. Sir *Hen. Constable's* case. And for this reason before the statute of 18 *Ed.* 3. no subject could pass over the sea, without the king's special license; but there it is enacted, that the sea shall be open to all merchants. And all port and havens, which are *ostia et januae regni,* appertain to the king, because he is *custos totius regni;* and F.N.B. 113 a. the king ought of right to save and defend his realm, as well against the sea, as against his enemies. And that the king hath the same prerogative and in-

[21] It is striking that Plaintiff's Brief never mentions this case.

terest in the branches of the sea and navigable rivers, so high as the sea flows and ebbs in them, which he hath *in alto mari,* as manifest by several authorities and records." Exhibit 157, p. 38.

In the case of *Attorney General v. Philpott,* decided by the Exchequer bench in 1632, the doctrine of the *Banne* case was repeated and confirmed.[22] The issue concerned certain houses and wharves erected between high- and low-water marks on the River Thames in London. It therefore dealt with the foreshore; and Moore, who opposed the *prima facie* theory of the foreshore, criticised the decision and pointed out certain differences or doubts among the judges. Moore, *op. cit.* at 265-66. Neither Moore nor any of the judges, however, expressed any doubt concerning the crown's ownership of the soil of the sea, which was the first premise from which the court's theory of the case proceeded.

The Attorney General's information claimed the Thames as being an arm of the sea and a navigable royal port, and reasoned from the crown's ownership of the river as an arm of the sea to the then-controversial theory that the crown also owned the soil of the foreshore. Exhibit 728, p. 262. The court held unanimously in favor of the crown. *Id.* at 263. The opinion of Baron Denham followed precisely the reasoning of the Privy Council in the *Banne* case: "The king has interest in a navigable river as high as the sea flows and re-flows in it, and the reason is, because such river partakes of the nature of the sea, and is called an arm of the sea as high as it flows, and the king has the sole interest in the soil of such rivers." *Id.* at 264. Davenport, Chief Baron, added that "if an island riseth in the sea, it does not belong to the occupier, but to the king," *ibid.*, showing his

[22] Professor Thorne was obviously confused about this case at Tr. 2676-79.

agreement with Denham that the crown owned the bed of the English seas and *therefore* owned the soil of navigable rivers. The decree in the case is set forth in full at Moore, *op. cit.* at 896-907. It is a clear decree in favor of the crown, and holds that the land in dispute belonged to the king "as parcel of the same port [of London] and his inheritance of the crown of England." *Id.* at 902. The court's holding extended to "any navigable river or port," *ibid.;* and as we have seen, the opinions made it clear that the crown owned the soil of navigable rivers by analogy to its undoubted ownership of the bed of the sea.

The case of *Rex v. Oldsworth,* decided by the Exchequer Court in 1637, followed the law declared in the *Banne* and *Philpott* cases. At issue was the ownership, as between the crown and the owners of a coastal manor, of derelict lands left by the sea adjacent to the manor. The owners claimed these lands by custom and by prescription. Moore, *op. cit.* at 292 *et seq.* The Attorney General's argument was straightforward: the crown owns the British seas and the soil thereof, and since the crown owned the land in dispute when it was under the sea, it still owns it after its emergence therefrom. *Id.* at 295-300. The Attorney General contended that prescription does not run against the crown. *Id.* at 299-300. While he argued that the crown owned the seabed as a part of the prerogative, he plainly regarded the prerogative as a part of the common law, and dealt with the case as a perfectly conventional dispute over title to real property, to be governed by the common law as opposed, for example, to local custom. *Ibid.*

The court held unanimously in favor of the crown. Baron Weston's opinion shows that the defendants had relied on Bracton, Britton and Justinian as authorities for the freedom of the seas; but Weston held that those Roman-law authorities were overcome by Selden's doctrine and by the established English law that the sea is not free for

fishing to foreigners. Disagreeing with the Attorney General, Weston held that in principle prescription might lie against the king, but that facts sufficient to show prescription in the case at bar had not been made out. Weston regarded the *Philpott* case as establishing that the crown owned submerged land in ports (actually the holding, or at least the *ratio decidendi*, was broader; see pp. 100-01, *supra*) and reasoned from that holding that the king likewise owns submerged lands outside ports, since he "can increase or diminish the ports at his pleasure." *Id.* at 300.

Baron Trevor held in a straightforward fashion that submerged lands belong to the king while still under water, and that nothing had been shown sufficient to take the title from him when the lands at issue emerged from the water. Trevor's view is clear that the crown's ownership is part of the common law ("our law," *id.* at 302); he is equally clear that the king's ownership of submerged land is part of the prerogative. *Ibid.*

Professor Thorne indicated considerable confusion about the *Oldsworth* case. He asserted (Tr. 2453-54) that Baron Weston must have believed that the property was ownerless before its emergence from the sea, and gives as his reason that Weston discussed the question of prescription. This is an utter *non sequitur;* see Tr. 2715-20. As Weston himself pointed out, prescription is a title which overcomes a pre-existing title; Weston's words were: "prescription . . . ought to lie [if it lies at all] against the king, and this plainly shews that, if such prescription was not [made out in fact], the king is to have the property." Moore, *op. cit.* at 300.

Professor Thorne repeatedly argued (*e.g.*, Tr. 2720) that anyone who regarded derelict lands as belonging to the crown by the prerogative must necessarily believe that the lands were ownerless while still under water. This contention is fully refuted by Baron Trevor's opinion, which

declared both that crown ownership was by the prerogative and that "as the land was in the king when it was parcel of the sea, now, when it is made parcel of the dry land, it shall not be taken from him." Moore, *op. cit.* at 303. Professor Thorne is on completely unsound ground in apparently assuming that, merely because things subject to such admiralty droits as flotsam were regarded as ownerless until the king's ownership attached, the same was true of *everything* which the king owned by his prerogative. An obvious example to the contrary—and one which is mentioned by Baron Trevor, *id.* at 302, as analogous to the crown ownership of submerged lands—is the case of royal mines, which were never "ownerless."

We submit, therefore, that the contention repeatedly made by both Professors Thorne and Wroth, that the "prerogative" theory of crown ownership of derelict lands is inconsistent with crown ownership of the bed of the sea, is wholly unsound and quite foreign to the legal thinking of the 17th century. In any event, even were the professors correct, their argument would avail the United States nothing in this proceeding. It is conceded by all sides that the crown's ownership attached, at the latest, as soon as the land or anything of value therefrom emerged or was taken from the sea; and that is entirely adequate to sustain the position of the Common Counsel States in this proceeding.

In the *Ship Money Case (Rex v. Hampden)*, several of the arguments and opinions mentioned the king's ownership in property of the English seas, and the soil and profits thereof. See pp. 49-54, *supra*.

In the case of *Johnson v. Barrett*, decided by the Court of King's Bench in 1646, it was disputed whether the crown owned a dock erected on the foreshore, "but it was clearly agreed that if it were erected beneath the low-water mark, then it belonged to the king." Moore, *op. cit.* at 310-11; App. 92-93.

As Professor Thorne admitted (Tr. 2681-82), in those cases relating to the foreshore or to derelict lands in which the crown was unsuccessful the winning argument against the crown was always based on either prescription, custom or a specific title derived from the crown by grant. (An example is the case involving the Lord Berkeley; see Moore, *op. cit.* at 306-09.) Professor Thorne conceded that none of these cases involved a denial that the king owned the seabed of the English seas. Tr. 2681-82.

In the case of *Whitaker v. Wise*, in 1671, the crown's lessee prevailed in a case regarding the ownership of land gained from the sea. Moore, *op. cit.* at 415-16. The court regarded the *Philpott* case, pp. 100-01, *supra*, as authoritative.

In *Bulstrode v. Hall*, in 1674, a King's Bench case, "it was frequently affirmed, and no one denied, that the soil of all rivers as high as the sea ebbs and flows as in the king and not in the lords of manors etc. without prescription." 82 *English Reports* 1024 (1908).

In *Attorney General v. Farmer*, in 1676, the defendant claimed derelict lands on the basis of a royal grant of the adjacent manor and of all grounds "which hereafter should be recovered from the sea." Moore, *op. cit.* at 417. Both parties agreed that the soil of the sea belonged to the king while it was still covered with water. Exhibit 159; App. 40-41. The Court of King's Bench held for the crown on the ground that the words of the grant were too vague. Moore, *op. cit.* at 417. Professor Thorne contends that in this case the crown argued that the king did not own the land at the time of the grant. Tr. 2459. This is questionable: the crown expressly argued that "the sea is the soil of the king," Exhibit 159. In the alternative the crown argued—and this is the argument which Professor Thorne seems to be referring to—that "it is only a possibility, and therefore void; as if the King grants land when it shall escheat, it is a

void grant." Exhibit 159. It seems clear enough that this argument referred to the language of the grant—land "which hereafter should be recovered from the sea"—as an attempt to create "a freehold to commence in futuro, which the law permits not." Exhibit 159. So construed, the argument is not at all inconsistent with the view that the crown owned the land while it was still under water, and could have conveyed it by a properly worded grant. In any event, if the crown did argue as professor Thorne believes it did, the argument was plainly wrong: "it is to be observed that the argument that the King had not the land in him to grant was untrue, for he has the soil of the sea by his prerogative, and may grant it to a subject." Moore, *op. cit.* at 417-18.

No English case which we have encountered either before, during or after the 17th century has ever made any distinction with respect to ownership (or susceptibility to ownership) between the soil under the open sea and the soil under the arms of the sea, bays and tidal rivers. The English doctrine has always been that these waters, and the soil under them, are identical in their legal nature: they all partake of the nature of the sea, which is defined as all waters where the tides rise and ebb. Thus in English law, the sea extends juridically from the outmost bounds of English waters, as they have been defined from time to time, to the point on rivers where any perceptible tide disappears. And as to all these tidal waters, the law of England has at all times been that the ownership of the soil under them is vested in the crown by the common law except where a subject may claim title by grant from or prescription against the crown. No soil under any tidal waters within the realm of England, including its territorial seas, has ever been regarded in English law as ownerless or unsusceptible of ownership.

2. Other Official Pronouncements and Acts of State

The Reglement for Preventing Abuses in and About the Narrow Seas and Coasts, promulgated by Charles I in 1634, asserted the "property" of the crown in the four English seas. Exhibit 569, pp. 759, 760.

Professor Thorne conceded that the crown's exclusive ownership, as against foreigners, in the English seas extended both to the sedentary fisheries thereof and to the mineral resources, and that any English court would have so held if a case had come before it. App. 551-54. This concession is entirely adequate to establish the position of the Common Counsel States in the present proceeding, without regard to the academic distinction Professor Thorne seeks to draw between crown ownership of the seabed while still covered with water and the undoubted crown ownership—which no one ever questioned—of anything of value that emerged or was extracted therefrom.

There is no doubt that, throughout the 17th century, the crown claimed title to the soil of lands reclaimed from, or left derelict by, the English seas, and habitually granted or sold such lands to others. App. 41-42; Exhibits 215, 216, 217, 218, 219, 220, 230, 231, 234, 644, 645, 647, 648, 649, 650, 651, 652, 653, 654, 655; Moore, *op. cit.* at 420-26. Exclusive oyster fisheries in the sea were likewise granted (Exhibits 226, 227; Moore, *op. cit.* at 416-17, 418 n. 1). as were salt pans, probably on the foreshore. Exhibit 777, pp. 468-70.

The deed of Dunkirk by Charles II to France in 1662 included the submerged lands in the Channel off the coast. App. 905.

"In 1669 the Earl of Bath and others petitioned the king for a grant of all lands overflowed by the sea in the counties of Denbigh and Flint, *with all mines and minerals which*

shall be found there . . . . " Moore, *op. cit.* at 415. (Emphasis added.)

Undersea mining for coal was already well known and of practical importance in Britain by the early 17th century, when Sir George Bruce's mines extended for a mile under the Firth of Forth. The undersea mines at Whitehaven, in Cumberland, owned by the Lowther family, were important by the early 18th century. The Lowthers had grants from the crown to the foreshore of their Whitehaven property, obtained during the reign of Charles II. App. 661-63; Exhibits 190, 195, 196; Moore, *op. cit.* at 415, 418. Plaintiff's argument (Pl. Br. 96-97) that these mining activities took place in the subsoil of "inland waters" is far from the mark, since English law never made any distinction with respect to property rights between such waters and the open sea. Moreover, to regard such major arms of the sea as the Firth of Forth and Solway Firth as inland waters, as contemporary international law may or may not do, is wholly anachronistic when applied to 17th-century Britain, which knew nothing of such a concept.

Among the known, exploited resources of the English coasts and coastal waters in 1700 were amber, ambergris, copperice, jet, pearls, fine pebbles and flint. Exhibit 460, p. 373.

About 1666 an island rose in the sea at the mouth of the River Humber. Ownership was asserted and exercised by the crown, which leased the property out to others for many years. This "is a clear instance of the unquestioned right of the Crown to islands rising in the sea," which of course was a corollary of the crown's ownership of the seabed while still under water. Moore, *op. cit.* at 414.

3. Legal Treatises of the Period

Robert Callis, writing in 1622, had no doubt that the king owned in property both the water and the soil of the

English seas, and had the exclusive right to the profits therefrom whether real or personal, and that this ownership and right were part of the common law of England. App. 777-78. The king's ownership "must needs be by the common law of England; for no law gives the king any soil, but only the common law of England." App. 780. Callis repeatedly affirmed, *e.g.*, App. 782, that the seabed "was the king's when it was covered with waters."

Plaintiff's witness Professor Thorne argued (Tr. 2458) that Callis did not really believe this, because he regarded it as "very disputable whether grounds before they be relinquished by the sea, may be gained by charter and grant from the crown." App. 783; see also Tr. 2721-25. Callis immediately went on to resolve his doubt: "I suppose they may." Whatever the reason for the doubt, it cannot be the one Professor Thorne advances, in view of Callis' repeated affirmation—with no doubt expressed—that the king *does* own the bed of the sea. The probable reason for the doubt is that Callis questioned whether an ordinary subject could hold title to submerged lands;[23] and it is significant that Callis immediately goes on to affirm that a palatine can hold such ownership. App. 783. It also seems likely that Callis' skepticism concerning title in subjects to submerged lands based on "charter and grant" was related to the legal situation of the time, when subjects were habitually relying on fictitious, hypothetical or "presumed" grants in attempts, often successful, to defeat the crown's title. In any event, there is no way to impeach the express authority of

[23]That this was what was on Callis' mind is further suggested by Exhibit 194, pp. 31-32, where Hale deals with the question of whether an ordinary subject could possess a proprietary interest in the sea. Hale's opinion is that in general he cannot, because he does not have the type of power necessary to exercise such rights of ownership, but that he may acquire and hold title to a particular limited part of the seabed contiguous to the shore.

Callis for the ownership by the crown of the seabed and the English seas and of the sedentary fisheries and mineral resources thereof.

Sir John Boroughs maintained that the king has rights of ownership in the English seas extending to all things floating on the water or lying on the soil thereof. App. 650.

Selden, of course, held that the crown owned the seabed of the English seas, and made specific reference to sedentary fisheries, pearls, coral and mineral resources of the seabed as among the subjects of crown ownership. App. 35, 670-71; Exhibit 739, pp. 73, 77; Fulton, *op. cit.* at 372. He adhered to the conventional terminology in referring to the crown's ownership of the sea and seabed as among the royalties or *regalia. Mare Clausum*, p. 176. Selden sounds very modern when he contends that the crown must have such ownership because of the importance of these resources to the national economy and because of their obviously exhaustible character. The arguments in favor of control by the adjacent coastal sovereign of the resources of the continental shelf have not changed substantially in the three and a half centuries since Selden wrote.

Lord Hale's *De Jure Maris* is beyond question the best-known and most frequently cited work of all time on the English common law of the seashore and seabed. Hale is unequivocal that by the common law the soil of the seabed of the English seas belongs in property to the crown. Exhibit 194, pp. 11, 14, 17, 31. For this doctrine Hale cites many cases and other authorities going far back into English history. Hale plainly regards the crown's *prima facie* ownership as relatively non-controversial, and devotes most of his attention to the highly controversial questions of whether and how a subject claiming ownership of derelict lands or the foreshore may overcome the crown's *prima facie* title by grant, prescription or custom. Hale freely concedes the possibility of prescription against the king; and

the fact that he endorses both prescription and the crown's title to land while still under water is a further refutation of Professor Thorne's theory that anyone who allowed prescription must have believed that submerged lands were ownerless until they were uncovered by the waters.

Professor Thorne contended (Tr. 2453) that at one time Hale regarded the ownership of the seabed by the crown as doubtful, though he concedes that Hale resolved any such doubts in favor of the crown. Tr. 2453-57. Professor Thorne relied on a passage from a Hale manuscript set forth by Moore; *op. cit.* at pp. 357-69. The passage relied on by Professor Thorne reads in full as follows:

> "Because as the King hath right of jurisdiction or dominion of so much at least of the sea as adjoins to the British coast nearer than to any foreign coast: which appears by *Belknap*, 6 R. 2. *protection* 46; so as soon as any matter of profit happens upon or by reason of the said sea capable of propriety, it doth presently belong to the King unless some other better title doth interpose: such are wrecks, floatsam, etc. *Insulae natae in mari*, etc.; therefore though the King cannot have propriety in the water, yet when any thing therein emergeth that it is capable of propriety it is the King's as aforesaid: The sea is the King's royal waste *de communi jure*. But to leave that doubtful question whether the soil of the sea by the King's *aqua marina adhuc coopertum*." Moore, *op. cit.* at 362.

The first thing to be said about this passage is that, even if it, as interpreted by Professor Thorne, represented Hale's final view (which clearly it did not), it would avail the United States nothing in this proceeding, since crown ownership of anything emerging or taken from the sea or seabed which is capable of profit is wholly adequate to sustain the Common Counsel States' position.

Secondly, it seems unlikely that Hale was in this passage expressing a doubt which he himself entertained. A great deal of the treatise is devoted to analyzing and refuting the old Roman-law doctrine, of which Hale was fully aware, that the sea and seabed were insusceptible of ownership. It seems probable that in the passage just set forth Hale was using "doubtful" as meaning "controversial," and that those on the other side of the controversy were the old civil lawyers of prior centuries, not anyone either making, declaring or interpreting law in 17th-century England.

Moreover, as neither Professor Thorne nor indeed Moore seems to appreciate, a reading of the Hale manuscript or manuscripts in question makes it plain that they consist of a number of different drafts on the same subject-matter, all of which were later superseded by *De Jure Maris*. The manuscripts contain two other versions of the passage on which Professor Thorne relies, and both of those versions without question confirm the crown's ownership of the seabed while it is still under water. These two alternate versions are as follows:

> "Because the sea, at least so much thereof as adjoins nearer to our coast than to any other foreign coast: as it is within the king's jurisdiction, which amongst other evidences thereof appears by the book 6 R. 2, *protection* 46, where Belknap affirms the sea to be of the legiance of the king as of his crown of England, so likewise it is the king's in propriety as his royal waste, and therefore he hath those *bona caduca* or *vacantia, as flotsam* etc., partly in respect of the right of property which he hath in the soil underneath the water; and therefore questionless the islands near adjoining to our coast are parcel of the king's inheritance, as being part of that great royal waste covered with the British Ocean: and no more evident right

can there be of ownership or propriety than to be master of common right of such profits as any way the sea adjoining yields." Moore, *op. cit.* at 358.

* * *

"As touching the right of the sea shore and *jus alluvionis et maritima sinc fluvialia incrementa:* I conceive that by the common positive law of this kingdom they belong to the king as a part of his prerogative: my reasons are these as well in propriety as jurisdictions.

"1. The narrow seas, or at least so much thereof as adjoins to the English shore, is within the king's jurisdiction or royalty, 6 R. 2, *protect.* 46, etc.: and likewise in right of propriety; for although the use of the sea be common, yet the propriety thereof belongs to the king as a royal waste: which is the reason that as well all the *bona vacantia* upon the seas belong to the king as the right of his admiral jurisdiction, so likewise islands in the sea, which although by civil law *fiunt occupantis,* yet in our law they are annexed in point of interest to the crown, who is thereof presently in possession, and so prevents any right to be acquired *per occupationem.*

"2. All rights to any land in this kingdom depends upon mediate or immediate tenure of the king: therefore this *jus acquisitum per alluvionem,* if it be not otherwise derived out of him by some sufficient title, it is part of his waste and inheritance." Moore, *op. cit.* at 367-68.

Comparison of these two texts and that quoted by Professor Thorne leaves no doubt that all three are drafts or versions of the same passage. In the manuscripts as published by Moore, one of these appears before, and the other after, the version on which Professor Thorne relies.

The order in which these drafts was written is not known, but their language indicates that if Hale ever did have a doubt as to the crown's ownership of the seabed, it could not have endured for very long. It seems much more probable, as suggested above, that the "doubt" referred to was that of the archaic Roman lawyers, not of Hale himself. Finally, all this is academic since at no time was there ever any version of Hale's position which affords the United States any comfort in the present proceeding.

In the version from which the above quotation from p. 358 of Moore is taken, which affirms crown ownership of the seabed, Hale goes on, as he does in his final product *De Jure Maris*, immediately to affirm that prescription may lie against the crown, thus once again refuting Professor Thorne's notion that crown ownership and prescription are incompatible. It is also notable that, in the above quotation from pp. 367-68 of Moore, Hale combines the "common positive law," the prerogative, and crown ownership of the seabed, thus refuting Professor Thorne's allegations that the common law and the prerogative were regarded as distinct theories or bases for the crown's ownership, and that reliance on the prerogative necessarily implied that the bed of the sea was "ownerless."

Other points in his manuscripts at which Hale refers to the crown ownership of the seabed are published in Moore, *op. cit.* at 344, 347 and 357. At p. 321, in discussing ports, Hale declares that they are among the *regalia*, and establishes that they may be created by the king by proclamation—thus confirming Baron Weston's argument regarding ports in the *Oldsworth* case, p. 102, *supra*.

Professor Thorne testified (Tr. 2461) that in 1667 Hale "in effect rejected" the doctrine of crown ownership of the seabed while still under water. On cross-examination, Tr. 2728-31, Professor Thorne was compelled to withdraw that opinion, which is wholly without foundation. The statement

by Hale in 1667, as Professor Thorne finally conceded, questioned only the equity and practicality of rigorous crown enforcement of its right to derelict lands which had long been in the possession of the owners of the adjacent coastal properties. It bears repeating one last time that, while there was much controversy concerning the tests of adequacy for a claim of prescription or custom to overcome the crown's *prima facie* title to derelict lands, no one questioned the law that that title was indeed original and *prima facie*, and certainly no one questioned the crown's exclusive right to the resources of the sea and the seabed.

Molloy affirmed crown ownership of sedentary and seabed fisheries such as those for pearl, coral and amber, and expressly referred to them as a "regality." App. 852.

Chief Justice Rolle, in his *Abridgement*, declared that "the English sea and channels belong to the king; and he hath a property in the soil, having never distributed them out to his subjects." U.S. Exhibit 9, p. 47.

The opinion of Sir Henry Spelman, writing prior to 1643, was to the same effect. Exhibit 207, p. 229; App. 45.

William Sheppard's *Grand Abridgement of the Common and Statute Law of England* (1675) held that the king "not only as to *protection*, but to *propriety*, is said to be lord" of the four English seas; "the soil, banks and shores" of "the sea and rivers" belong to the crown in property. Quoted in Jerwood, *Dissertation on the Rights to the Sea Shores* 43-44 (1850).

4. Modern Commentators and Judicial Decisions

Fulton recognizes that ownership by the crown of the sea and seabed became part of English law in the 16th and 17th centuries, though he believed that was an innovation dating from Diggs' time. Exhibit 693, pp. 361-62.

Moore likewise agreed that the crown's ownership was and is part of English law. Exhibit 728, pp. xxviii, xxxii-iii; Exhibit 729, p. 14.

Robert Hall, an authoritative 19th-century English writer, set forth the doctrine of crown ownership of the seabed with great explicitness, and regarded it as unchanged to his day. Hall, "An Essay on the Rights of the Crown," Exhibit 449; republished at Exhibit 728, pp. 668-73; see App. 855-62 for selections. Jerwood's *Dissertation on the Rights to the Sea Shores* (1850) is to the same effect. Jerwood regarded the *Banne* case as authoritative, and pointed out that it had been cited with approval in at least one 19th-century judicial opinion. *Id.* at 60-61. *Accord*, Woolrych, *Treatise on the Law of Waters* 19-29 (1830).

Fenn did not address himself to the question of title to the seabed in 17th-century English law. Fenn's point is that, even in countries where the old civil-law tradition of ownerlessness *ab initio* survived, it was agreed that the crown has the power to grant exclusive rights of exploitation of the resources of the sea and seabed. Exhibit 690, p. 122. Professor Thorne concurred. App. 545.

Modern judicial authorities, in this country as well as in England, have affirmed the crown's ownership of the seabed, both anciently and as still in existence; many of them have recognized Hale as the primary authority on the law of England on the ownership of submerged lands and have cited his views on the crown's ownership of the seabed with approval. *E.g.*, *Shively v. Bowlby*, 152 U.S. 1, 11 (1894), *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 412 (1842); *Illinois Central R. R. v. Illinois*, 146 U.S. 387, 458 (1892); *New York v. New York & S.I. Ferry Co.*, 68 N.Y. 71, 76 (1877); *Gough v. Bell*, 22 N.J.L. (2 Zab.) 441, 445 (1850); *Narragansett Real Estate Co. v. McKenzie*, 82 Atl. 804, 810 (R.I. 1912); *New York, N.H. & H.R.R. v. Horgan*, 56 Atl. 179 (R.I. 1903); *Armour & Co. v. Newport*, 110 Atl. 645

(R.I. 1920); *Simons v. French*, 25 Conn. 345, 351 (1856); *Furman v. City of New York*, 7 N.Y. Sup. Ct. 16, 33 (1851); *Dunham v. Lamphere*, 3 Gray 268 (Mass. 1855); *Rogers v. Jones*, 1 Wend. 237 (N.Y. 1828); see English cases cited at Jerwood, *Dissertation on the Rights to the Sea Shores* 66-67, 70, 95-96, 118-119 (1850), and O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 323 n. 3 (1971). The following is typical:

> "Most of the English colonies had a similar origin in the charter of the sovereign, which granted not only the title to the soil, but the powers of government, and, as incident thereto, the right of the sovereign over the sea shores, and those powers denominated *regalia*. The nature and extent of these grants, both of property and powers, have been held to be regulated by the common law of England, which the English emigrants claimed as their birthright, and brought with them. This introduced and established the common law of England, as regulating the relative rights of the government and people in this country to the sea and sea shores. The effect of this charter was, to grant to the Governor and Company, as a body, the *jura regalia* or prerogative rights of the crown, to be held for the Colony, as the crown held them for the realm of England; and also the ordinary right of property in the soil, to be held and granted on the liberal tenure of free and common socage, as private rights in real estate are held at common law. Martin v. Waddell, 16 Pet. 367. The same rule, substantially, was established in all the colonial governments, the authorities for which, we think, are too numerous and uniform to require citation.
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> * * *

"We had considered it settled beyond controversy that, by the common law of England, the right of soil, not only in the sea, the *fundus maris*, was in the king, but also in the sea shore, the land between high and low water mark . . . .

* * *

"[A]t the time of the granting of the colony charters herein before stated, the king held the sea shores as well as the land under the sea . . . ." *Commonwealth v. Roxbury*, 75 Mass. (9 Gray) 451, 481-82, 483 (1857) (Shaw, C.J.).

For a succinct summary of Hale's views, regarded as authoritative in the 19th century, see the Hargrave and Butler edition (1823) of *Coke on Littleton*, Exhibit 448, n.

Joseph K. Angell, the leading American authority on the law of waters in the early 19th century, believed it beyond question that under English law the crown owned in property the soil of the sea adjoining the English coasts. Among many other authorities, Angell relied on the *Case of the Royal Fishery of the River Banne* as determinative. Angell, *The Right of Property in Tide Waters* 18 (1826).

O'Connell writes: "that the Crown possessed the coastal sea as royal waste in the seventeenth century is beyond question . . . ." *Op. cit.* at 381. *Accord*, Wait, "Supplementary History of Title of Massachusetts to Submerged Sea Lands," 36 Mass. L.Q. 17, 20-21 (1951).

E. THE FLAG SALUTE WAS INSISTED UPON AS AN ATTRIBUTE OF ENGLISH SOVEREIGNTY IN THE ENGLISH SEAS.

1. Court Cases

The record demonstrates that the English courts enforced the duty of the flag salute by foreign ships to English

warships in the English seas, and that the flag salute was judicially regarded expressly as an attribute of the sovereignty of the English crown in the English seas as part of the realm. App. 721-38, 896, 899-900; Exhibit 211, p. 708; Exhibits 621 through 629; Fulton, *op. cit.* at 512-13; Colombos, *op. cit.* at 52; 1 Marsden, *Law and Custom of the Sea* 509-10 (1915).

2. Acts of Parliament

In 1650 the Council of State directed the admiralty to enforce the flag salute as an attribute of the English "dominion of these seas." Exhibit 224.

3. Legal Opinions

At the request of Charles II, Judge Jenkins gave an opinion affirming the duty of the flag salute in the English seas, explaining its basis as an attribute of sovereignty, and setting forth the precedents therefor. App. 674; Exhibit 634; Exhibit 693, p. 484 n. 1.

The admiralty experts of Trinity House gave an opinion to the same effect in 1671.

4. Other Official Pronouncements and Acts of State

The record shows that throughout the 17th century the English navy enforced the right of flag salute against foreign ships by attack, arrest and seizure wherever necessary. See Exhibit 578; Exhibit 579, pp. 5, 6; Exhibit 679, p. 51; Exhibits 584, 585, 632, 633; Exhibit 693, pp. 511-13, 517. Failure to honor the flag salute was a *casus belli* against the Dutch in 1671, Exhibit 693, pp. 482, 487, and against the French in 1689, being specifically mentioned in the declaration of war. Exhibit 693, p. 518.

The duty of enforcing the flag salute figured prominently in the naval instructions given by Charles I to his fleet, and equally prominently in those issued by the admiral in 1643 and by the Parliamentary Committee on the Admiralty in 1647, the salute always being explained as an acknowledgment of English sovereignty in the English seas. 1 Marsden, *Law and Custom of the Sea* 522 (1915); Exhibit 693, pp. 380-81. The instructions were likewise explicit in the reigns of Charles II, Exhibit 458, and William III, Exhibit 693, pp. 518-20, and continued unchanged throughout the 18th century.

5. Legal Treatises of the Period

Every one of the 17th-century legal writers we have previously mentioned who discussed the flag salute affirmed the right to it as an attribute of the crown's sovereignty in the English seas. These writers included Selden *(Mare Clausum,* pp. 398-402), Stubbe (Exhibit 693, p. 496), Molloy (Exhibit 726, pp. 102-30; selections at App. 850-55), and many others.

6. Modern Commentators

Among the many modern writers who have discussed the flag salute are Fulton, *passim;* Colombos, *op. cit.* at 52-55, and 1 Halleck, *International Law* 134 (4th ed. 1908), reprinted in Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* 83 (1919).

7. Acquiescence by Other States

The Dutch acknowledged the duty of the flag salute in the British seas by treaty in 1654, 1662, 1667, 1674 and 1689; although they always managed to avoid explicitly conceding that it was an attribute of English sovereignty in those seas, there was never any question that the English so

regarded it. The 1654, 1662 and 1667 treaties required the flag salute "as has been heretofore accustomed," within the extent of the "British seas," which were undefined. 3 Parry, *Consolidated Treaty Series* 225, 249; 7 Parry, *op. cit.* at 193, 201; 10 Parry, *op. cit.* at 231, 242; Exhibit 717, p. 40. The 1674 treaty described the salute as a British "right" which the Dutch were "justly acknowledging," and specified that the salute was required in any of the seas from Cape Finisterre, in Spain to "the middle point of land in Norway, called Van Staten." 13 Parry, *op. cit.* at 123, 134-35; Colombos, *op. cit.* at 53. The 1689 treaty confirmed that of 1674. 18 Parry, *op. cit.* at 485, 488.

In 1694 the Danish government disavowed the conduct of a Danish captain who had refused to strike, and promised to punish him. 2 Marsden, *Law and Custom of the Sea* 165-66 (1916).

F. OTHER ASPECTS OF MARITIME SOVEREIGNTY DEALT WITH NAVIGATION AND NEUTRALITY.

All the principal 17th-century English legal writers who dealt with maritime sovereignty discussed whether, and on what conditions, foreign ships had a right of passage through the English seas. Their views need not be discussed at length; Molloy's opinions (Exhibit 727) are typical. While holding unequivocally that the English seas were part of the realm and "as much under the absolute jurisdiction of the prince as the very land itself" (*id.* at 209), he believed that ordinarily the right of innocent passage should be accorded to foreign ships. He asserted that the right of passage was subject to the right of the crown to suspend it for reasonable cause, to impose reasonable restrictions and regulations, and to charge tolls if they were directly related to expenses incurred by the crown for the protection or advancement of navigation. All this is vir-

tually identical to the modern international law relating to the right of innocent passage through territorial waters. For our purposes its significance is simply to confirm that a full-blown, and quite sophisticated, doctrine of territorial waters existed in the 17th century, rather than being a later development as the United States contends.

There remains the matter of neutral waters, that is, those portions of the adjacent seas in which a coastal sovereign prohibits other states from making war against one another. In 1604, and again 30 years later, England defined its neutral waters as the areas known as the "king's chambers." These consisted of the maritime areas within very broad baselines drawn from headland to headland; Fulton gives a map of them at p. 123. The "chambers," while far more extensive than what would be considered territorial waters today, nonetheless were not nearly so extensive as the English seas which were regarded as subject to the sovereignty and ownership of England. See, generally, Fulton, *op. cit.* at 750-54; Oudendijk, *Status and Extent of Adjacent Waters* 57-58 (1970); Exhibit 569; Tr. 347-51. Fulton recognizes that the king's chambers "had no reference to the claim of James to property in his seas." *Op. cit.* at 122. The limits were established by a jury of Trinity House, reporting to the High Court of Admiralty, and were described as "the king's chambers, havens or ports." *Id.* at 754. The formula in the royal proclamation was: "our ports, havens, roads, creeks, or other places of our dominion, or so near to any of our said ports or havens as may be reasonably construed to be within that title, limit or precinct." *Id.* at 751-52.

In 1684, Charles II by proclamation similarly defined the areas in which belligerent activities would be prohibited as "our ports, harbors, or other places reputed to be within our more immediate protection, and where our commanders and officers are accountable for the public

peace"; again, "so near our coasts, or the entry of our harbours, as may be easily construed to be under our more special care and protection"; again, "within our ports, havens, roads and creeks, as also in every other place or tract at sea that may be reasonably construed to be within any of those denominations, limits or precincts." Exhibit 225. The proclamation drew a clear distinction between "the seas belonging to these our kingdoms" and the more limited areas "under our more special care and protection."

It could be argued that a coastal state's assertion of sovereignty over its adjacent seas entails the obligation of maintaining neutrality wherever sovereignty is claimed. The Spanish government invoked this argument when, in recognizing English sovereignty over the Channel and North Sea, it contended that by that token England had an obligation in those seas to protect Spanish ships from belligerent activities. Exhibit 609.[24] However, since the enforcement of neutrality was plainly more of a burden than of a benefit to a maritime sovereign, England in the 17th century made a sharp distinction between the broad seas over which it claimed sovereignty and proprietorship and the more modest areas, the "king's chambers," within which it undertook to maintain neutrality. In reaffirming the king's chambers for neutrality purposes in 1634, Charles I "expressly declared that his maritime rights were far more extensive and as soon as he had created a powerful fleet his Admiral was instructed to permit no fighting between belligerents in the presence of his ships in any part of the Narrow Seas." Oudendijk, *op. cit.* at 57-58; Exhibit 569; p. 59, *supra.*

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[24]Gentili, as lawyer for Spain, had taken the same position in 1605-08 in prize cases in the English Admiralty Courts. Exhibit 693, pp. 358-61.

However, it became firmly fixed in English doctrine and practice that the maritime areas within which protection against belligerent activities would be afforded was far more limited than the areas in which English sovereignty and proprietorship were claimed and exercised. Hedges' legal opinion of 1699, defining the extent of the English seas, expressly made the point that they were much broader than the king's chambers, which were for neutrality purposes only. App. 667-68. Selden had earlier carefully distinguished between the king's chambers and the much broader English seas. *Mare Clausum*, pp. 363-75.

All this shows how far English law and practice in the 17th century were from the "protective" concept of sovereignty which plaintiff's witness Professor Wroth contended, without a shadow of foundation, was operative at that time. It is apparent, also, that 17th-century Britain was far from agreeing with Professor Henkin's assertion that "if you are talking about territorial sovereignty, it must include everything, including neutrality." Tr. 2602.

The distinction is also crucial for understanding developments in the late 17th and 18th centuries, when England in a number of treaties embraced the line-of-sight rule for neutrality purposes (at least as to certain of its possessions) without in the slightest degree renouncing its claims to sovereignty, exclusive fishing, ownership of the seabed and the right to the flag salute in far broader maritime areas. The British treaties with Algiers of 1682 and 1688 (see p. 73, *supra*) required Algerian ships to refrain from cruising or taking prizes in sight of any British roads, havens, ports, towns or places. Exhibit 674, pp. 356, 362. The 1675 treaty with Tripoli contained a similar condition applicable to Tangier only. *Id.* at 715. Since these treaties also contained explicit reference to the seas under the sovereignty of the British crown (p. 83, *supra*), they demonstrate very clearly the distinction which Britain made in this period between

the territorial seas and the more limited areas in which neutrality would be enforced. For later treaties of the same type, see p. 127, *infra*.

III.

BRITISH LAW AND PRACTICE IN THE EIGHTEENTH CENTURY DID NOT CHANGE SUBSTANTIALLY WITH RESPECT TO MARITIME SOVEREIGNTY AND DOMINION.

Plaintiff's position apparently is that at some unspecified time during the 18th century Britain abandoned its established doctrines regarding the British seas, and that the British claim to sovereignty and property in the sea and the bed thereof retreated either to the distance of cannon shot from the coast, or to three miles, or even all the way to the low-water mark.[25] (No one except plaintiff's witness Dr. Kavanagh believes that *high*-water mark is relevant to the discussion.)

To the contrary, the record shows that the British claim to the British seas, as previously defined, persisted fully in law throughout the 18th century, though there were reasons why those claims received less attention and discussion than they had in the previous century. Those reasons were essentially four:

(1) The establishment of British maritime supremacy in fact, in seas even broader than the British seas as

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[25] Plaintiff's position finds some support in Fulton, but Professor O'Connell has recently demonstrated that Fulton was wholly wrong on this point. O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 316-319 (1971). Even Fulton acknowledges that the cannon-shot rule and the three-mile limit were "unknown to English law" prior to 1800. Fulton, *op. cit.* at 579-80.

traditionally defined, meant that the British legal claims were both less important to establish and less often called in question.

(2) Universal recognition of the right of innocent passage of foreign ships through territorial waters removed what had previously on occasion been a source of contention.

(3) The great decline in the Dutch North Sea fishery, and general observance by the Dutch of their agreement to stay beyond the line of sight in English waters, where their presence had been most obtrusive and where the fisheries were richest, reduced almost to the vanishing point what had been the principal ground of controversy in the 17th century.

(4) Foreign ships normally and usually acquiesced in the British right to the flag salute in the British seas from Finisterre to Van Staten. While the foreigners may have rationalized this in thier own minds as a mere tradition or mark of respect, Britain quite clearly continued to regard it as acquiescence in British territorial sovereignty over those seas.

As we shall see in a later section (pp. 222-36, *infra*), the most important disputes regarding maritime sovereignty and exclusive fishing in which Britain was involved in the 18th century concerned North American waters, and there the British exclusive claims were fully maintained.

As to the alleged rules of the cannon-shot line and the three-mile limit, no British authority ever applied any such rules to British waters throughout the course of the 18th century, even for the purpose of neutrality, let alone for the purpose of territorial sovereignty, exclusive fisheries or ownership of the seabed.

In the domain of private law or property rights, the 18th century brought no abandonment or hiatus whatever in the

doctrine that the crown owned the soil of the seabed beneath the British seas except to the extent that soil had been acquired by British subjects by grant, custom or prescription. That doctrine was as authoritative and unchallenged after the end of the 18th century as it had been before that century began.

A. THE BRITISH SEAS CONTINUED TO BE REGARDED AS SUBJECT TO BRITISH SOVEREIGNTY AND A PART OF BRITISH TERRITORY.

In 1713 Sir Charles Hedges, judge of the admiralty court from 1689 to 1701, Secretary of State and Privy Councillor, 1700-06 (9 *Dic. Nat. Biog.* 362-63), at the request of the Lords of the Admiralty, rendered a formal opinion concerning the extent of the British seas, which he believed are "without any doubt . . . within her majesty's sea dominions, as queen of Great Britain." App. 665. Hedges adhered to the traditional view that British territorial sovereignty included the entire North Sea, English Channel and Bay of Biscay, and the sea to the north of Scotland at least as far as Iceland. He expressed doubt only as to the extent of the British seas on the westward side. There he regarded as minimum limits the 100-mile belt or 60-mile belt generally asserted by civil lawyers as the territorial waters of any coastal sovereign. However, he advanced various theories by which British sovereignty might be considered as extending farther, including the theory that, being possessed of the North American coast as well as of Ireland, Britain might reasonably claim all the waters in between.[26]

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[26] Hedges' opinion may not be read as expressing any doubt as to whether the British possessions in North America had their own territorial seas. Those possessions were not part of the realm of Great Britain; and Hedges had been asked only for his opinion as to the extent of the seas in which the queen was sovereign "as queen of Great

In 1721 Sir Henry Penrice (later judge of the admdiralty court, Exhibit 640), at the request of the Lords Commissioners of the Admiralty, rendered an opinion on the question whether the British seas extended to Cape Finisterre, that is, included the entire Bay of Biscay as far as the Spanish coast. Penrice, after examining the precedents, affirmed that the British seas did so extend, and were under the sovereignty of the British crown. App. 693-94, 741-44.

A British treaty of 1716 with Tripoli provided for a limited right of visitation of British merchant ships at sea except "in any of the seas appertaining to his majesty's dominions." Exhibit 674, p. 721. In 1751 another treaty with Tripoli contained the same provision. *Id.* at 726.

If there was any abandonment or diminution of British territorial sovereignty in the four British seas as traditionally defined, during the 18th century, the legal writers of the period—mostly public officials knowledgeable both as to the state of the law and as to the attitude of the government—were certainly unaware of it. Alexander Justice's *General Treatise of the Dominion and Laws of the Sea* (1705) stated the full traditional doctrine of maritime sovereignty with its recognized attributes, including the exclusive right to the fisheries, territorial admiralty jurisdiction over both subjects and foreigners, and legislative power. Exhibit 450; Exhibit 710, pp. 129,

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Britain." Thus North American waters came within the purview of his opinion only on the theory that, of the four seas traditionally regarded as British waters, the western sea extended from Ireland all the way to the opposite shore. If there was a belt of international water in between, then the North American seas, though under British sovereignty, would not be part of the "British seas." This may seem a curious technicality to a modern student, but it is plainly the way Hedges thought. If asked, Hedges would obviously have said that if the British seas did not reach across to North America, the British colonies there would have their own territorial seas of 100 or 60 miles at minimum.

133-58. Writing in 1720, Josiah Burchett, who was Secretary of the Admiralty from 1698 to 1742, relied both on the historic English sovereignty over the four British seas and on the general law that any coastal sovereign has territorial waters of 100 miles from its coasts. Exhibit 675; selections at App. 771-75.

In 1735 Thomas Lediard, who was a British diplomat, asserted British sovereignty over the four British seas and gave a quite precise definition of them on the west and north as well as on the other sides, saying they were "generally reckoned" as those seas within a line drawn from Cape Finisterre to 63 degrees of north latitude, and thence eastwards to Van Staten in Norway. App. 824-28. (This demarcation was probably assumed by the many other writers who speak of the British seas as extending from Finisterre to Van Staten. It was reiterated as late as the 19th century. 1 Chitty, *The Laws of Commerce* 102 (11th ed. 1857).) Lediard goes on to discuss British sovereignty in American waters. He states what was plainly the general view at the time: that while the British seas properly so called did not extend all the way across the Atlantic Ocean, the British possessions in North America had their own territorial seas. App. 827.

In 1742 Charles Viner's *Abridgement* recorded the established law that the British seas are under both the sovereignty and the ownership of the crown. Exhibit 208. Viner traced back to King Alfred's time the doctrine that "the sovereignty of all the land to the middle of the sea about the land belongs to the king in right of his crown." 6 Viner, *Abridgement* 505 (2d ed. 1792).

Matthew Bacon's *Abridgement*, which appeared in 1759, likewise affirmed British territorial sovereignty and dominion in the British seas. Exhibit 171. The digest of Sir John Comyns, Chief Baron of the Exchequer, was to the same effect. App. 657.

In 1746 there appeared an ambitious and interesting work in two volumes entitled *The Laws, Ordinances and Institutions of the Admiralty of Great Britain, Civil and Military.* Exhibits 716, 717; selections at App. 823-24. The work is anonymous, but obviously had official or semi-official status. The author affirms British sovereignty (which he calls dominion) in the four British seas. In prior times, he says, that sovereignty permitted the crown to prohibit navigation through the British seas and to levy tribute thereon. Now those rights have lapsed in the interest of free navigation and commerce. Nonetheless, "the being of our dominion [a modern writer would say: "the substance of our sovereignty"] subsists exactly as before." Exhibit 716, p. 9. This is an excellent statement of territorial sovereignty as limited by the right of innocent passage.

Blackstone, in affirming crown ownership of the seabed in the English seas, is clear that such ownership is a corollary of territorial sovereignty, the king being "lord of the sea." App. 649. And: "the main or high seas are part of the realm of England, for thereon our courts of admiralty have jurisdiction." 1 Blackstone, *Commentaries* 110 (1765).

B. THE CLAIM TO EXCLUSIVE FISHERIES IN THE BRITISH SEAS WAS NOT ABANDONED, AND INDEED WAS EXTENDED TO NEW BRITISH POSSESSIONS.

Early in the 18th century the Dutch herring fishery in the North Sea suffered a precipitate decline, and ceased to be a substantial interference with the British fisheries or with the British claim to maritime sovereignty. The French, when at war with Holland, destroyed many of the Dutch fishing ships; though Britain was not at war with the Dutch early in the century but indeed was allied with them, the British navy likewise took severe measures against the Dutch fishing boats to enforce the British claim to maritime sovereignty. "Not infrequently their [the Dutch] herring

fishery was entirely suspended, it might be for a series of years, owing to the inability of the States-General to protect the fishing vessels from the French or the British cruisers . . . . From these repeated blows the Dutch fisheries never recovered, and the fleets of buses gradually dwindled . . . . Thus the part of the pretention to the sovereignty of the sea which related to the fisheries along the British coasts was solved, the British fisheries, now the greatest in the world, rising on the ruins of the Dutch." Fulton, *op. cit.* at 534.

Controversy with the Dutch was also generally minimized by their observance of their agreement of 1619 (p. 81, *supra*) to stay beyond the line of sight from the British shores. At various times during the century the British government, when necessary, made representations to the Dutch, French and Danish governments to insure that their fishermen not come too close to the shore. Exhibit 693, pp. 604-05. There were no major disputes, however, and as we shall see the really serious controversies regarding foreign fishing in waters under British sovereignty related to North American waters (pp. 222-36, *infra*).

In 1790 Britain agreed by formal treaty that British subjects should not navigate or fish within ten leagues of any coast in the Pacific Ocean occupied by Spain. Exhibit 674, pp. 663, 666. Here, at the very end of the century, we see Britain, so far from adhering to any cannon-shot or three-mile rule, acquiescing in a Spanish claim to territorial waters of 30 miles for exclusive fishing purposes.

The treatise writers of the century uniformly asserted and recognized the British right to exclusive fisheries in the British seas as traditionally defined. These included Justice, Burchett, Lediard, Viner, Bacon and Comyns. See App. 657, 771-75, 824-28; Exhibit 710, pp. 129, 132; Exhibit 675, p. 28; Exhibits 208, 171. Comyns, in addition to the passages in Exhibit 185 (App. 657), declared that "the

fishery of every navigable river, as high as the sea flows and reflows, belongs to the king by his prerogative . . . but every one [*i.e.*, subjects] may fish in the sea, of common right . . . though it flows upon the soil of another [*i.e.*, the king]. But foreign nations cannot fish in the British seas, without the king's license." 7 Comyns, *Digest of the Laws of England* 70 (5th ed. 1822).

Thomas Neale's *Abstract of the Sea-Laws, as Established in Most Kingdoms of Europe, But More Particularly in England and Scotland* (1704), upheld the British claims to exclusive fisheries. He relied on Bartolus' 100-mile limit, and regarded the seas within that limit as part of the *territorium* (preface, pp. 8-9).

The author of *The Laws, Ordinances and Institutions of the Admiralty of Great Britain, Civil and Military*, regarded the British right to exclusive fishing as extending midway to the opposite coasts, but indicated that at that period (the book was published in 1746) the British right was insisted upon in practice only "to a certain distance" from the shore, which at one point the author appears to identify as the line of sight. Exhibit 716, pp. 4, 5, 11, 38.

An act of Parliament of 1714 prohibited "any person" from using certain types of nets "at sea, upon the coast of England." App. 869-70; Exhibits 716, 413-414. A statute of 1771, still in force in 1903, provided that persons employed in the British white-herring fisheries "may fish in any part of the British seas." App. 872. Finally, an act of 1791 prohibited trespass by unauthorized persons upon "the several [*i.e.*, exclusive] oyster fisheries of this kingdom" and the use of nets or trawls therein. App. 870.

In the case of *Carter v. Murcot*, in 1768, it was held that the fisheries in navigable rivers, as arms of the sea, belong *prima facie* to the crown, but that a subject can acquire an exclusive fishery therein by royal grant or prescription. The court regarded the decision in the *Case of the Royal Fishery*

of the Banne (pp. 98-100, *supra*) as authoritative, and declared " 'tis a very good case." Exhibit 455, p. 129; Angell, *op. cit.*, Appendix, at 32-35. The court also relied on Hale.

The crown asserted and exercised jurisdiction over fishing in the waters not only of Britain, and America but also of new British possessions elsewhere. After Minorca (Mahon) became a British possession, one Charles Williams petitioned the Board of Trade in 1751 for a license for an exclusive tuna fishery in Minorcan waters. Williams' petition carefully explained that the license he sought would not interfere with established fishing rights, but would be exclusive only as to new and improved methods of fishing devised by him. This was fully in accordance with the law of monopolies in force ever since Elizabeth I's time. The governor of Minorca endorsed the petition. Its ultimate disposition does not appear in the record, but it seems highly probable that it was granted. See Exhibits 796, 807; Exhibit 772, pp. 147, 209, 232-33, 253, 257. Foreigners had previously petitioned for licenses to fish on the coasts of Minorca, but had been refused on the ground that they were not British subjects. Exhibit 807, p. 3.

C. THE ADMIRALTY JURISDICTION IN THE BRITISH SEAS REMAINED UNCHANGED.

Justice and Burchett, the leading admiralty writers of the period, affirmed the full traditional doctrine of the territorial jurisdiction of admiralty in the British seas, including jurisdiction over foreigners. Exhibit 710, pp. 153-58; Exhibit 675, preface, first and second pages. Similarly, the anonymous work of 1746 listed among the prerogatives of the British maritime sovereignty, along with exclusive fishing, "the regular execution of justice for all crimes committed within" the British seas. App. 824. Blackstone is to the same effect. 1 *Commentaries* 110 (1765).

The admirals' commissions of the 18th century were couched in territorial terms, and conveyed the maritime jurisdiction both of Great Britain and of the British dominions, including those of North America; they spoke of "our fleets and seas," granted powers "by sea, water or land within our kingdoms and places aforesaid," and conferred criminal and civil jurisdiction "within our maritime jurisdiction of our admiralty of England and other places aforesaid." Exhibit 638, pp. 2, 4, 5, 11. The patents of admiralty judges contain similar material. Exhibit 640, pp. 5, 8.

A statute of the reign of George III provided that the jurisdiction of the crown commissioners for admiralty extended to all crimes committed in the seas outside the bodies of counties. Exhibit 160, p. 88.

D. CROWN OWNERSHIP OF THE SEABED AND SUBSOIL AND OF THE RESOURCES THEREOF CONTINUED TO BE FULLY RECOGNIZED IN LAW.

The doctrine of crown *prima facie* ownership of the seabed and foreshore "has been stated in varying language by judge after judge from that time [the time of Hale] to the present day [1888]." Exhibit 728, pp. xxxii-iii. The crown's assertion of ownership of lands recovered from the sea likewise continued unchanged throughout the 18th century. Exhibit 646, pp. 4-6; Exhibit 656.

The treatise writers who referred to crown ownership of the seas and seabed include Lediard, App. 827, and Viner, Exhibit 208. The anonymous but authoritative author of 1746 listed among the crown rights in the British seas "the royalty of granting the liberty of fishing for pearl, coral and amber, and other precious commodities." App. 823. Comyns declared that "land, derelict by the sea, belongs to the king by his prerogative; for when the dominion and soil of the

British sea belong to him, the derelict land, by consequence, shall be his . . . . So, an island which rises in the sea . . . . So, if a wharf be erected under low water mark, it belong to the king . . . . Or, between high and low water mark." 7 Comyns, *Digest of the Laws of England* 75 (5th ed. 1822).

Blackstone, who was of course the weightiest British legal writer of the century, affirmed without question the crown ownership of the soil of the sea when covered with water and, by consequence, of lands reclaimed from the sea. App. 649. Blackstone referred to the crown's ownership as a "prerogative," yet again refuting Professor Thorne's theory that the "prerogative" theory means that the seabed is ownerless. Plaintiff's theory that Blackstone's reference to the prerogative meant that he believed the crown did not own the seabed while still covered with water (Pl. Br. 93, 95) is wholly without merit for the reasons stated at pp. 102-103 and 113, *supra*.

In *Attorney General v. Richards*, in 1795, the crown asserted ownership of a portion of the foreshore as against a subject who had erected buildings thereon. The information stated, and the Attorney General argued, that the crown owned the sea and the soil thereof, and therefore owned the foreshore also. The defendant denied none of this, but claimed title on the basis of a grant. The court held that the grant did not include the land in dispute, upheld the title of the crown, and ordered the buildings abated as a nuisance. Angell, *The Right of Property in Tide Waters*, Appendix, at 9-19 (1826); Moore, *op. cit.* at 434-35.

The crown's jurisdiction over sedentary fisheries, as well as surface fisheries, was asserted and exercised in the waters of new British possessions. Charles Williams' petition of 1751 (p. 132, *supra*) sought an exclusive license to exploit the coral resources in Minorcan coastal waters, the exclusive feature being justified by a showing that those

resources had not previously been exploited. Exhibit 807. Williams' petition, which was endorsed by the governor of Minorca, was that he should have the exclusive coral fishery for 14 years and that the fishery should thereafter be open to all British subjects but to them only.

Also in 1751, Britain considered acquiring the island of Tabarka from Tunis, and one of the principal arguments in favor of the acquisition was the existence in the coastal waters of the island of a rich coral fishery. If the island were acquired, Britain "might sell the liberty of fishing for coral to the Genoese or any other persons, until the English should have acquired the art of fishing it for themselves." Exhibit 772, pp. 203-04, 206-07. Exhibit 710, p. 158. See also Exhibit 675, pp. 35-37; Exhibit 718, p. 42; Exhibit 716, p. 2.

E. THE FLAG SALUTE CONTINUED AS A RECOGNITION OF SOVEREIGNTY IN THE BRITISH SEAS.

Sir Henry Penrice's legal opinion of 1721 affirmed the right of the flag salute as a recognition by foreigners of British sovereignty in the British seas. App. 694, 742. The navy enforced the obligation throughout the British seas; and this on occasion led to sea battles, Fulton, *op. cit.* at 520-21, though it appears that for the most part foreigners complied without incident. The admiralty instructions continued to require the salute throughout the century. Exhibit 458, pp. 263-64; 2 Marsden, *Law and Custom of the Sea* 263-64 (1916).

The treatise writers of the period are unequivocal both as to the duty and as to its significance as a recognition of British sovereignty in the British seas. Justice specified that foreigners failing to give the salute "are punishable by the king of England before his admirals, in the same manner as

if they had committed a crime within the jurisdiction of his territories by land; which ceremony has been for many ages exacted by the English kings with all imaginable vigor." Exhibit 710, p. 158; see also App. 828; Exhibit 675, pp. 35-37; Exhibit 716, p. 2.

The Anglo-Dutch treaty of 1784, ending the Dutch participation in the war of the American Revolution, provided that the flag salute should be honored and practiced as in the past. Fulton, *op. cit.* at 522.

F. OTHER ATTRIBUTES OF SOVEREIGNTY AND JURISDICTION INVOLVED NEUTRALITY AND SMUGGLING.

As we have seen (pp. 121-24, *supra*), it was already clearly established in the 17th century that the waters within which Britain protected foreign ships from belligerent activities of other states were by no means coextensive with the seas in which Britain claimed sovereignty and dominion. Plaintiff appears to argue that during the 18th century Britain adopted the cannon-shot rule for purposes of neutrality and that this represented a curtailment of its claims to sovereignty and dominion. Plaintiff is wrong on both counts: the neutrality belt bore no relation to Britain's definition of its territorial seas, and the measure used for neutrality purposes in British waters was not the cannon shot, but at a minimum the line of sight. That measure is found in British treaties with Algiers, Tripoli and Tunis of 1716 and 1751. Exhibit 674, pp. 369, 725, 729, 737 and 741. Several of these treaties were limited in their application to Minorca and Gibraltar, and it seems questionable whether any of the treaties were regarded as having any application to the home waters of the United Kingdom, since the Barbary pirates did not venture so far. In one of the treaties the line of sight appears to be regarded as 10 miles from shore. *Id.* at 737. As to British home waters, Sir Henry Penrice in 1718 regarded the "king's chambers" as still fully in effect

for neutrality purposes. 3 McNair, *International Law Opinions* 46-47 (1956); 2 Marsden, *Law and Custom of the Sea* 243-45 (1916).

Plaintiff's witness Professor Henkin (Tr. 2596-98) made much of the treaty between Britain and Algiers of 1762. That treaty adopted the cannon-shot rule for neutrality purposes in Algerian (not British) waters. Exhibit 674, p. 372. There was a similar treaty with Tunis the same year, *id.* at 744, though Professor Henkin did not mention it. These treaties forms the *sole* basis for Professor Henkin's contention that Britain had adopted the cannon-shot rule—and indeed the three-mile limit—in the 18th century for purposes of British sovereignty and dominion in the British seas themselves. The contention is patently frivolous.

A series of acts of Parliament spanning the entire 18th century asserted regulatory and criminal jurisdiction, including jurisdiction over foreigners, out to various limits from the British coasts for the purpose of preventing smuggling. These are the well-known "hovering acts." See Masterson, *Jurisdiction in Marginal Seas with Special Reference to Smuggling, passim* (1929); Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* 535, 538, 539, 541 (1919).

A statute of 1718 prohibited the transfer of goods at sea from one ship to another with intent to bring them within the limits of any British port.

> "No limit or distance was specified. It is not necessary to determine the limits of the various ports; for the offense defined was an unlading 'at sea' with the intention to place the goods on board a vessel in the limits of any port, regardless of what those limits were. Nothing was said as to where the goods could have been seized or the

> masters arrested; but as already indicated, during this period, seizures and arrests were made anywhere on the 'English seas.'" Masterson, *op. cit.* at 7.

The penalties specified included not only the forfeiture of the goods in question but also fines upon the masters or persons in charge of both the in-taking and the unlading vessels. *Ibid.*

Acts of 1719, 1736 and 1783 prohibited hovering on the coast within the limits of any port or within two leagues of the shore. *Id.* at 12, 37. Another act of 1736 prohibited the taking in of foreign goods within four leagues of the coast, and authorized the seizure without geographical limit of ships which had previously come within the limits of any port. *Id.* at 26-27. Here again, the penalties included fines against individuals as well as the forfeiture of goods. Other statutes of the same general type were enacted in 1751, 1763, 1765, 1779, 1784 and 1794. *Id.* at 37-42, 58, 65. The 1784 act authorized the seizure, with no geographic limits specified, of ships which had previously come within four leagues of the British coast. *Id.* at 58. The 1794 statute asserted smuggling jurisdiction over the king's chambers, extending in places as far as 50 miles from land. *Id.* at 65. The hovering acts were enforced by the courts against both subjects and foreigners. *Id., passim; e.g.*, p. 42.

Chancellor Kent has an interesting comment as to the doctrinal basis for the hovering acts and its adoption into American law:

> "It was declared in the case of *Le Louis*, that maritime states claim upon a principle just in itself and temperately applied, a right of visitation and inquiry within those parts of the ocean adjoining to their shores. They were to be considered as parts of the territory for various domestic pur-

poses, and the right was admitted by the courtesy of nations. The English hovering laws were founded upon that right. The statute (9 Geo. II, c. 35) prohibited foreign goods to be transshipped within four leagues of the coast without payment of duties; and the act of Congress of March 2, 1799 (c. 128, secs. 25, 26, 27, 99), contained the same prohibition; and the exercise of jurisdiction, to that distance, for the safety and protection of the revenue laws, was declared by the Supreme Court, in *Church v. Hubbart*, to be conformable to the laws and usages of nations." Kent, *Commentaries on American Law* (1896, reprinted in Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* 182 (1919).

Herbert A. Smith remarks that the hovering acts "seriously embarrassed the British government in its efforts to obtain a general recognition of the three-mile rule" in the late 19th and early 20th centuries. Exhibit 747, p. 143.

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British law and practice since 1800, which are not part of the law of this country but which cast further light on certain aspects of the pre-1800 law, are treated in an appendix to this Brief.

IV.

THE AMERICAN COLONIAL CHARTERS CREATED TERRITORIAL SEAS AND CONVEYED MARITIME SOVEREIGNTY AND DOMINION.

A. GIVEN THE LEGAL AND POLITICAL CLIMATE IN WHICH THE COLONIAL CHARTERS WERE ISSUED, IT WOULD HAVE BEEN INCREDIBLE IF THE COLONIES THEY CREATED HAD STOPPED AT LOW-WATER MARK.

As we have seen, the 17th century, during which all the Common Counsel States were founded and received their charters, was a period of intense British awareness and assertion of maritime sovereignty and its corollaries, including the right to exclude foreigners from fisheries and crown ownership of the seabed and the resources thereof. The official British position, repeatedly stated and acted upon, was that any nation had a right to territorial waters of 100 miles, and that in the four seas surrounding Britain there were particular historic rights sufficient to create a wider British sovereignty, extending at least in the case of the English Channel and the North Sea all the way to the opposite coasts.

It was also a time, as Edmundson put it, of "chartered companies, of trade monopoly, and of commercial protection in its most aggressive form." Exhibit 775, p. 6. The crown habitually granted monopolies of newly discovered areas, trade and resources; and the incorporated company—the device through which many of the American colonizations were begun—was a standard mechanism by which such monopolies were created.

In this atmosphere, it would be extraordinary—indeed inexplicable—if, as the North American English colonies

were chartered and established, we did not find the crown making, and either conveying by charter or retaining for itself, exclusive claims to sovereignty and ownership of the sea and seabed in North American waters. *Prima facie*, if we knew nothing of the colonial charters but fully understood the English background, we should expect to find such claims and would be astonished if we did not. As to distance, we should expect to find confident assertions of sovereignty and dominion, of the right to exclusive fisheries, and of proprietorship of the sea and seabed extending at least 100 miles from the North American coast. And if charters or other legal documents defining colonial rights contained any ambiguity on these points, we should have no hesitation, in view of the English background, in construing them to create such rights.

1. The Issuance of the Colonial Charters and Important Acts of Maritime Sovereignty in British Waters Were Closely Correlated in Time.

The charter of 1606, which vested in monopolistic corporations rights of settlement comprising the entire Atlantic seaboard now occupied by the Common Counsel States, was issued during the period of intensive legal analysis which preceded James I's proclamation asserting sovereignty in the British seas and exclusive fishing therein. The coincidence of dates, both then and throughout the century, is striking. The British kings and their governments would have all had to be victims of advanced schizophrenia had they not claimed sovereign and property rights in the North American seas, in view of their legal position and practical policies in British home waters at the same time.

To illustrate this point more fully, it may be instructive to set forth in parallel columns the chronology of the principal colonial charters together with some of the important events in the development of British law and practice regarding

maritime sovereignty and ownership in British waters. The following chart is far from complete but is, we think, sufficient to make the point.

Colonial Charters	Events in the Development of British Law and Practice Regarding Maritime Sovereignty and Dominion
	1603—James VI of Scotland succeeds as James I of England, bringing with him the Scottish legal tradition of "reserved waters." James is immediately met with intense urging to take action to remedy Dutch encroachments on English fisheries (Exhibit 693, pp. 135-38).
	1603—Publication of Sir Thomas Craig's work asserting maritime sovereignty and exclusive fishing rights.
	1604—Draft treaty of union between Scotland and England, reserving to each nation its coastal fisheries. James proclaims neutrality within the king's chambers.
	1605—The plan for assertion of sovereignty in the four seas and exclusive fishing therein "took more definite form" "within two or three years of the accession of James" (Exhibit 693, p. 138). Parliament regulates sea fisheries by statute.
1606—The Northern (Plymouth) and Southern (London) "Virginia companies are chartered.	

1607—First permanent English settlement in America, at Jamestown.

1607—The Privy Council considers the proposed proclamation of maritime sovereignty and exclusive fishing, and a committee reports favorably on the legality thereof.

1609—Second Virginia charter.

1609—Issuance of James I's proclamation of maritime sovereignty and exclusive fishing.

1610—Newfoundland charter.

1610—Decision by the Privy Council of the *Case of the Royal Fishery of the Banne.* Sir Julius Caesar's legal opinion asserting maritime sovereignty and exclusive fishing.

About 1610—The Earl of Salisbury, prime minister, declares that every state has sovereignty over its adjacent seas for at least 100 miles.

1612—Third Virginia charter.

1613—Publication of Welwood's *An Abridgement of All Sea Laws.* Russia Company receives charter confirming its exclusive right to "Greenland" whale fisheries.

1617—Sir Julius Caesar's legal opinion that crimes at sea were committed within the territory of England.

1618—Selden writes *Mare Clausum* and the King reads it. England claims the "Greenland" whale fisheries on the ground of first discovery and use, and occupation of the Island of Spitzbergen.

1620 Charter of New England.

1621—Nova Scotia charter.

1622—Grant of Maine by New England Council to Gorges and Mason.

1622—Callis' lectures on the Statute of Sewers.

1623—Calvert's charter for Avalon, in Newfoundland.

1628—Publication of Coke's *First Institute.*

1629—Massachusetts Bay charter; Heath patent for Carolina; grant of New Hampshire by New England Council to Mason.

1632—Maryland charter.

1632—Exchequer Court decides *Philpott* case.

1633—Sir John Coke's "Propositions for Fishing." Publication of Boroughs' *The Sovereignty of the British Seas.*

1634— Charles I's Ship Money proclamation. "Reglement" asserts maritime sovereignty.

1635—New Hampshire charter.

1635—*Mare Clausum* is published as a state paper.

1636—Charles I's proclamation of maritime sovereignty and exclusive fishing. Admiralty opinion affirming its lawfulness.

1637—The courts uphold maritime sovereignty and dominion in the *Ship Money* case and *Rex v. Oldsworth.*

1639—Maine charter.

1643—patent for Providence Plantation.

1644—Publication of Coke's *Fourth Institute.* The Parliamentary Committee on the Admiralty instructs the navy to maintain "sovereignty and regality in the seas."

1650—Council of State directs the admirals to preserve the dominion of the sea. Council grants fishing licenses to foreigners.

1652—*Mare Clausum* is translated and republished at the direction of the Council of State.

1652-54—First Anglo-Dutch war. By treaty of 1654, Dutch acknowledges flag salute.

1660—House of Commons passes bill regulating sea fisheries to the midline between England and coasts opposite England.

1662—Nova Scotia charter to Temple.

1662—Dutch again acknowledge flag salute by treaty.

1663-Rhode Island charter; Carolina charter.

1663—*Mare Clausum* is republished for Charles II in a new translation.

1664—Duke of York's patent for New York and New Jersey. The Duke grants New Jersey to Berkeley and Carteret.

1665-67—Second Dutch war. Act of Parliament appropriating supplies says it is for the preservation of the king's "sovereignty and dominion of the seas." By treaty of 1667, Dutch again acknowledge the flag salute.

1668—Jenkins' charge to an admiralty jury.

1670—Hudson's Bay charter.

1671—Opinion of Trinity House on the extent of the British seas.

1672-74—Third Dutch war. Dutch again acknowledge flag salute.

1673—Lease of Virginia to Arlington and Culpeper.

1674-1676, 1677—Foreigners are indicted and convicted for failing to give flag salute in recognition of crown sovereignty over the four British seas.

1681—Pennsylvania charter.

1681—Scottish statute defining the admiralty jurisdiction "within this realm."

1682—The Duke of York's charter for New Castle (Delaware).

1689—British declaration of war with France, specifying as a *casus belli* French incursions on British sovereignty in "our seas," including seas of America. Dutch acknowledge flag salute for the fifth time.

1691—Second Massachusetts Bay Charter.

1699—Enactment of the first "hovering act." Judge Hedges' legal opinion on the extent of the British seas. Parliament excludes foreigners from Newfoundland fisheries.

2. The Persons Involved in Acts of Maritime Sovereignty in British Waters Were Largely the Same Persons as Those Responsible for the Chartering and Establishment of the American Colonies.

Not only were these events happening during the same period; they involved for the most part the same people. The ruling group in England was small; most of its members knew each other intimately and were related by blood or marriage. In these circumstances it is hardly surprising that the men most actively involved in asserting, adjudicating and exercising British sovereignty and dominion over the British seas in Europe were also the persons most active in promoting, chartering and establishing the British colonies in North America. The following list, which could be greatly expanded both by the addition of more names and of more activities of the persons named, is sufficient to make the point. These men would have been schizophrenic indeed had they taken a wholly different view of maritime sovereignty and dominion in North American waters from the view which they were simultaneously establishing and vindicating at home.

First, of course, we have the sovereigns themselves. All the Common Counsel States were chartered during the

reigns of James I, Charles I and Charles II—each of whom was intensively aware and an ardent advocate of British maritime sovereignty and dominion, as was Cromwell. The establishment of a similar dominion in North American waters as the new colonies were chartered and established is hardly a matter likely to have escaped them.

The next sovereign, James II, had a unique triple status as Lord High Admiral, colonial proprietor and monarch. While Duke of York he served as admiral during the period, encompassing the second and third Dutch wars, in which the British claims to maritime sovereignty and dominion were carried to perhaps their highest pitch both in theory and in practice. His instructions to the navy as Lord High Admiral required enforcement of the flag salute "in acknowledgment of his majesty's sovereignty in those seas," extending to Finisterre. Exhibit 458. James was also one of the patentees of Charles II's royal fishery in 1677. Fulton, *op. cit.* at 516. And by grant from his brother Charles, he was himself the proprietor and viceroy of New York, New Jersey, Maine and Delaware. Any one reckless enough to assert that those colonies were deemed to end at high- or low-water mark, at least so long as James, admiral, colonial proprietor and king, had anything to do with them, bears a heavy burden.

In the early years the crown's supervision over the colonies was exercised by the Privy Council, consisting of the principal officers of state. In 1634, Charles I appointed as "Lords High Commissioners for the Plantations "the Archbishops of Canterbury and York, the Lord Keeper, the Lord Treasurer and eight other officers of state; under this administration the New Hampshire and Maine charters were granted. Under the Commonwealth colonial affairs were directed by a Board of Commissioners for the Plantations consisting of the principal men of the state, including Cromwell himself.

There follows a discussion of a few only of the men who were principal figures both in the assertion, adjudication and exercise of British maritime sovereignty and dominion at home and in the chartering and establishment of the North American colonies. These will be listed in alphabetical order.

George Monk, Duke of Albemarle (1608-1670). Monk was "general at sea" in the first Dutch war, and commanded the entire British navy in 1653. The principal architect of the restoration of 1660 and one of Charles II's most intimate advisors, he commanded the fleet during the second Dutch war when the Duke of York was absent. 15 *Encyclopaedia Britannica* 1723-24.[27] Albemarle was one of the patentees and proprietors of the Carolina colony in 1663. His son the second Duke was a patentee of the Hudson's Bay colony in 1670. 33 *British and Foreign State Papers* 1365.

Henry Bennet, Earl of Arlington (1618-1685). Bennet was secretary to the Duke of York from 1654 and Charles II's agent at Madrid in 1658-60. Secretary of State from 1662 to 1674, he was throughout that period the principal minister of the crown dealing with foreign affairs. He was heavily involved in the second and third Dutch wars and frequently asserted the English claims to maritime sovereignty and the flag salute. 2 *Dic. Nat. Biog.* 230-33; Exhibit 693, pp. 469, 483, 497; Fulton, *op. cit.* at 490, 502, 506. Arlington was a patentee of the Hudson's Bay Colony in 1670. In 1673 he and Lord Culpeper received a lease of Virginia for 31 years, including "all islands . . . within ten leagues of any of the coast of any of the said territories." Tr. 1489; 33 *British and Foreign State Papers* 1365.

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[27] All references to the Encyclopaedia Britannica in this section are to the 1959 edition.

Thomas Howard, Earl of Arundel (1585-1646). Arundel held many high offices, including that of Lord High Steward, in the reigns of James I and Charles I. He was a friend and patron of John Selden. 2 *Encyclopaedia Britannica* 493. Arundel was one of the commissioners and councillors for Charles I's exclusive fishing society. Exhibit 693, pp. 227, 239. He was also one of the patentees of the New England charter of 1620, Exhibit 11, and a leading member of the Council for New England. In the division of New England lands in 1622, he received a coastal tract "with all the fishing . . . islands, etc. . . . within 9 miles directly into the sea." App. 1003-05. He and the Duke of Lennox arbitrated the New England fishing dispute in 1619. App. 678-79; see p. 219, *infra*.

Francis Bacon, Viscount St. Albans (1561-1626). Bacon was one of the commissioners who drew up the draft treaty of union between England and Scotland in 1604, including the clause preserving exclusive fisheries for each nation in its reserved waters. Exhibit 693, p. 223. Bacon was Solicitor General from 1607, Attorney General from 1613 and Lord Chancellor from 1618. As Attorney General, he was involved in the collection of authorities to justify the English assertion of sovereignty and exclusive fishing in the English seas. Fulton, *op. cit.* at 163, n.1. As one of the principal law officers of the crown, he participated in drafting the colonial charters issued during his time, including the second and third Virginia charters. Scott, *The United States of America: a Study in International Organization* 71, 72 (1920). He advised the king concerning the establishment and management of the Virginia plantation, Bowen, *Francis Bacon* 124 (1963), and wrote an "Essay on Plantations." Bacon was himself one of the patentees of the second Virginia charter in 1609 and a member of the Council of the Virginia Company. Exhibit 42. He was also active in procuring the Newfoundland patent of the following year and was one of the patentees named therein. Exhibit 663, p.

304; Exhibit 756, p. 11. He became a member of the governing Council for Newfoundland. Rowse, *op. cit.* at 202. See also 2 *Encyclopedia Britannica* 882-88.

George Calvert, first Lord Baltimore (died 1632). Calvert was one of the principal officers and advisors of the crown for 30 years. In 1605 he became Clerk to the Privy Council, and from 1613 on he was in charge of Italian and Spanish diplomatic correspondence. A member of Parliament, he was Secretary of State from 1619 to 1625. 3 *Encyclopaedia Britannica* 1. Calvert was one of the patentees of the second Virginia charter of 1609. Exhibit 42. He signed the warrant for the New England charter of 1620. Exhibit 466, p. 31. Also a member of the Council for New England, he received a share of New England lands in the division of 1622. App. 1003-05. As Secretary of State, he was involved in the New England fisheries dispute in Parliament and defended exclusive fishing rights in American waters. Exhibit 740, pp. 35-36. In 1623 he received a royal charter for Avalon in Newfoundland. The Maryland charter was prepared for him in 1632 and issued to his son and heir just after his death.

George Villiers, Duke of Buckingham (1592-1628). As the royal favorite and intimate counselor of both James I and Charles I, Buckingham was much involved in their assertions of maritime sovereignty. In 1620, at a time when he held the post of Lord High Admiral of England, he was one of the patentees of the New England charter. Exhibit 11. He became president of the Council for New England on Lennox's death in 1624. Preston, *Gorges of Plymouth Fort* 235 (1953). He received a patent for Guiana, in South America, in 1627 and founded a colony there. Greene, *The Foundations of American Nationality* 41 (1922).

Sir Julius Caesar (1558-1636). A famous lawyer and public official, Caesar was Chancellor of the Exchequer in 1606-14 and Master of the Rolls from 1614 to his death. His

legal opinions (p. 61, *supra*) were of capital importance in establishing English maritime sovereignty and exclusive fishing rights in the English seas. He had previously been a commissioner of the Admiralty from 1581, and judge of the High Court of Admiralty from 1584 for many years. As Master of the Rolls, Caesar signed the warrant for the New England charter of 1620. Exhibit 466, pp. 31-32; 3 *Dic. Nat. Biog.* 656-59. He was a member of the Privy Council which decided the *Case of the Royal Fishery of the Banne*, which declared the crown's sovereignty and ownership of the sea and seabed of the English seas. 1 Turner, *The Privy Council of England* 75 (1927).

James Hay, Earl of Carlisle (c. 1580-1636). Carlisle was ambassador to France, Spain, Germany and Venice. He was active in the "reserved waters" negotiations between England and Scotland, and was one of the commissioners of Charles I's exclusive fishery company. In 1627 Carlisle received a charter for the Windward and Leeward Islands, in the Caribbean. 4 *Encyclopaedia Britannica* 875; 2 Cokayne, *Complete Peerage* 151 (1889); Exhibit 693, pp. 222 n. 1 and 227 n. 3; Greene, *The Foundations of American Nationality* 39-40 (1922).

Sir George Carteret (c. 1610-1680). In 1636, Carteret was one of the captains and commanders of the Earl of Northumberland's fleet collecting licenses from the Dutch in the North Sea and driving unlicensed fishermen from English waters. Fulton, *op. cit.* at 291; Exhibit 607, p. 3. The accounts of the expedition show that Carteret collected £657 in license fees from the Dutch. *Ibid.* He was comptroller of the English navy in 1639, and Vice Admiral of Jersey in 1644. Appointed Privy Councillor at the restoration, he served as treasurer of the navy from 1661 to 1667. Carteret was one of the eight proprietors named in the Carolina charters of 1663 and 1665. In 1664, he and Lord Berkeley were granted New Jersey by James, Duke of York. 4 *En-*

cyclopaedia Britannica 940. He was a promoter of the Hudson's Bay Company and a member of its Court of Adventurers. Exhibit 765, p. 14.

Edward Hyde, Earl of Clarendon (1609-1674). Father-in-law of James II and maternal grandfather of Queen Mary II and Queen Anne, Clarendon was Lord Chancellor and chief minister of Charles II from 1660 through the end of the second Dutch war in 1667. He asserted the sovereignty of the crown over the British seas against the Dutch. 5 *Encyclopaedia Britannica* 757-60. In 1666, Clarendon as Lord Chancellor received the royal warrant to grant a fishing license to 50 ships of the City of Bruges. Exhibit 693, p. 451. Clarendon was one of the patentees of Carolina in 1663.

Sir Edward Coke (1552-1634). As Attorney General from 1594 to 1606, Coke formulated crown doctrine as to the circumstances in which monopolies might lawfully be granted (p. 42, *supra*), and as Speaker of the House of Commons he defended that policy in Parliament. Coke was Chief Judge of the Court of Common Pleas, 1606-13, and of King's Bench, 1613-16. 5 *Encyclopaedia Britannica* 950-51. As a parliamentary leader, he was involved in the New England fisheries dispute in the 1620's. As one of the most eminent of all English legal authorities, he asserted the crown's sovereignty and ownership of the seas (p. 65, *supra*). As Attorney General, he supervised and participated in the drafting of the Virginia charter of 1606. App. 366; Bowen, *The Lion and the Throne* 343 (1956); Scott, *The United States of America: a Study in International Organization* 70 (1920).

Sir John Coke (1563-1644). Coke was a commissioner of the navy, Secretary of State from 1625 to 1639, and one of the councillors of Charles I's exclusive fishing society of 1632. Exhibit 693, p. 239. He wrote "Propositions for Fishing" and many other state papers asserting the crown's sovereignty and ownership of the fisheries in the British

seas. Exhibit 693, pp. 212 *ff.* His works include instructions issued to Captain John Mason for the Scottish fishery, directing among other things that foreigners be excluded. Exhibit 693, p. 219; Exhibit 756, pp. 276-81. Coke was one of the patentees of the second Virginia charter in 1609. Exhibit 42. As Secretary of State, he was involved in defense of the crown in the New England fisheries dispute in Parliament in the 1620's. In 1632 he declared, in the presence of the king, that the crown owned all the fisheries in both the British and the American seas. Exhibit 693, p. 235. See 5 *Encyclopaedia Britannica* 951.

Sir Dudley Digges (1583-1639). At various times a member of Parliament, Digges was a diplomat; sent as ambassador to Holland in 1620, he was doubtless involved in and fully aware of the continuing Anglo-Dutch dispute regarding the North Sea fisheries. Digges became Master of the Rolls in 1636. 7 *Encyclopaedia Britannica* 382. He was one of the patentees both of the second Virginia charter of 1609 (Exhibit 42) and of the New England charter of 1620 (Exhibit 11), and was a member of the Council of the Virginia Company. His son Edward Digges was governor of Virginia in 1655-1657. In the 1620's Sir Dudley Digges was active in Parliament in defending the Muscovy Company's right to its monopoly of whale fishing in "Greenland" waters. 2 Stock, *Proceedings and Debates of the British Parliaments Respecting North America* 61, 84 (1927).

Sir Dudley Carleton, Viscount Dorchester (1573-1632). As ambassador to Holland from 1616, Carleton bore the brunt of the diplomatic controversy with the Dutch resulting from James I's assertion of sovereignty and dominion of the North Sea. Fulton, *op. cit.* at 168, 180-85, 190; Exhibit 693, pp. 174, 192-93. Later Privy Councillor and principal Secretary of State in 1628, he collected authorities on the territorial admiralty jurisdiction in the narrow seas. Exhibit 693, pp. 212-13. Carleton was involved

in, or at least knowledgeable about, the inception of the Virginia colony in 1607. Exhibit 663, p. 82. In 1622 he received a petition from certain Walloons and French seeking permission to fish in the seas of Virginia. Tr. 2196.

Sir Ferdinando Gorges (c. 1566-1647), "the father of New England colonization." Exhibit 720, p. 34. A soldier and a sailor, Gorges was captain and keeper of the castle of Plymouth from 1596 to 1629, with considerable naval responsibility in the western part of the English Channel. He was, with Popham, chiefly instrumental in procuring the charter of 1606, was a member of the Plymouth Company in 1606 and was involved in the foundation of the Popham colony in Maine. Exhibit 756. One of the most important of the first generation of entrepreneurs of American colonial settlement, he was principally instrumental in obtaining the New England charter of 1620 and was the guiding spirit of the Council for New England. Later he became the patentee of Maine. 10 *Encyclopaedia Britannica* 530.

Sir Robert Heath (1575-1649). Heath was Solicitor General, 1621-25; Attorney General, 1625-31; Chief Justice of Common Pleas, 1631-34, and of King's Bench, 1642-45. He was one of the principal defenders of the prerogative in the Parliaments of 1623-25. "As a constitutional lawyer he was distinguished by learning and ability." 9 *Dic. Nat. Biog.* 348. He was a patentee of the New England charter of 1620 and a member of the Council for New England. Exhibit 11. In 1629 Heath was granted the "Heath patent" for Carolina, extending from sea to sea between the 31st and 36th parallels. He was also a Councillor of the Virginia Company. Greene, *The Foundations of American Nationality* 41 (1922).

Lodowick Stewart, Duke of Lennox (died 1624). As lessee of the crown, this near relative of James I was in charge of the measures in 1616 and subsequent years to

collect the tax called the "assize herring" from Dutch and other foreign fishermen in Scottish waters. Fulton, *op. cit.* at 168-71, 180. He was a member of the Privy Council which decided the *Case of the Royal Fishery of the Banne.* 1 Turner, *The Privy Council of England* 73-74 (1927). He was one of the commissioners to negotiate with the Dutch regarding the fisheries dispute in 1618. Fulton, *op. cit.* at 186. Also Admiral of Scotland (Exhibit 466, p. 54), Lennox was one of the patentees of the New England Company charter of 1620, Exhibit 11, and was president of the Council for New England until his death. Preston, *Gorges of Plymouth Fort* 235 (1953). In the division of New England lands in 1622 he received a coastal tract with "all the fishings . . . and islands . . . within 9 miles directly into the sea." App. 1003-05. He and the Earl of Arundel arbitrated the New England fishing dispute in 1619. App. 678-79.

Captain John Mason (1586-1635). In 1610 Mason was employed by James I to collect the "assize herring" from Dutch fisherman in Scottish waters, and made a naval expedition to that end. Fulton, *op. cit.* at 165; Exhibit 693, p. 153 n. He served as governor of Newfoundland from 1615 to 1621, and published the first map of that region. 15 *Encylopaedia Britannica* 15; Exhibit 663, p. 305. He was one of the guiding spirits of the New England Company, served as vice president of the Council for New England in 1632, and 10 years previously had obtained a grant of land called Mariana from the Council. New Hampshire was chartered to him in 1629. In the early 1630's he was the principal originator of the plan for an exclusive fishing society in Scottish waters, was a councillor and treasurer of the society, and was appointed admiral of its ships. Exhibit 693, pp. 216, 219-20, 241. He was the author of a state paper entitled "A Collection of Diverse Particulars Touching the King's Dominion and Sovereignty in the Fishings, as well in Scotland as in the British Ocean."

Exhibit 693, p. 364. He also wrote "A Brief Discourse of the New-found-land" (1620), emphasizing the fisheries. Bridenbaugh, *Vexed and Troubled Englishmen 1590-1642*, pp. 227-28 (1968). His last appointment was as vice-admiral for New England, but he died before taking up that position. See generally Exhibit 756; Exhibit 683, pp. 26, 28, 34-35.

Henry Howard, Earl of Northampton (1540-1614). Northampton was Lord Privy Seal from 1608 to 1614. In 1608 the draft of James I's proclamation of maritime sovereignty and exclusive fishing was referred to him and the Earl of Devonshire for their opinions; they recommended its adoption. Exhibit 693, p. 138. Northampton was a member of the Privy Council which decided the *Case of the Royal Fishery of the Banne*. 1 Turner, *The Privy Council of England* 73-74 (1927). He was active in procuring the issuance of the Newfoundland patent in 1610. Exhibit 663, p. 304.

William Penn (1644-1718). Penn owed his charter for Pennsylvania primarily to royal favor towards his father, Sir William Penn, admiral during the second Dutch war. The elder Penn had collected a number of documents on the crown's sovereignty and dominion of the sea, and the younger Penn presented those papers to the king. Exhibit 632.

Sir John Popham (c. 1531-1607). Privy Councillor from 1571, Solicitor General 1579-81, Speaker of the House of Commons in 1580, Attorney General 1581-92, and Chief Judge of the Court of King's Bench from 1592 until his death, Popham was one of the most eminent legal personages of his time. 16 *Dic. Nat. Biog.* 147-49. At the end of his life Popham was intensely interested and influential in colonial enterprises, and was one of the prime movers in procuring the "Virginia" charter of 1606, of which he is said to have been the principal draftsman. Scott, *The*

United States of America: a Study in International Organization 70 (1920). His nephew George Popham (died 1608), also one of the petitioners for the 1606 charter and one of the patentees named therein, was governor of the abortive Popham-Gorges colony in Maine.

Prince Rupert of the Rhine, Duke of Cumberland (1619-1682). Nephew of King Charles I, Prince Rupert commanded the royal army during the Civil War and the royal fleet in 1648-52, in which capacity he reduced Barbados and other West Indian islands to obedience. He was one of the principal British admirals in the second and third Dutch wars, and First Lord of the Admiralty from 1673 to 1679. The prince was one of the chief originators and backers of the Hudson's Bay expedition in 1668, and one of the incorporators of the Hudson's Bay Company and grantees of its charter in 1670; the company's land territories were called Rupert's Land after him. On the establishment of the Council for Trade and Plantation in 1670, Rupert became one of its first members. 17 *Dic. Nat. Biog.* 405-17; 33 *British and Foreign State Papers* 1365.

Robert Cecil, Earl of Salisbury (1563-1612). As chief minister of the crown from 1598 to 1612 and Lord Treasurer for the last four years of his life, Salisbury was at the head of government throughout the period which saw the charter of 1606, the second and third Virginia charters, and James' proclamation of maritime sovereignty in 1609 and the dispute with the Dutch which resulted therefrom. He was intensely active in defending diplomatically James' claim to maritime sovereignty and dominion, Fulton, *op. cit.* at 150-59, and stated England's official position that every coastal state was entitled to sovereignty out to at least 100 miles from its coasts. Salisbury subscribed to the opinion of the Privy Council Committee in 1607 which endorsed the lawfulness of James' proclamation, Exhibit 693, p. 146, and was of the Council when it decided the *Case of*

the Royal Fishery of the Banne. 1 Turner, *The Privy Council of England* 73 (1927). Salisbury was himself one of the patentees of the second Virginia charter of 1609. Exhibit 42. A kinsman of Sir Ferdinando Gorges, he took great interest in the initial ventures of colonization. Rowse, *The Elizabethans and America* 76, 98-100 (1959).

Anthony Ashley Cooper, Earl of Shaftesbury (1621-1683). Shaftesbury was a Privy Councillor and a leading minister in the first part of Charles II's reign, and served as Lord Chancellor in 1672-73. He was much involved in the third Dutch war and in the negotiations with the Dutch in which he repeatedly asserted the crown's sovereignty and property in the British seas. Exhibit 693, pp. 506-07. Shaftesbury was intimately involved in colonial affairs both before and after the restoration. 20 *Encyclopaedia Britannica* 426-29. He was one of the patentees of Carolina in 1663, and was the prime mover in the establishment and government of the Carolina colonies. In 1670 he was a patentee of Hudson's Bay. 33 *British and Foreign State Papers* 1365.

Sir Thomas Smith (c. 1558-1625). Smith was special ambassador to Russia in 1604 and chief executive of the Muscovy Company, which as we have seen had the exclusive whale fishery in the "Greenland" seas. For many years he was governor of the East India Company, and was a commissioner for the settlement of disputes with the Dutch in 1619. Smith was one of those most active in procuring the second Virginia Charter of 1609, and served as treasurer of the Virginia Company from 1609 to 1621. He was also one of the chief commissioners of James I's navy and governor of the Somers Islands (Bermuda) Company. 18 *Dic. Nat. Biog.* 536-37; Greene, *The Foundations of American Nationality* 38 (1922).

William Alexander, Earl of Stirling (c. 1567-1640). As Secretary of State for Scotland from 1626 to 1640, Alexander

was intimately involved in Charles I's exclusive fishing scheme, in 1630 was one of the commissioners to draft the project, and was a councillor of the fishing company. Exhibit 693, pp. 219-20, 227, 232, 239. Also a leading proponent of American colonization, Alexander received a charter in 1621 for Nova Scotia and New Brunswick, and served as lieutenant governor thereof. 21 *Encyclopaedia Britannica* 411-12.

Robert Rich, Earl of Warwick (1587-1658). Warwick was vice admiral of Essex from 1619, was appointed admiral of the fleet by Parliament in 1642, and held the office of Lord High Admiral from 1643 to 1645. In 1643 he was ordered to enforce the flag salute in the English seas. Exhibit 693, p. 380. Always interested in colonial ventures, he was one of the patentees of the New England charter of 1620 (Exhibit 11), was chiefly responsible for procuring the Massachusetts Bay charter in 1629, and was president of the Council for New England until 1631. In 1643 he was appointed head of the Board of Commissioners for the Plantations, which the following year granted a patent to the Providence colony in Rhode Island. 23 *Encyclopaedia Britannica* 377. In 1630 he and the parliamentary leader John Pym had founded a colony on the island of Providence, in the Caribbean. Greene, *The Foundations of American Nationality* 41 (1922).

Edward Zouche, Baron Zouche of Harringworth (c. 1556-1625). A diplomat, Zouche was ambassador to Scotland in 1593-94, and to Denmark in 1598. President of Wales from 1602 to 1615, he became one of the Commissioners of the Treasury at Salisbury's death in 1612. He was a member of the Privy Council which decided the *Case of the Royal Fishery of the Banne.* 1 Turner, *The Privy Council of England* 74 (1927). Zouche was a cousin, intimate friend and patron of Richard Zouche, one of the scholarly authorities for English maritime sovereignty (p. 67, *supra*) Lord Zouche was heavily involved in colonial enterprises. A

patentee of both the second Virginia charter of 1609 and of the New England charter of 1620 (Exhibits 11, 42), he was a member of the Council of the Virginia Company and also one of the first members of the Council for New England. As warden of the Cinque Ports from 1615 to 1624, Zouche had substantial responsibilities for the enforcement of English rights in the narrow seas. 21 *Dic. Nat. Biog.* 1330-32.

3. The English Discoveries and Symbolic Acts of Taking Possession Were Sufficient in Law To Establish Maritime Sovereignty.

Plaintiff seems to take the position that, admitting that England might have claimed sovereign rights in the seas adjacent to its North American colonies, it would have had to make some sort of occupation or appropriation in fact of those seas for its claim to be effective under the legal concepts of the time. That is plainly unsound. As Keller, Lissitzyn and Mann have demonstrated in their authoritative book *Creation of Rights of Sovereignty Through Symbolic Acts 1400-1800:*

> "Next, it may be asserted on the basis of the facts that the formal ceremony of taking of possession, the symbolic act, was generally regarded as being wholly sufficient *per se* to establish immediately a right of sovereignty over, or a valid title to, areas so claimed and did not require to be supplemented by the performance of other acts, such as, for example, 'effective occupation.' A right or title so acquired and established was deemed good against all subsequent claims set up in opposition thereto unless, perhaps, transferred by conquest or treaty, relinquished, abandoned, or

> successfully opposed by continued occupation on the part of some other state." App. 822.[28]

Thus, even as to land areas, "effective occupation" was not regarded as necessary in the 16th, 17th and 18th centuries to create a valid and exclusive claim of sovereignty. *A fortiori* this was true of the adjacent seas. Under the established legal norms of the era, the establishment of sovereignty over a land area was regarded as entailing sovereignty over the adjoining territorial sea. See Tr. 1219. That this was true under English law we have demonstrated at length. It was likewise true under international law. The Supreme Court has recognized that this was established law in the colonial period, and that discovery, without "effective occupation," was adequate to establish English sovereignty. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 573 (1823) (Marshall, C.J.); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842); *Massachusetts v. New York*, 271 U.S. 65, 85 (1926). *Accord*, 1 Story, *Commentaries on the Constitution* §§ 2-38, pp. 6-18 (5th ed. 1905).

1 Oppenheim, *International Law* 510 (1947), cited and relied on by plaintiff, is fully in accord with our position:

> "In former times, the two conditions of possession and administration, which now make the occupation effective, were not considered necessary for the acquisition of territory through occupation. Although even in the age of the discoveries States did not maintain that the fact of discovering a hitherto unknown territory was equivalent to acquisition through occupation by the State in whose service the discoverer made his

[28]The quotation is from the conclusion of the work. The authors' conclusions are supported by a careful and exhaustive analysis of the evidence.

explorations, the taking of possession was frequently in the nature of a mere symbolic act. Later on a real *taking possession* was considered necessary. However, it was not until the eighteenth century that the writers on the Law of Nations postulated an *effective* occupation,[3] or until the nineteenth century that the practice of the States accorded with this postulate.

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[3]"For an interesting and scholarly survey see Keller, Lissitzyn and Mann, *Creation of Rights of Sovereignty Through Symbolic Acts*, 1400-1800 (1938)."

William Bollan, an "able lawyer" in Massachusetts and agent for that colony in London, writing in 1764, founded "the ancient right of the English nation to the American fishery" on Cabot's discovery and Gilbert's symbolic acts, in the same manner as British entitlement to the land mass of North America was invariably justified. Exhibit 669; App. 766-71. Keller, Lissitzyn and Mann regard Gilbert's acts of taking sovereignty as typical of the period, *op. cit.* at 62-65; and control of the fisheries was the principal motive for the Gilbert expedition.

4. The Common Law of England, Including the Law of Maritime Sovereignty and Dominion, Became Law in This Country.

The English colonists considered, in general, that they brought the common law of England with them to their new home.[29] This was indeed explicity from the beginning: the King's Orders and Instructions of 1606 to the King's Council for Virginia provided that the law in the colonies should be "in substance as near to the common law of England,

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[29]The common law included the prerogative. Exhibit 755. This doctrine was restated by William Bollan in 1766. Exhibit 672, pp. 10-11.

and the equity thereof, as may be," and most of the colonial charters contain similar formulas. As a body of American common law grew up, it remained established doctrine that the common law of England was in force in this country except where inappropriate for some reason to conditions on this side of the Atlantic. "The universal principle (and the practice has conformed to it) has been, that the common law is our birthright and inheritance, and that our ancestors brought hither with them upon their emigration all of it which was applicable to their situation. The whole structure of our present jurisprudence stands upon the original foundations of the common law." 1 Story, *Commentaries on the Constitution of the United States* 140 (1833). See Tr. 802-37, 1278-86, 1721-27, 2032-33, 2341-46. Additional citations are unnecessary for a proposition that cannot be questioned without frivolity.

Plaintiff has not suggested, and cannot suggest, the slightest reason why the English common law bearing on sovereignty and ownership of the sea and seabed in adjacent waters might have been considered inappropriate here. There might, of course, have been a reason for such inappropriateness, particularly as the colonies came to feel more self-reliant and independent, if the crown had sought to retain for itself in American waters all the rights of sovereignty and property which the English law gave it. There could be no such inappropriateness, however, if the crown granted or delegated its rights to the colonial

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The American revolutionary statesmen had no quarrel with the royal prerogative, but rather with the purported legislative power of Parliament. The petition to the king adopted by the first Continental Congress in 1774 declared, "we wish not a diminution of the prerogative." 1 Journals of the Continental Congress 119; McIlwain, The American Revolution: a Constitutional Interpretation 116 (1923). Indeed the revolutionary statesmen *relied* on the prerogative as the source of the crown's power, by the colonial charters, to establish new governments not subject to parliamentary legislation. *Id.* at 130-37; Adams, Political Ideas of the American Revolution 97 (1939).

proprietorships and governments on this side of the Atlantic.

Plaintiff's witness Professor Morris conceded as much:

"Q Let's assume for the moment—I know you don't believe it—but let's assume a hypothetical that you think is contrary to fact, that the English common law in the 17th century gave the sovereign of the coast rights of ownership or paramountcy in the surrounding waters and the bed and subsoil thereof. If that were the common law of England in the 17th century, can you think of any motive which the colonists might have had to change it, or to deviate from it?

"A The only motive they might have to change it or deviate from it was their very strong opposition to the navigation laws which involved English control of the sea and seaports; and there was violent opposition between 1644 and 1681. This could be a motive.

"Q That would be a motive, I take it you mean against recognizing crown control of the sea?

"A That's right.

"Q It wouldn't be a motive against recognizing their own control of the sea, would it?

"A No.

"Q And it wouldn't have anything at all to do with the seabed, would it?

"A No." App. 538.

5. The Exploitation of Fisheries and Other Marine Resources Was of Paramount Importance as an Objective of American Colonization.

We can confidently go much farther and say that, given the objectives of the North American colonization, it was in the highest degree appropriate, and indeed essential, that rights of sovereignty and property be asserted in the American seas. The objectives of colonization were, of course, primarily economic; and in the early stages—the period of the charters—they were focused not so much on settlement and production of crops as on the discovery and exploitation of fisheries and mineral resources. Knowledge of the rich North American fisheries was one of the principal incentives to the English colonization. There was great awareness also of sedentary fisheries, and it was hoped that pearls would be found. The search for gold and other minerals was likewise a paramount objective, and those involved were hardly ignorant that these could be found below as well as above low-water mark.[30] For the paramount importance of fisheries in the North American colonization, see generally Tr. 2055-57, 2283; Exhibit 179, p. 51; Exhibits 663, 664, 719, 720, 740, 741, 742, 748; Exhibit 777, pp. 300-12; U.S. Exhibit 368, p. 27; Rowse, *The Elizabethans and America* 46, 64, 71, 93, 101, 103-05, 109, 160-80 (1959); Greene, *The Foundations of American Nationality* 32-33 (1922). In these circumstances, rights of sovereignty and property in the adjacent seas and seabed—particularly the right to exclude foreigners from such resources as might be found—were of very considerable importance both to the authors and to the recipients of the colonial charters.

[30] Selden noted that "it is well known to us that precious stones and pearls are very often found also in the Western Seas," and referred to the exclusive coral and pearl fisheries in Middle Eastern waters. Mare Clausum, p. 142.

When all these factors are considered together—the English law and practice of the period with respect to maritime sovereignty and dominion; the fact that the same persons were intimately involved both in the assertion and exercise of such sovereignty and dominion in Europe and in the process of American colonization; the established English law and practice regarding monopoly of newly discovered resources; the firm belief both of England and of the other colonizing powers that valid title could be established by discovery plus symbolic acts of sovereignty; the conspicuous importance of maritime and seabed resources as one of the principal objectives of colonization—we would be utterly astonished to find that England asserted and the charters conveyed no rights of sovereignty and property below low-water mark in the American colonies. It is fair to say that, given the background and the surrounding circumstances, we must approach the colonial charters with a strong presumption that we shall find that they recognized the adjacent seas and seabed as proper subjects for the exercise of sovereignty and ownership.

Plaintiff's witness Professor Thorne conceded as much with respect to exclusive fishing rights:

> "Q Can you think of any reason why the Crown, given its frame of mind in that era, would not have asserted its exclusive fishing rights off the North American coast?
>
> "A No, I think they would have tried to do it if they could, yes.
>
> "Q So that it is logical to assume that they would have tried to convey exclusive fishing rights by charter?
>
> "A Right, that's true." App. 555.

Likewise plaintiff's witness Professor Henkin, once his confusion as to the period in which the colonial charters were granted was cleared up, made the obviously necessary concession:

> "Q Is it not the fact then that the period of issuance of these colonial charters coincided precisely with the period in which the English sovereigns were most intensively aware of sovereignty over the sea and making the most expansive claims to that sovereignty?
>
> "A Well, it is obvious, so there is some coincidence of the two events, yes.
>
> "Q That being the case, can you think of any conceivable reason why they would not have wished to make claims off the North American coast similar to the claims they were making around England?
>
> "A If they were made around that period then I would withdraw that [*i.e.*, his testimony in chief that he would not expect the charters to contain maritime claims]. I don't have the expertise on the history of the period, but I was assuming that these claims [*sic;* charters] were dated at a later period when Great Britain had already abandoned these claims." App. 540-41.

Both the legal and political climate in which the charters were issued, and the provisions of the charters themselves, have been aptly summarized as follows:

> "The expansion of England was largely due to the efforts of this group which was composed of men drawn from the landed classes, of merchants and of sea-captains who had gained experience in the expeditions of Elizabeth's reign. Either as in-

dividuals or as members of a company these men had received charters granting them land and sea within certain limits, the power to organise a government and exercise jurisdiction within these limits, and the right to control the trade and fisheries of the plantation. It was the period of the great struggle between the Stuart kings and the United Provinces over the North Sea fisheries, and everyone was familiar with the attempts of the British government to compel the Dutch to buy licenses to fish for herring in the North Sea; they knew of the expedition under the command of Captain John Mason to collect the white penny from the fishermen of the west coast of Scotland; they were acquainted with the arguments of Selden, who in Mare Clausum, argued that the sovereignty of the British king extended from the shores of the British Isles uninterruptedly to the coasts ruled by other sovereigns. Though Selden did not discuss the question of British sovereignty over the North Atlantic [*sic;* see pp. 172-74, *infra*], by making grants of these waters the crown tacitly assumed sovereignty there. The colonial patentees then received grants of jurisdiction and territory which had to be turned into a source of profit. In an age when fisheries were a favorite speculaton and the North Atlantic was already frequented by ships of several nations, considerable interest was taken in the grants of sole fishing rights and jurisdiction by sea as well as by land." App. 784-85.

B. BRITAIN CLAIMED MARITIME SOVEREIGNTY IN NORTH AMERICAN WATERS.

In this subsection we shall summarize what the record shows as to the general claims, made by British legal writers and in official documents, regarding maritime sovereignty

or the corollaries thereof in North American waters in the 17th and early 18th centuries. More specific claims and examples of the exercise of rights of sovereignty or ownership will be reserved for later sections.

The first writer to deal with England's rights in American waters appears to have been Albert Gentili, regius professor of civil law at Oxford, who died in 1608, the year after the first settlement in Virginia at Jamestown. Gentili maintained that Spain and England, owning as they did both opposite coasts of the Atlantic in their own latitudes, were each sovereign over the seas extending between those opposite coasts. Alternatively, he relied on the established doctrine that every coastal sovereign had territorial waters of 100 miles. Exhibit 693, pp. 359-60.

As we have seen, the Anglo-Dutch dispute over the "Greenland" whale fishery, beginning in the second decade of the 17th century, involved waters which were at least sometimes deemed to extend as far as the North American coast (pp. 84-85, *supra*). The dispute unquestionably involved an English claim to maritime sovereignty and exclusive fishing rights, outside the British seas as traditionally defined, based on first discovery and use and on occupation of the nearest land mass. The dispute thus demonstrates the natural and inevitable attitude of the English government and crown towards maritime sovereignty in the adjacent seas of new English colonies.

Sir John Coke, Secretary of State, in 1632 asserted in the presence of the king that the crown owned the fisheries in the American seas. Exhibit 693, p. 235. In his "Propositions for Fishing," written the following year, Coke wrote that the British exclusive fisheries comprised three areas: the coasts of Britain and Ireland themselves, the North Sea, and the waters of the "North and Northwest discoveries," that is, North America. Coke urged that the British must be vigilant to prohibit the French and Dutch from fishing in American waters.

Sir John Boroughs, in his *The Sovereignty of the British Seas* in 1633, immediately after establishing (p. 22) that in the British seas the crown enjoyed sovereignty, jurisdiction and exclusivity of fishing, continued as follows:

> "... [H]is majesty is now absolute commander of the British Isle, and hath also enlarged his dominion over a great part of the western indies; by means of which extent of empire (crossing in a manner the whole ocean) the trade and persons of all nations (moving from one part of the world to the other) must of necessity, first or last, come within compass of his power and jurisdiction." *Ibid.*

As we have seen, the immediate occasion for Selden's authorship of *Mare Clausum* was the "Greenland" fisheries dispute, involving not the traditional British seas but the newly discovered whaling fisheries in northern waters sometimes regarded as extending to the coasts of America. In *Mare Clausum* Selden wrote as follows regarding British maritime sovereignty in American waters:

> "But there is, moreover, in the more westerly part of this open and main sea, another right belonging to the King of Great Britain, and that of a very large extent upon the Shore of America. Whereas Sir Humphrey Gilbert, Knight, did by authority of Queen Elizabeth transport a colony into the New World, with design to recover certain lands in the east parts of the Northern America, which the right belonged to the English dominion, the queen was by him as her procurator, put into a possession, for ever to be held by her and her heirs, both of the port called by the name of St. John (which is in the Island of Baccalaos [Newfoundland]) and also of the whole sea as well as land on every side, for the space of six hundred

miles. Then he recieved this new kingdom of the queen, as her beneficiary, having a branch and a turf delivered in his hands, according to the usual ceremony of England in transferring the ownership of lands and possessions. *Nor truly was it necessary that he should otherwise get the possession, from whence this dominion of the queen and her posterity had its original. For (as Paulus says well) there is no necessity that he who intends to take possession of a field, should walk about the whole, but it is sufficient if he enter any part of that field, so long as he doth it with a mind, thought and intent, to possess the field to its utmost extent and bound: Which saying may relate to seas, as well as lands, that were never taken into possession.* So that as Siculus Flaccus treating of occupied lands, saith, men did not possess so much land as they were able to till, but they reserved as much as they were in hope they might be able to till, the like also may be said of a sea so taken into possession. Look how much was reserved in hope of using and enjoying; so much also was bounded. But perhaps the first original of the dominion of this sea of America did not proceed from the possession that was acquired by Gilbert. He rather restored and enlarged the right of the crown here: for, that Island called Baccalaos, was added to the English Empire by Sebastian Cabot, in the time of Henry the Seventh. And it is certain that afterwards it grew to be a custom for the officers belonging to the High Admiral of England (in whose charge are all the seas subject to the King of England and Ireland, as King of England and Ireland) to demand tributes of such as fished also in this sea; which was (I suppose) a most evident token of the king's dominion.

> But it was provided by an Act of Parliament, in the reign of Edward the Sixth, that no tributes of that kind, to the grievance of fishermen, should be paid any longer. How far our English colonies, lately transported into America, have possessed themselves of the sea there, I have as yet made but little enquiry." *Mare Clausum*, pp. 441-42. (Emphasis added.)

This most interesting passage, among other things, thoroughly explodes plaintiff's contention that Selden's theory of maritime sovereignty was based solely on historic appropriation or possession and hence could have no application to American waters. To the contrary, Selden is in entire agreement with the general contemporary opinion that discovery plus symbolic acts were sufficient to establish sovereignty and ownership, over both land and sea areas. And while Selden says that he is ignorant how far the American colonists have actually taken possession of their adjacent seas, he plainly regards them as having rights of sovereignty and ownership therein whether they had taken possession or not.

The report of the admiralty commissioners to Charles I in 1636 (App. 719; Exhibit 693, pp. 288-89, 762-64; Exhibits 604, 223; pp. 78-79, *supra*) declares the king's ownership of the fisheries not only in the seas "devolved unto you from your royal predecessors" but also in the seas "of any other your dominions," that is, territories acquired by the English crown since Charles' accession in 1625, which were all in North America.

Needham's translation and edition of Selden's *Mare Clausum*, published in 1652 by the direction of the English government as a state paper, includes in the dedication the following verse addressed by Neptune to the Commonwealth of England:

"Go on (great State!) and make it known
Thou never wilt forsake thine own,
Nor from thy purpose start:
But that thou wilt thy power dilate,
Since Narrow Seas are found too straight
For thy capacious heart.
So shall thy rule, and mine, have large extent:
Yet not so large, as just, and permanent."
Exhibit 693, p. 411 n.1; Tr. 1289-90.

One's amusement at the flowery style of this poetic effort should not divert attention from the fact that it is evidence of recognition and awareness of an extension of British maritime sovereignty beyond the traditional "narrow seas" because of the establishment of British colonies in North America.

Robert Codrington, in his *His Majesty's Propriety, and Dominion on the British Seas Asserted* (published in London in 1665), evidences a like awareness:

> "There is also another dominion of the sea belonging to the king of Great Britain, and that of a very large extent upon the shore of America, as on the Virginian sea, and the islands of the Barbados and St. Christophers and many other places. . . ." *Id.* at 101.

Since this passage is preceded by a lengthy exposition of the standard British claim to maritime sovereignty and its usual attributes, including exclusive fishery and admiralty jurisdiction, in the British seas, there is no doubt that by "dominion" Codrington meant full territorial sovereignty and its corollaries.

The treaty between Great Britain and Spain, signed at Westminister in 1670, included the following provision:

> "XV. The present treaty shall in nothing derogate from any pre-eminence, right, or dominion, of either confederate in the American seas, channels, or waters, but that they have and retain the same in as full and ample manner as may of right belong unto them: but it is always to be understood, that the liberty of navigation ought in no manner to be disturbed, where nothing is committed against the genuine sense and meaning of these articles." Exhibit 736, p. 400.

Similarly, the Treaty of Peace between Great Britain and France, signed at Whitehall in 1686, included the following:

> "It is agreed that each king shall have and retain for himself all dominions, rights and prerogatives in the seas, straits, or other waters of America, with the same amplitude which belongs to each by right and in the same manner in which he now enjoys them." Exhibit 737, p. 91, Article 4.

While these treaty provisions are very general in their terms —doubtless because the parties would have found it difficult to agree on all the specifics—they are hardly consistent with, for example, Dr. Kavenagh's notion that sovereignty and ownership were regarded as ending at high-water mark on the Atlantic coast of the British North American colonies. As to the "dominions," "rights," "preeminences" and "prerogatives" referred to, we have seen that English law and practice in the 17th century was more than adequate to provide specific content to those otherwise general terms.

There can be no doubt that the territorial jurisdiction of the Lord High Admiral of England was regarded as extending to the territorial seas of the North American colonies, since the commissions of the admirals and judges

in plain language referred to those colonies and gave the admirals jurisdiction in their seas. Exhibits 639, 640; see also Exhibit 675, 3d page of preface.

In 1688 the crown granted to Sir Robert Holmes for a three-year period all goods belonging to or seized by pirates "upon the land in any part or parts of America, or any the islands or sea limits or territories thereof." App. 368.

A fisheries tract of 1719, after affirming British sovereignty in the British seas, referred to the British exclusive fisheries of New England and Newfoundland. App. 694. Burchett, writing in 1720, claimed for the British crown the seas of "Newfoundland and the adjacent parts of North America," by virtue of Cabot's discovery and Sir Humphrey Gilbert's taking of possession, as well as the northern seas as far as the shore of Greenland on the basis of Sir Hugh Willoughby's "invention" and the discovery and exploitation of the whale fishery by the Muscovy Company. App. 775. Lediard, writing in 1735, is of the same view in almost the same words. App. 827.

Professor Henkin, more candid on this point than some of plaintiff's other witnesses, recognized that Great Britain claimed exclusive fishing rights in North American waters. Tr. 2628-30.

In 1720 the law officers of the crown issued a most interesting opinion demonstrating their conviction that the seas adjacent to the American colonies were within the boundaries of those colonies. In 1700 Parliament had enacted a statute providing for criminal trials in admiralty cases, pursuant to commission, "in any place at sea, or upon the land, in any of his majesty's islands, plantations, colonies, dominions, forts, or factories." 1 Crosskey, *Politics and the Constitution* 450 (1953). In 1720 the question arose whether commissions could be issued under the statute for trials in any place at sea throughout the

world, or whether there were limitations. The law officers advised the crown that the proper construction of the statute was that the words "in any place at sea" were modified by the words "in any of his majesty's islands, plantations, colonies, dominions," etc., and that in consequence commissions for trials at sea could not be issued for "any place at large upon the sea" but only for trials in "the sea adjoining" to particular colonies. *Id.* at 452. This may or may not have been the most reasonable construction of the statute, and Crosskey disagrees with it; its significance for our purposes is that the law officers saw nothing anomalous about the formula "in any place at sea . . . in any of his majesty's . . . colonies." They plainly believed that the colonies had territorial seas and that those seas were within the boundaries or limits of the colonies themselves. The statute, incidentally, provided for jurisdiction over "all piracies, felonies, and robberies committed upon the sea, or in any haven, river, creek, or place where the admirals have power or jurisdiction," with no distinction between crimes committed by subjects and by foreigners. 6 Viner, *Abridgement* 511 (2d ed. 1792).

C. THE COLONIAL CHARTERS, CONSTRUED IN THE LIGHT OF CONTEMPORARY LEGAL USAGE, CONVEYED EXTENSIVE RIGHTS BOTH OF SOVEREIGNTY AND OF PROPERTY IN THE MARGINAL SEAS.

The 17th-century colonial charters are generally similar in language; there is no need in this brief to discuss all of them, which the witnesses in any event have done. We shall analyze the pertinent provisions of two typical charters, and then shall point out certain variations in the language of others.

1. The Second Virginia Charter of 1609

The pertinent portions of the second Virginia charter of 1609 read as follows:

> "all those Lands, Countries, and Territories, situate, lying, and being in that Part of America, called Virginia, from the Point of Land, called Cape or Point Comfort, all along the Sea Coast to the Northward, two hundred miles, and from the said Point of Cape Comfort, all along the Sea Coast to the Southward, two hundred Miles, and all that Space and Circuit of Land, lying from the Sea Coast of the Precinct aforesaid, up into the Land throughout from Sea to Sea, West and Northwest; *And also all the Islands lying within one hundred Miles along the Coast of both Seas of the Precinct aforesaid;* Together with all the *Soils, Grounds, Havens, and Ports, Mines, as well Royal Mines of Gold and Silver, as other Minerals, Pearls, and precious Stones,* Quarries, Woods, *Rivers, Waters, Fishings, Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preeminences within the said Territories, and Precincts thereof, whatsoever, and thereto and thereabouts both by Sea and Land, being, or in any sort belonging or appertaining, and which We, by our Letters Patents, may or can grant,* in as ample Manner and Sort, as We, or any our noble Progenitors, have heretofore granted to any Company, Body Politic or Corporate, or to any Adventurer or Adventurers, Undertaker or Undertakers of any Discoveries, Plantations, or Traffic, of, in, or into any Foreign Parts whatsoever, and in as large and ample Manner, as if the same were herein particularly mentioned and expressed; . . . ." Exhibit 42, pp. 3795-96; App. 263-64 (Emphasis added.)

Also granted was the right

> "to dig and to search for all manner of Mines of Gold, Silver, Copper, Iron, Lead, Tin, and all sorts of Minerals, as well within the precinct aforesaid, as within and [any] part of the mainland not formerly granted to any other." Exhibit 42, p. 3798; App. 264.

The letters patent further provided

> "that in all Questions and Doubts that shall arise upon any difficulty of Construction or Interpretation of any Thing contained either in this, or in our said former Letters-patents, the same shall be taken and interpreted in most ample and beneficial Manner for the said Treasurer and Company, and their Successors, and every Member thereof." Exhibit 42, p. 3801; App. 264.

Professor Smith has given some of the reasons which compel the conclusion that this language was intended to convey, and as a matter of English law did convey, territorial sovereignty and ownership in property of the seas and seabed out to 100 miles in the Atlantic. App. 264-66. His conclusion cannot seriously be questioned.

Among the rights conveyed are jurisdictions, royalties and franchises, all "by sea and land." *Jurisdictions*, of course, included the admiralty jurisdiction; and we have explained at some length what that consisted of, and on what basis it was considered to rest, in 17th-century English law (pp. 92-98, *supra*).[31] The term *franchises* was in common

[31] Provisions in other charters confirm that the admiralty jurisdiction was territorial. The Gorges charter of 1639 for Maine is perhaps unique in specifying different distances for admiralty jurisdiction than for other purposes: the seas and islands were conveyed out to five leagues, but the admiralty jurisdiction to 20 leagues. App. 274, 277. The Maryland charter conferred admiralty jurisdiction in "the sea of those

use as including, among other things, exclusive fisheries, as Blackstone, Hall and Moore have all pointed out. App. 858-59; Exhibit 729, pp. 20, 33. The term *royalties* (sometimes *regalities* or *regalia*) was well understood to include the crown's rights of sovereignty and propriety in the adjacent seas and seabed, and is the normal term a 17th-century conveyancer would have used to grant such rights. App. 254, 555, 556-58; pp. 13, 58, 59, 60, 73, 74, 78, 79, 81, 83, 86, 89, 90, 96, 109, 112, 113, 114, 116, 133, *supra*.[32]

Why did the authors of the charter not simply write that the boundaries or territory of the colony were to include the seas out to 100 miles? The linguistic or legal usage of any period is based on unarticulated assumptions, which may or may not be wholly obvious to later generations. At the time the charters were written, a territorial sea, usually defined as 100 miles in width, was regarded not as a separate or independent piece of territory, to be conveyed separately, but as an accessory or appendent of territorial sovereignty on land.[33] The legal climate today is not significantly different on this point. A study of 20th-century peace treaties, acts of independence and instruments

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parts." App. 285. Plaintiff's witness Dr. Kavenagh admitted that the admiralty jurisdiction conferred by colonial charters was territorial in that it was to be exercised within fixed maritime bounds. Tr. 2050-51.

[32]In 1700 William Penn asserted his conviction that the grant in his patent of "the royalties of both land and water" made him "lord of the waters," with power to serve writs, admiralty jurisdiction and rights of property in the territorial sea. Exhibit 284, p. 349; Exhibit 285, pp. 140-41; App. 335.

[33]Similarly, in 1817, in the arbitration concerning title to the islands in Passamaquoddy Bay and the Bay of Fundy, the United States contended that islands within a reasonable distance from a mainland coast are dependent on it and pass, even without an express provision, along with a conveyance of the mainland. "Case of the United States," 6 Moore, International Adjudications 47, 58-60, 71, 107 (1933).

ceding territory would rarely, if ever, reveal explicit mention of a territorial sea or a continental shelf. These are regarded as passing automatically and implicitly along with sovereignty over a land area which has a coastline. The 17th-century attitude was substantially identical; indeed, the 17th-century documents are much more explicit than would be regarded as necessary or normal today.

The text of the 1609 charter suggests that, while the territorial sovereignty of the adjacent sea was regarded as passing automatically, it was considered necessary or at least prudent to mention specifically the attendant rights of property and government in those seas—the soils, the mines, the pearls, the fisheries, the admiralty jurisdiction, royalties and franchises. It is perhaps unclear from the text whether the adjacent sea was regarded as part of the "territories" or as part of the "precincts thereof" or "thereabouts . . . or in any sort belonging or appertaining." *Precincts*, Dr. Kavenagh to the contrary, included surrounding or adjacent areas, not merely subdivisions of the territory itself. Tr. 2072.

It is essential to understand, finally, that to a 17th-century mind a conveyance of "all the islands lying within 100 miles along the coast" was regarded implicitly either as a conveyance of the intervening seas or as a recognition that the intervening seas likewise passed as a necessary appurtenance to the mainland. Over and over again, the writers of this period identified sovereignty and ownership of islands with sovereignty and ownership of the sea surrounding such islands and intervening between them and the mainland. Callis, for example, wrote that the islands in the English seas are part of the realm *because* they are in the English seas, which are themselves part of the realm. App. 781. Hale, likewise, considered that islands in the British seas are parts of those seas, which, with the bed thereof, belonged to the crown. Moore, *op. cit.* at 358.

Justice, seeking to prove British sovereignty and ownership of the British seas, argued that England is in possession of all the islands within those seas; to Justice, that is proof of dominion over the seas themselves. Exhibit 710, p. 154. Selden was to the same effect. *Mare Clausum*, pp. 333-43, as was Malynes, App. 663-64.

This mode of thinking can be traced back directly to Bartolus (1314-1357), the most famous jurist of the middle ages. Bartolus' view is described by Fenn, App. 798-803. "An island is regarded as part of the mainland, as it were, sticking to it . . . . It goes with the territory nearest to it." App. 800. A state automatically has extended power out to sea, entailing property in the islands and jursidiction in the sea itself. (The rights in the sea were not yet thought of as ownership, though that development followed inexorably.) Bartolus declares that he who has jurisdiction in territory adjoining the sea has jurisdiction in the sea also. App. 265, 802. To what distance? Without answering the question he turns to islands, and says that because there is jurisdiction over the sea there is jurisdiction over the islands also. He then arrives at 100 miles from the coast as the distance to which that jurisdiction over islands extends. This was later interpreted to mean jurisdiction over 100 miles of adjacent sea. Bartolus probably intended this, and "it follows from his reasoning," since "the state's jurisdiction over the islands in the adjacent sea is made to depend upon the jurisdiction of the state over that part of the sea." App. 802-03.

The integral linkage of seas and islands is likewise apparent in *De Superioritate Maris*, which founded England's sovereignty over the English seas on the fact that "the kings of England, by reason of the said kingdom, . . . have been in peaceable possession of the dominion of the sea of England and of the isles being in the same. . . ." App. 651.

Plainly, this background must be understood before the words used in the charters can be fully appreciated. Once

the background is understood, we submit, any superficial ambiguity in the charters is resolved.[34]

That a grant of islands was regarded as granting the intervening sea as well is further confirmed by language in at least two of the subsequent charters. The Maryland charter of 1632, App. 645-46, conveys all islands within ten leagues of the shore. It then goes on to convey the fisheries "in the sea . . . within the premises," except that free fishing to English subjects is reserved "in the sea . . . of the province aforesaid." What was the "sea within the premises," "the sea of the province"? Quite apparently, it was the sea within ten leagues of the coast, even though the reference to ten leagues reads in terms of islands rather than of the sea itself. There is no other language in the charter which can possibly be construed as creating a "sea of the province." Dr. Kavenagh, after struggling to resist the obvious, at length admitted that it could only be the language conveying islands within ten leagues which created a sea of the province and a sea within the premises. App. 531-35.

Similarly, the lease of Virginia to Arlington and Culpeper in 1673 conveys all islands within ten leagues of the coast. The charter goes on to convey "the royalty of the said seas . . . aforegranted." U.S. Exhibit 60. Yet no seas

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[34] In the second Gulf States litigation, the Court held that an early 19th-century boundary formula referring to islands within certain limits did "not appear on its face to establish a boundary line that distance from shore," and said that nothing in the history of Mississippi and Louisiana had been shown to require departure from that conclusion. United States v. Louisiana, 363 U.S. 1, 81-82 (1960). In his separate opinion Justice Black, who had written for the Court in *California*, conceded that this "islands" language provided "some color of title" to boundaries in the sea and that Congress had regarded the language as highly significant. *Id.* at 96-97. In the present proceeding, unlike the Gulf States litigation, we have a record which permits construction of the "islands" language in 17th-century charters in the legal and semantic context of that time.

have expressly been referred to or granted as such—only the islands have been referred to and granted. Yet the assumption that the grant of islands within a certain distance included within it a grant of the seas themselves to that distance was so strong that it determined even grammar: the draftsmen of the charter could and did refer to "the said seas" when only islands had previously been mentioned. Dr. Kavenagh was unable to suggest any other explanation of how the charter could have been constructed as it was. App. 528-31.

Another example of the same type of construction is found in a deed of Nova Scotia in 1630 from the Earl of Stirling to the Baron de la Tour. The deed grants "all the country, coasts and islands" within defined limits, and later in the same sentence "all the fruits, profits and emoluments" "of all the which said lands and seas," though no seas have been explicitly mentioned as such. 1 Moore, *International Adjudications* 92 (1929).

The third Virginia charter, of 1612, provides that its purpose is to create "a more ample extent of their [the colony's] limits and territories into the seas adjoining to and upon the coast of Virginia . . ." App. 363. This is an authoritative interpretation that the second charter did create limits and territories in the seas adjoining, which are now to be made more ample. The third charter also differs slightly in phraseology from the second in granting all soils, jurisdictions, royalties, franchises, etc., both on the mainland "and also within the said islands and seas adjoining"—language that can leave no doubt that both territorial sovereignty and rights of property in the main sea were conveyed. App. 364.

2. The New England Charter of 1620

The boundaries of the New England colony were stated in its charter of 1620 as follows:

"that all that Circuit, Continent, Precincts, and Limits in America, lying and being in Breadth from Forty Degrees of Northerly Latitude, from the Equinoctial Line, to Forty eight Degrees of the said Northerly Latitude, and in length by all the Breadth aforesaid throughout the Main Land, from Sea to Sea, with *all the Seas*, Rivers, *Islands*, Creeks, Inlets, Ports, and Havens, within the Degrees, Precincts, and imits of the said Latitude and Longitude, shall be the Limits, and Bounds, and Precincts of the second Colony: . . . ." Exhibit 11, p. 1829; App. 270. (Emphasis added.)

The granting language was as follows:

"all the aforesaid Lands, and Grounds, Continent, Precinct, Place, Places and Territories, viz, the aforesaid Part of America, lying and being in Breadth from forty Degrees of Northerly Latitude from the Equinoctial Line, to forty-eight Degrees of the said Northerly Latitude inclusively, and in Length of, and within all the Breadth aforesaid, throughout the Main Land from Sea to Sea, together also, with the . . . *Fishings*, *Mines*, and *Minerals as well Royal Mines of Gold and Silver, as other Mine and Minerals, precious Stones*, Quarries, and *all, and singular other Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preeminences, both within the same Tract of Land upon the Maine, and also within the said Islands and Seas adjoining:* Provided always, that the said Islands, or any of the Premises herein before mentioned, and by these Presents intended and meant to be granted, be not actually possessed or inhabited by any other Christian Prince or Estate, nor be within the Bounds, Limits, or Territories, of that Southern

> Colony heretofore by us granted to be planted by diverse of our loving Subjects in the South Parts, to have and to hold, possess and enjoy, all, and singuiar, the aforesaid Continent, Lands, Territories, *Islands*, Hereditaments, and *Precincts, Sea Waters, Fishings*, with all, and all Manner their *Commodities, Royalties, Liberties, Preeminences, and Profits*, that shall arise from thence, with all and singular their Appurtenances, and every Part and Parcel thereof, and of them . . . ." Exhibit 11, p. 1834; App. 270-71. (Emphasis added.)

The favorable-construction clause also was included:

> "And further our will and Pleasure is, that in all Questions and Doubts, that shall arise upon any Difficulty or Instruction or Interpretation of any Thing contained in these our Letters-patents, the same shall be taken and Interpreted in most ample and beneficial Manner, for the said Council and their Successors, and every Member thereof." Exhibit 11, p. 1840; App. 271.

Here, in addition to the same formulas as appeared in the second Virginia charter, we have express statements that "all the seas" specified are within the boundaries of the colony, that "sea waters" are among the properties conveyed, and that the royalties and other benefits include those "within the said islands and seas adjoining." What is missing, however, is the specification of 100 miles or any other distance from the shore.

In its grant to Gorges and Mason in 1622 (App. 641), again in its grant of Mariana to Mason in 1622 (App. 642), and yet again in its grant of New Hampshire to Mason in 1629 (App. 644), the Council for New England authoritatively described the charter to it of 1620 as having conveyed the

land area "together with the seas and islands lying within 100 miles of any part of the said coast of the country aforesaid." This most interesting interpretation obviously sheds decisive light on how we are to interpret both the 1620 charter and the many other charters and patents which speak of the adjacent islands and seas without specifying any particular distance. The Council doubtless based its construction on one or both of two factors, probably on both: first, that 100 miles was generally understood in English law at the time to be the breadth of the territorial sea in the absence of special historic factors; second, that the charter of 1606 had established or recognized a uniform 100-mile territorial sea all up and down the Atlantic coast and that such boundaries were implicitly incorporated into subsequent charters for particular areas.[35]

The "first division" of its lands made by the Council for New England in 1622 is likewise instructive as to how the Council interpreted its charter and as to the linguistic usage of the time. The Council agreed, for example, that the Duke of Lennox was to have a certain tract of land with boundaries "three leagues into the sea." App. 1003. When later in the same meeting Sir Ferdinando Gorges came to define this grant in conveyancer's language, he described the land area and added "with all the fishings, bays, havens, harbours and islands lying or being within 9 miles directly into the sea." App. 1005. The Earl of Arundel's division went through a similar process of definition and

[35] Plaintiff's witness, Dr. Kavenagh argued that the Council for New England was uncertain, and continually changed its mind, as to what it had been granted. He bases this (1) on the fact that certain other grants by the Council, in describing the 1620 charter, did not mention the 100-mile limit but merely referred back to the text of the charter for its boundaries, and (2) on the fact that the sea boundaries conveyed by the Council to its grantees were less than 100 miles off shore and differed from grant to grant. The argument is frivolous. See Tr. 2113-21, 2151-53.

description. App. 1003, 1005. These minutes confirm that the Council interpreted its charter as giving it boundaries in the sea which could be subdivided among the members. The minutes also show, most interestingly, that boundaries in the sea—"three leagues into the sea"—were regarded as accurately conveyed by language specifying fishings and islands within nine miles into the sea, without an express conveyance of the sea itself. This further confirms the position outlined above that a grant of islands within a certain distance was regarded as a grant of the intervening sea.

The patent of Mariana by the Council to Mason in 1622 expressly granted all the seas and islands within three miles of the land area conveyed. App. 643. The Council's grant to Gorges, Mason and others of the Piscataway area in 1631 conveyed "all the seas within 15 miles of the foresaid sea coasts," together with all the soil, mines, fisheries, royalties, franchises, etc. App. 311-12.

Other charters used formulas slightly varying from those so far discussed. The Newfoundland charter of 1610 granted "the seas and islands lying within ten leagues of any part of the sea coast of the country aforesaid." Exhibit 179, p. 53; App. 329. The grant of Nova Scotia to Sir William Alexander in 1621 conveyed the "islands or seas lying near or within six leagues from any part of" the mainland on the west, north and east sides, and to the south, "all the seas and islands . . . within forty leagues of the said shores." 1 Moore, *Arbitration Digest* 20 (1898); 6 Moore, *International Adjudications* 136 (1933). The boundaries created by the 1662 charter of Nova Scotia extended "30 leagues into the sea." App. 331; Exhibit 240, p. 101. The Hudson's Bay charter of 1670 conveyed the right of sole trade in all "seas," etc., "that lie within the entrance of the straits, commonly called Hudson's Straits" with all fishings "in the seas . . . within the premises" and "the royalty of the sea upon the coasts." Exhibit 777, p. 229; Exhibit 765; 33 *British and Foreign State Papers* 1364, 1370.

The Nova Scotia charter of 1621, with its express grant of territorial seas, was confirmed by a statute of the Scottish Parliament. 6 Moore, *International Adjudications* 14 (1933). Obviously, Parliament believed that boundaries in American waters extending at least 40 leagues from shore were legally proper. The British in the 18th century regarded the boundaries of Nova Scotia as those established by the Alexander charter. Exhibit 768, pp. 90-91, 97. In 1817 the United States agent in the boundary arbitration with Great Britain construed the Nova Scotia charter of 1621 as follows:

> "By the charter to Alexander he must have been the unqualified proprietor of all rights of fishing in the Gulf of St. Lawrence, in the Bay of Passamaquoddy and round his whole shores for six leagues from the coast, and in part for forty leagues, because his sweeping clause of title expressly gives him all the 'bays, shores, islands or seas' within that distance. It is not merely a right of jurisdiction, but of actual property; it is an indefeasible fee simple estate which is granted. It is not the claim of national sovereignty to the marine league which by the law of nations belongs to an independent community, but it purports to grant, and does in fact grant the same title to the sea for six leagues, that it does to any part of the lands upon the continent." "Case of the United States," in 6 Moore, *International Adjudications* 47, 161 (1933).

Nova Scotia as chartered in 1621 lay within the bounds granted by the New England charter of the preceding year. Gorges and Mason had consented that Nova Scotia be carved out of New England "within the bounds" granted by the New England charter. Gorges, quoted at 6 Moore, *International Adjudications* 243 (1933); see Exhibit 673, p.

25. Thus the Nova Scotia charter's express conveyance of "seas" is yet further confirmation, if any were needed, that the New England charter conveyed seas.

3. Modern Interpretations of the Charters

Prior to 1947 the Supreme Court uniformly construed the colonial charters entirely consistently with the views set forth above. In *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 412 (1842), in construing the charter of New York, the Court declared:

> "The object in view appears upon the face of them [the letters patent]. They were made for the purpose of enabling the Duke of York to establish a colony upon the newly discovered continent, to be governed, as nearly as circumstances would permit, according to the laws and usage of England; and in which the duke, his heirs and assigns were to stand in the place of the king, and administer government according to the principles of the British constitution . . . . The estate and rights of the king passed to the duke, in the same condition in which they had been held by the crown and upon the same trusts. Whatever was held by the king as a prerogative right, passed to the duke in the same character. And if the word 'soils' be an appropriate word to pass lands covered with navigable water, as contended for on the part of the defendant in error, it is associated in the letters-patent with 'other royalties' and conveyed as such . . . . And in the judgment of the court, the lands under navigable waters passed to the grantee as one of the royalties incident to the powers of government, and were to be held by him, in the same manner, and for the same purposes, that the navigable waters of England, and the soils under them, are held by the crown."

And in *Shively v. Bowlby*, 152 U.S. 1, 14, 16 (1894), the Court declared as follows:

> "The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide waters."
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> * * *
>
> "By those [colonial] charters . . . 'the dominion and propriety in the navigable waters, and in the soils under them, passed, as a part of the prerogative rights annexed to the political powers conferred . . . ' '[T]he lands under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; . . .'"

Many State cases are to the same effect. *E.g., Barker v. Bates*, 13 Pick. 255 (Mass. 1832); *New York, N.H. & H.R.R. v. Horgan*, 56 Atl. 179 (R.I. 1903); *Dunham v. Lamphere*, 3 Gray 268 (Mass. 1855) (sea fisheries); *Nichols v. Boston*, 98 Mass. 39, 42 (1867); *Gough v. Bell*, 21 N.J.L. 156, 160 (1847); *People v. Trinity Church*, 22 N.Y. 44, 46-47 (1860); *Commonwealth v. Newport News*, 158 Va. 521, 164 S.E. 689 (1932).

The United States will probably contend that such decisions had reference only to internal waters, *i.e.*, rivers, harbors and perhaps bays. Suffice it to say that there is not a word in any of the opinions which suggests such a distinction, and that no trace of any such distinction can be found in the English common law on which both the charters and the judicial decisions were founded. Many decisions are expressly inconsistent with such a notion; *e.g.*:

> "[T]he king is held to be owner of the soil under the sea, which royal right, by the common law of

England, extends over the shore where the tide ebbs and flows to ordinary high water mark . . . .

" . . . [W]e have no doubt, that by the charters of Charles I and James I, under which the land of the colony of Massachusetts was granted, for the purpose of founding a colonial government of English subjects, all the rights to the sea and sea-shores, with the incidental rights of fishing, were granted to the colonists . . . .

"[A]ll the right, both to the soil under the sea, as far as by the law of nations one government is conceded to hold an exclusive right to the sea-coasts, and to the shores and arms of the sea, where the sea ebbs and flows, did vest in the grantees under those charters. Whatever right or jurisdiction, if any, remained in the crown after those grants, it is clear that it ceased on the establishment of independence, and has remained absolute in the States." *Weston v. Sampson*, 62 Mass. (8 Cush.) 347, 351-53 (1851) (Shaw, C.J.).

In *United States v. California*, 332 U.S. 19, 32-33 (1947), the Court, without the benefit of any evidentiary record, dismissed the charters as follows:

"Neither the English charters granted to this nation's settlers, . . . nor any other document to which we have been referred, showed a purpose to set apart a three-mile ocean belt for colonial or state ownership. Those who settled this country were interested in lands upon which to live, and waters upon which to fish and sail. There is no substantial support in history for the idea that they wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of its wealth."

Of course the Court was correct that the charters did not create a three-mile belt: no one had ever heard of such a thing at the time of the charters, and the territorial seas they created were much broader, usually 100 miles either explicitly or implicitly. And the rights created in the marginal sea were not "private," but rather pertained to the coastal government just as they did in English waters.

In the present case, the record contains, besides a great wealth of historical and legal evidence bearing on the background, terminology and proper construction of the charters, interpretations of them by Professors Smith and Flaherty and by Dr. Kavenagh. We submit that on the basis of credentials, knowledge of the relevant areas of law and history, cogency of reasoning and behavior on cross-examination, the testimony of Professors Smith and Flaherty merits far greater weight than does that of Dr. Kavenagh. The latter is not a lawyer, was not qualified as an expert in either English or American law, and is not even an expert on English history—the milieu in which the charters originated. His unfamiliarity with English history and law during the pertinent period is striking; see, *e.g.*, Tr. 2075-76, 2131-32. He believes in a clear and sharp distinction between inland waters and the sea, Tr. 2076-78, 2090. although nothing of the sort can be found in English law or practice at the time. His entire testimony was based on the clearly erroneous view that under 17th-century English law the sea and seabed were not susceptible of ownership. Tr. 2072-74, 2097, 2120-21, 2132-37, 2142, 2151, 2153-56, 2174. His testimony generally was not such as to inspire confidence in his conclusions or in the accuracy of his research. See App. 528-29; Tr. 1422 (compare this with Tr. 2025-29 and Exhibit 754), Tr. 2037-38, 2041-43, 2081-82, 2090-91, 2093, 2102-03, 2108-12, 2179, 2186-87, 2193-94, 2205, 2211-20, 2224-34, 2240-41.

Dr. Kavenagh appears to give away plaintiff's entire case at App. 535-36, where he concedes that the maritime "jurisdiction" which all the colonial charters contain was sufficient to entitle the grantees to the exclusive right to exploit pearls or shellfish five miles off the coast. And Dr. Kavenagh referred to the colonial right to exclude or to license foreign fishermen as "exercising the jurisdiction." App. 536. Such rights, whether called "jurisdiction" or anything else, are plainly enough to sustain the position of the Common Counsel States in the present proceeding.

Finally, Dr. Kavenagh conceded (App. 537) that if he was mistaken concerning the state of English law and legal terminology in the 17th century, his testimony would fall. Since he was indeed mistaken, his testimony does fall.

The only way plaintiff has suggested to avoid the conclusive force of the grant of "royalties" in the colonial charters is Professor Wroth's argument that royalties were a part of the prerogative and such rights had to be more specifically mentioned; therefore, the Professor opines, a general reference to "all royalties" or "all royalties by sea and land" conveyed nothing whatsoever. Tr. 2793-94.[36] The argument, of course, flies in the face of the accepted principle of the common law that words in a grant are wherever possible to be construed as effective rather than as a

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[36] Pl. Br. 129-30 accuses Professor Smith of inconsistency in not asserting that the third Virginia charter and the Heath patent conveyed the seas all the way to Bermuda and the Bahamas, respectively. Professor Smith pointed out the particular language in the third Virginia charter which led him to that conclusion. App. 269. As to the Heath patent, it was not one of Professor Smith's exhibits and Professor Smith naturally said "I haven't seen anything" to lead him to an opinion as to the extent of its maritime grant.

nullity.[37] Obviously, the crown's lawyers were not childish people who used flowery language to no effective purpose. Professor Wroth's argument, of course, also flies in the face of the favorable-construction clauses of the charters.

Gould gives the conclusive answer to plaintiff's argument:

> "Although royal grants to individuals, for private purposes, include only what is expressly granted, and pass nothing by implication, yet, in the case of a grant by the Crown of extensive foreign domains, where the obvious intent of the grant is not merely to vest the Crown's right of property in the grantees, but also to invest them with civil and political powers, and to establish complete though subordinate sovereignties, a different rule has been held applicable in this country. The grant of King James I, in November, 1620, to the council of Plymouth, upon the basis of which most of the others were framed, expressly named, as included in the grant, not only the lands described, but also all havens, ports, rivers, waters, fishings, mines, etc., and all and singular other commodities, jurisdictions, royalties, privileges, franchises, and preeminences, both within the tract of land upon the main, and within the islands and seas ad-

[37] *E.g.*, 26 C.J.S. § 86b (1)(1956); 4 Tiffany, The Law of Real Property § 981 (1939); Saulsberry v. Maddox, 125 F.2d 430 (6th Cir. 1942); Etheridge v. United States, 218 F. Supp. 809 (E.D.N.C. 1963).

Plaintiff relies (Pl. Br. 127-28) on an opinion of 1723 that the New Jersey charter did not convey royal mines. The opinion never mentioned the word *royalties*, and its authors may have overlooked its presence in the charter. The result was doubtless influenced by the fact that the New Jersey proprietors had surrendered their governmental rights, and the opinion could well have reached that result on the ground that the surrender included royalties. The opinion gives no reasoning, and states that the proprietors had not been heard on the subject.

joining; and, although such words as ports, rivers, waters, or fishings, may be insufficient, in the case of a private grant, to convey the soil, yet the other words employed, and especially the word 'royalties,' in connection with the manifest purpose of the grant, were held to convey to the colonial governments the right and jurisdiction of the Crown in the shores of navigable waters, and in the soil under such waters, and to invest them with such powers of legislation and administration as were necessary to advance the prosperity of the colonists. Such was the construction adopted by the Supreme Court of the United States, and by the Courts of Massachusetts, New Jersey, and Connecticut. It is doubtless consonant to the law of England. Thus, in *Doe v. East India Co.*, before the Privy Council, it appears to have been conceded that the defendants, as representing the Indian government, had a freehold in the bed and shores of the navigable rivers of India. Upon this principle the colony of Massachusetts passed the ordinance of 1647, by which the seashores and flats of the colony, down to low-water mark, not exceeding one hundred rods from high-water mark, were made the property of the littoral proprietors. In *Brookhaven v. Strong*, in New York, a grant of an exclusive right to the soil and the oyster fisheries in an arm of the sea, which was made by the colonial government, and was ratified and confirmed by the colonial assembly, was held to be valid." *Op. cit.* at 70-72.

Likewise, Angell gives the answer, as commonly understood in this country in the early days of the Constitution:

"The territory, therefore, which was discovered, acquired and possessed by the early settlers of this country, although it was separated from the principal establishment, or mother country, might be considered as a part of the British empire, and subject to the rules and provisions of the British system of jurisprudence. Hence, not only the jurisdiction of the British sovereign extended over the possessions which were acquired by the colonists from the native occupants by grant or conquest, but also his *jus proprietatis*, or right of property in all the tide waters included in these possessions existed, at least to the same extent, as in the tide waters of England.

"But inasmuch as the king by virtue of his prerogative was authorized to create *political* power in this as in all countries newly discovered and possessed by his subjects, the colonies on receiving the royal charters, were invested with a *political character*, by which they succeeded to all the territorial interests, which had previously belonged to the sovereign power of the parent country. These charters, it is to be observed, were in the nature of grants, and were conferred by the king, on the idea that he was proprietor. But as they respectively created *governments*, they were not construed as his other grants were; that is as not excluding arms of the sea, &c. but as *including* them. And thus the governments of the several colonies had ample authority to alter the established law with regard to their tide waters, or to grant an exclusive property therein, at their discretion.

"If any doubt could be entertained on general principles, as to the property of the tide waters of

> this country being in the king before the charters were granted, it will be removed by referring to the charters. What is particularly alluded to, is the reservation of the right of fishery, which, (as will be shown, in the following chapter,) is contained in several of the charters; the object of which, was to prescribe how far this important and, *prima facie* public right, might be restrained by any colonial enactment. By a reservation of this kind, it is clear that the king considered himself as the undoubted legal proprietor of the tide waters; for if he had not thus considered, then to qualify his grants by such a reservation was manifestly absurd." Angell, *The Right of Property in Tide Waters* 36-38 (1826).

None of the authorities relied on by plaintiff stands for so absurd a proposition as that a conveyance of "all royalties" passes nothing because each royalty must be mentioned separately. The cases abstracted in 17 Viner, *General Abridgement* 130-39 (2d ed. 1792), simply show that where the granting language is vague or ambiguous it will be construed rather narrowly. A typical example is *Grabham v. Geales*, 81 English Reports 995 (1619), specifically relied upon by plaintiff. The rule was, moreover, one of intent, 17 Viner at 133, 135; *Grabham v. Geales, supra; Basket v. University of Cambridge*, 96 Eng. Rep. 59, 61, 64-65 (1758).[38] and applied to grants to "a common person," 17 Viner at 133, it not being presumed that the crown intended to grant governmental or royal rights to such per-

[38] Plaintiff cites the argument for defendant (not the opinion) in the *Basket* case, 96 Eng. Rep. at 64, that "the king cannot convey special prerogative rights by general words, where there are general prerogative rights, that may pass to satisfy the grant." The argument went on to give illustrations that the rule is never applied, if another construction is at all possible, to make words in a grant wholly void. That is exactly the application plaintiff seeks here.

sons unless the intent was made very clear. Thus the rule did not apply to colonial charters, which were plainly governmental, and indeed was expressly negated by the most-favorable-construction clauses of the charters.

A good illustration of the application of the rule in cases involving private parties is the case discussed at 17 Viner at 138-39. While the general rule was that a grant of "all mines" did not include royal mines, nevertheless, if the king had a royal mine and no other mine in the land of J.S. and granted "all mines, which he has in the land of J.S., by this grant the mine royal shall pass; for otherwise the words shall be void." This is hardly consistent with plaintiff's claim that the words "all royalties" passed nothing, even in a conveyance to a private grantee, much less in a colonial charter to a governmental body.

Plaintiff's construction of *Attorney General v. Trustees of the British Museum*, [1903] 2 Ch. 598, is expressly negated by the passage immediately following the passage which plaintiff quotes:

> "The same argument to some extent applies to the word 'royalties.' Mr. Warmington argued that the word 'royalties' would be sufficient to pass these flowers of the Crown on the authority of *Dyke v. Walford*, cited above. The Attorney-General does not admit this, and I express no opinion on the point; but if it would, it is not suggested that treasure trove belongs to the office of vice-admiral, and the fact that the only royalties granted are those that belong to that office raises a strong presumption that none other were intended to pass. I have arrived at the conclusion that treasure trove does not pass by the charters by applying the ordinary rules of construction, so far as is compatible with the subject-matter of the grant, and it is therefore un-

> necessary for me to express any opinion on the contention of the Attorney-General as to the rules by which the Crown is entitled to have its grants construed." [1903] 2 Ch. at 614.

The grant there at issue conveyed all franchises, but the court held that treasure trove was a royalty, not a franchise. The grant contained no conveyance of all royalties, but only all royalties pertaining to the office of vice admiral, of which the treasure trove was not one. As shown by the above quotation, the court expressly declined to decide the point for which plaintiff erroneously seeks to make the case stand, *i.e.*, that under a conveyance of "all royalties" treasure trove would not have passed.

In *Dyke v. Walford*, 5 Moore's Reports 434 (1846), the Privy Council, the highest court in England, held in an exhaustive opinion that the words "all royalties" in a grant of governmental and property rights to a county palatine were effective to convey such royalties. The losing party argued, just as plaintiff does here, that "grants by the crown are to be strictly construed," that "prerogative rights, unless specially named, do not pass," and that "general words will not carry, in Kings' grants, which pass nothing by implication," *id.* at 454, 455, 468. The court's holding was as follows:

> "The material words of the grant do not differ in the several Charters. The grant in the Charter of 1377, is, that the Duke of *Lancaster* shall have within the County of *Lancaster*, his Chancery, his Justices to hold Pleas of the Crown, as all other pleas at Common law, and all manner of executions, to be made by his writs and his ministers; then *'et quae cumque alia libertatis et jura regalia ad Comitum Palatinum pertinentia, adeo liberè et integrè sicut Comes Cestriae infra*

Eundem Comitatum Cestriae dinoscitur obtinere:' saving to the Crown certain rights, only material to the present purpose, as showing the great extent to which the preceding words of grant, but for the reservation, might be held to reach.

"Upon the construction of this Charter, two questions were made: First, whether the original words of the grant are sufficient to pass the right; and Secondly, whether they are restrained, by the subsequent reference to the Earl of *Chester.*

"The grant is, first, of all *'jura regalia,'* belonging to a County Palatine. These rights appear to have been very extensive. Lord *Coke* lays it down (4 Inst. 204), that a 'Count Palatine has *"jura regalia,"* within his county, as fully as the King himself.' In *Coke Littleton,* 114 a, he states that, though a man cannot claim directly by prescription, to have such franchises and liberties as cannot be seized, before the forfeiture appears on record, as the goods of felons, yet he may make a title to them indirectly by prescription, for he may claim a County Palatine by prescription, and by reason thereof, to have the goods of traitors, felons, &c. In the case of *The Queen v. Archbishop of York* (Cro. Eliz. 240), it was held, that the Queen was entitled to the same prerogative when she was seised in right of the Duchy of *Lancaster,* as when she was seised in right of Her Crown. In the case of *Bowes v. Bishop of Durham,* (2 Bulstr. 219), it was held, that the Bishop of *Durham,* having a County Palatine and *'jura regalia,'* should have, incident to a County Palatine, *'bona et catalla felonum,* and of such as stand mute,' although he should not have

had the goods of such as stand mute, under a grant of *bona et catalla felonum*. The same point appears to have afterwards come before the Court, on a *Quo Warranto*, and is reported under the title of *The King v. Bishop of Durham* (3 Bulstr. 156). The decision was to the same effect, and on the same grounds: and Lord *Coke* appears to have laid it down, (though there is some inaccuracy in the printing of the passage,) 'that if one prescribe for a County Palatine, and to have *"jura regalia"* within this; it extends to all which the King himself may have.'

"Upon these authorities, which are quite unopposed by any to a contrary effect, we cannot doubt that the right in question, passed to the Duke of *Lancaster*, amongst other *'jura regalia,'* unless there be something in the grant restricting its effect.

"Then are there any such words? The words relied on, are, that the Duke is to have these rights, *'adeo liberè et integrè sicut Comes Cestriae dinoscitur obtinere.'* There is nothing restrictive in these words. It is not a grant of such privileges and franchises belonging to a County Palatine, as the Earl of *Chester* enjoys; but it is a grant of all liberties and royal rights belonging to a County Palatine, to be enjoyed as freely and entirely as they are known to be enjoyed by the Earl. It is not necessary for the Duke of *Lancaster* to show an enjoyment of rights by the Earl of *Chester*, in order to found his title; but if it were necessary inasmuch as it appears that *'jura regalia,'* generally, was enjoyed by the Earl, and we are of opinion, that the right in question, is amongst *'jura regalia,'* we should presume the enjoyment

of this right by the Earl of *Chester*, unless some evidence were offered to the contrary.

"Upon the whole, we are of opinion, that the right to goods belonging to persons dying intestate, without leaving husband, or widow, and without kindred, was vested in the King, in right of His Crown, at the date of these Charters; that this right, within the County Palatine, passed, with other '*jura regalia*,' to the Duke of *Lancaster*, and is now vested in Her Majesty, in right of Her Duchy, and that the sentence complained of, must, therefore, be affirmed." 5 Moore at 496-98.

This authoritative holding, applied to a palatine charter which, so far as appears, unlike the colonial charters did not even contain a most-favorable-construction clause, is dispositive of plaintiff's contention.

Plaintiff's claim that the grant of all royalties in the New England seas "falls far short of a grant of ownership of the seas themselves" is wide of the mark. As shown exhaustively in our brief, the crown's ownership of the soil of adjoining seas was universally described as a royalty in 17th-century English law. But even if there were some doubt (which we think there is not) concerning title to the submerged lands themselves, there could be no doubt as to the right of extraction of minerals and other valuable resources therefrom. Plaintiff, focusing as always solely on "general property rights," *i.e.*, fee-simple title to land (see pp. 2-3, *supra*), never once denies that the crown's royalties included, at the very least, a property right in all things of value found upon or extracted from the bed of the adjacent seas. That is ample to sustain the States' title to the only right at issue in this litigation—the exclusive right to explore and to exploit seabed resources. To repeat, plaintiff has never once denied that the crown had this royalty in the

17th century and intended to convey it in the colonial charters. Plaintiff has simply ignored our demonstration on these critical points.

Thus, in analyzing the New England charter, plaintiff claims that the reference to the "seas adjoining" falls short of "ownership of the seas themselves," and that the "adjoining" seas must have been outside the boundaries of the colony. We think plaintiff's arguments on these points are wholly unpersuasive. But even if they were right, what does plaintiff make of the express grant of "Mines, and Minerals as well Royal Mines of Gold and Silver, as other Mine and Minerals, precious Stones, Quarries, and all . . . other . . . Royalties . . . within the said . . . Seas adjoining"? Plaintiff does not and cannot tell us, and the reason is obvious: there is no possible construction of these words which fails to sustain the States' title to the right at issue in this litigation.

The testimony of plaintiff's witness Professor Morris was inconsistent and self-contradictory regarding maritime sovereignty in the American territorial seas in the 18th century. He conceded that there were territorial waters off the North Atlantic coast in that era; he believed the extent of those waters to be unclear, and in spite of the charter provisions asserted that they belonged to the crown, not to the colonies. Tr. 1854. He opined that the coastal sovereign could prohibit navigation in the territorial waters, Tr. 1857, but then said that the sovereign could probably not exclude foreign fishing boats, even from coming as close as 30 yards to the shore. Tr. 1859. (He had his law exactly backwards: because of the recognized right of innocent passage the coastal sovereign could not prohibit navigation, but did have the right to prohibit foreign fishing.) Yet again, Professor Morris said that "The coastal fisheries belong to the proprietor of the coast" (Tr. 1863), but then declared that as to the seabed neither the crown nor the colonial

government had any exclusive sovereign or property rights one foot below low-water mark. Tr. 1865-66. Professor Morris' expertise on the law and practice of England and colonial America regarding maritime sovereignty and property was, to put it charitably, shaky in the extreme.

Plaintiff relies (Pl. Br. 122-23, 131-37) on various descriptions of the colonies, in charters, governor's commissions and other documents, as extending "from sea to sea," as "bounded by the Atlantic Ocean," and the like. Such general statements, made in contexts involving no focus on maritime rights, are hardly persuasive that their authors believed that all territorial and property rights of the colonies stopped at low-water mark. Even today, it would be altogether natural to describe one of the defendant States, or the United States, as bounded on the east by the Atlantic Ocean, unless the purpose of the statement required a specific focus on territorial waters or continental-shelf rights. Such usage is of no probative value for the issues here involved.

Plaintiff also contends (Pl. Br. 131-32) that the absence of boundary disputes among the colonies as to their maritime territories is evidence that no such territories existed. In fact there were disputes among the colonies regarding invasion of one another's maritime rights, see pp. 219-22, *infra*, though after the initial years these were minimized by the prevalence of "free fishing" clauses. The fact that such disputes did not, so far as is known, take the form of disagreements as to the location of the maritime boundaries is of little if any significance.

Indeed, it is plaintiff's version of colonial law which, if true, would have been far more likely to give rise to a great body of evidence and literature of which in fact there is no trace. Plaintiff's position apparently is that English and colonial law made a rigid distinction between "inland" waters, including bays, harbors, and the like, within which

full territorial sovereignty and dominion existed, and the open sea, where there was neither. The problem of demarcating the boundaries between "inland" waters and the sea is vastly complex, has given rise to endless disputes since that unhistorical distinction was imported into our law, and even today is far from completely resolved. See U.S. Exhibit 9, pp. 17-20; *United States v. California*, 342 U.S. 891 (1951); *United States v. California*, 381 U.S. 139 (1965); *United States v. California*, 382 U.S. 448 (1966); *United States v. Louisiana*, 382 U.S. 288 (1965); *United States v. Louisiana*, 389 U.S. 155 (1967); *United States v. Louisiana*, 394 U.S. 1 (1968); *United States v. Louisiana*, 394 U.S. 11 (1969); *United States v. Louisiana*, 394 U.S. 836 (1969); *United States v. Louisiana*, 404 U.S. 388 (1971). The fact that no such problems arose in the colonial period is evidence that the distinction was unknown at that time.

4. The Free Fishing Clauses

The Newfoundland charter of 1610, which expressly granted "the seas and islands lying within ten leagues of any part of the sea coast of the country," and which contained the usual language conveying soil, pearls, fishings, royalties, etc., nevertheless contained a clause saving and reserving to "all manner of persons of what nation soever and also to all and every our loving subjects which do at this present or hereafter shall trade or voyage to the parts aforesaid for fishing, all . . . liberties . . . concerning their said fishing . . . in as large and ample manner as they have heretofore used and enjoyed the same, . . . anything in these presents to the contrary notwithstanding." Exhibit 179, p. 53; see also Exhibit 777, p. 317. As Angell points out (p. 199, *supra*), the fact that the saving clause was considered necessary is yet further proof, if any were needed, that in its absence the general language of the charter would have conferred an exclusive right to the fisheries upon the patentees. It is notable that the saving clause was carefully

limited to such fishing as had been practiced prior to the date of the charter; obviously this is a recognition of established or vested fishing rights, in accordance with the recognized English law of the period regarding the circumstances in which monopolies were proper and those in which they were not.

Dr. Kavenagh to the contrary (Tr. 2059-60), none of the charters of what are now the Atlantic coastal states of the United States contained reservations of free fishing both to aliens and to subjects. Only the Newfoundland charter did that, in recognition of the long-established fisheries of other nations in Newfoundland waters. The early charters of the Common Counsel States, down through the New England charter of 1620, contained no free-fishing clauses of any kind; and as we shall see (pp. 219-22, *infra*), those charters were universally understood and recognized to authorize their recipients to exclude or to license all fishermen, whether British or foreign, within their adjacent seas. As a result of the political uproar which this caused, in several of the charters after 1620 the crown included clauses saving the liberty of fishing to some or all classes of British subjects. Such clauses appear in the Massachusetts Bay charter of 1629 ("any of our loving subjects," App. 282), in the Gorges charter for Maine of 1639 ("all our subjects of our kingdom of England," App. 277), in the Maryland charter of 1632 ("all the subjects of our kingdoms of England and Ireland," App. 286), and in the Rhode Island charter of 1663 ("any of our loving subjects," App. 732). No argument was ever made that such clauses applied to foreigners or that the colonial governments did not have the right to exclude foreigners from the fisheries.

The saving clause in the Maryland charter applied to "fishing for sea fish . . . in the sea . . . of the province." App. 729. In 1766 Daniel Dulany, at one time Attorney General of Maryland, gave a legal opinion indicating his

view that in the absence of the saving clause the colonial government could have excluded English subjects:

> "When the charter of the Province was framed, it was thought that extensive fisheries might be carried on here, as a matter of great consequence in the national trade and navigation. As [*sic;* doubtless should be *An*] extensive legislative authority was conferred by the charter, under which, regulations might have been made, (if not controlled by the saving) less favorable to the *English* and *Irish*, than the inhabitants here; but it is not to be supposed that acts of assembly would be wanting, to put the people here upon as good a footing, as any other, and therefore there seems to be very little reason for the notion, that the distinction is unfavorable to the people of Maryland, when it only imports that the liberty is secured to one, against the attempts of the other, and yet leaves to the latter the right of exercising it, in what manner they please, not affecting the liberty of the former, if the provincial legislature should think it for the public benefit. And since an act of assembly may confer the same liberty and privilege to the inhabitants of Maryland, that is contained in the saving, may regulate, restrain or control it, as the general interest may require, I apprehend that the saving is rather favorable to the inhabitants here than otherwise, according to the above interpretation." Quoted in Angell, *A Treatise on Tide Waters* 56-57 (1826).

Dulany pointed out that the reservation was only to the subjects of the realms of England and Ireland, which did not include citizens of the colonies; it followed that Maryland remained free to exclude other colonials from its sea fisheries. Angell agreed:

"Admitting this exposition of Mr. Dulany to be correct, which seems too obvious to be disputed, however favorable it may be to the people of Maryland, it must be regarded as unfavorable to the inhabitants of the other States. For as the inhabitants of the other States were not originally included in the saving, and the reservation not extending to them, they were of course debarred the liberty of exercising any piscarial privilege afforded by the waters of Maryland. And it would therefore, be superfluous for the legislature of Maryland, to enact any law to prohibit the citizens of the other States from fishing in its waters. In fact, as the persons to whom the reservation was confined, lost the right thus reserved by the revolution, it became the common right of the inhabitants of Maryland only." *Op. cit.* at 57.

D. THE RECORD IS SUFFICIENT TO ESTABLISH A UNIFORM TERRITORIAL SEA 100 MILES IN WIDTH OFF THE COASTS OF THE COMMON COUNSEL STATES.

By the end of the colonial period, the following situation emerged from the various charters so far as specific grants of territorial sea to the predecessors of the Common Counsel States are concerned. Maine had 20 leagues for admiralty jurisdiction, and five leagues for other purposes, by its grant of 1622 and its charter of 1639. App. 272-74, 277-78. New Hampshire, by its grant of 1629 and its charter of 1635, had five leagues. App. 309, 312. Massachusetts by its 1629 charter had a territorial sea with no explicitly defined limit (App. 281); by its 1691 charter it had ten leagues. App. 322. Rhode Island had no explicit limit by its charter of 1663. App. 287-89. As to all the New England colonies, the New England charter of 1620, while containing no explicity limit, had been authoritatively construed as con-

veying a territorial sea of 100 miles. The difference between that 100 miles and the specific boundaries later granted to particular New England colonies may have passed to the individual colonies upon the dissolution of the Council for New England, or that intermediate belt may have returned to the crown.[39]

New York had no fixed limit by its 1664 charter. App. 290-91. New Jersey had no fixed limit by the New York charter and the Duke of York's patent of the same year to Berkeley and Carteret. App. 294. Delaware had no fixed limit by the charter of 1683 to Penn. App. 304-07. Maryland had ten leagues by its charter of 1632. App. 285. Virginia retained the 100 miles conveyed by its second charter of 1609. App. 263-64.

The status and width of the territorial sea of all the colonies was not in the least affected by the chain of title or particular legal status of the charters as in force or not at any particular time. As Professor Flaherty has demonstrated (and Dr. Kavenagh conceded) in connection with the revocation of the Virginia charter in 1624 (App. 371-79; Tr. 2079-82), there was no intention to change the boundaries of the Virginia colony because of any change in its degree of autonomy or governmental status. Those boundaries remained the same except where specifically altered.[40] The same conclusion is equally applicable to the

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[39] The charter of 1620 never lapsed entirely, but is in the direct chain of title of the States whose territories were within its bounds. The United States took the position, in arbitrating the Maine-New Brunswick boundary with Britain in 1817, that "it is . . . only by a regular conveyance, consistent with this grand charter [of 1620], that any valid title can with propriety be derived from or to the English Crown." "The Case of the United States," 6 Moore, International Adjudications 47, 54 (1933).

[40] Virginia lost territory, of course, when Maryland was carved out of it. Since Virginia's territorial sea was 100 miles and Maryland's was only ten leagues, the question arose during the hearings as to what became of the 70-mile intermediate belt when Maryland was created.

other colonies. All of them relied before, during and after the Revolution on their charter boundaries, regardless of whether those charters were in force as governmental instruments or what the precise chain of title had been.

Quite naturally, two questions arise: (1) is the claim of each of the Common Counsel States limited to its charter boundary as summarized above; and (2) what boundary applies in the case of States whose charters specified no boundary explicitly? We believe the proper analysis is as follows. The crown in 1606 asserted and established a 100-mile territorial sea up and down the coast of all the Common Counsel States. Colonies which had no different limit specified in their charters therefore had territorial seas of 100 miles. As to colonies whose charters specified limits of less than 100 miles, the crown retained the waters between those limits and the 100-mile line. As we shall show, what was retained by the crown passed to each State separately at the time of the American Revolution.

We think the evidence is sufficient to show the establishment of a uniform 100-mile territorial sea all up and down the Atlantic coast. There is a wealth of 17th- and early 18th-century English authority for the proposition that 100 miles is the width of the territorial sea in the absence of special history or circumstances (pp. 35, 47, 58, 61, 67, 68, 126, 128, 131, *supra*). The 100-mile belt was the most frequently and authoritatively asserted standard of the

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Tr. 1244-48. We submit that the answer is perfectly plain: that belt reverted to the crown. A territorial sea is not an independent territory which can be owned without reference to the adjacent coast. To the contrary, the territorial sea was regarded in the 17th century, and has ever since been regarded, as an appurtenant or corollary of coastal sovereignty. Thus Virginia lost that part of its territorial sea which abutted Maryland when Maryland was erected as a separate colony. Since the crown chose to confer less than all of that territorial sea on Maryland, the remainder reverted to the crown, which held it as ultimate sovereign and feudal overlord of Maryland.

period under international law as well (pp. 276-78, *infra*). The 100-mile limit was asserted during the period of the earliest colonial charters both by the prime minister of England, speaking officially, and by the leading international-law authority resident in England at the time (pp. 35-36, 58, 171, *supra*). The charter of 1606, which asserted English sovereignty over the entire coastline of the Common Counsel States and authorized colonies there, included the 100-mile limit. Perhaps most conclusively, while the New England charter of 1620 specified no fixed limit, the Council for New England had no doubt that that was the limit in force, and in a number of official documents described its charter as having vested in it a territorial sea with that limit. That was a wholly legitimate conclusion on the basis of the existing legal situation and is equally applicable to the other colonies whose charters contained no explicit limits.

The charters which specify a territorial sea of less than 100 miles in width in no way imply a shrinking of what the crown believed it owned or had the power to convey. Plainly, the crown on occasion granted less than everything it had or claimed. For example, the lease of Virginia to Arlington and Culpeper in 1673 conveyed ten leagues, while Virginia's territorial sea and ownership of islands was known to extend for 100 miles. Likewise, it cannot be seriously contended that in 1632 the crown believed it owned only the ten leagues it granted Lord Baltimore, or that in 1635 or 1639 the crown believed it owned only the five leagues it granted Maine and New Hampshire. The briefest recollection of the position being taken by the crown in the 1630's with reference to maritime sovereignty in European waters is enough to render such a speculation preposterous. Doubtless whether a particular patentee received all or less than all of the territorial sea and the islands therein depended on how much he or it was in royal favor.

There are clear precedents, in the grants made by the Council for New England, for simultaneously asserting a territorial sea and islands of 100 miles and granting much less than that. The Council did so in 1622 and 1629 (pp. 187-88, *supra*); in each case the same document both declared the Council's 100-mile limit and granted a lesser maritime and island belt to the patentees. Indeed, two of these documents, the grant to Gorges and Mason in 1622 and the grant to Mason in 1629, created the very maritime and island belts of five leagues which the crown a few years later adopted in confirming the patentees' title to those territories, *i.e.*, Maine and New Hampshire.

Obviously, both the Council and the crown, vis-a-vis their respective grantees, sometimes wished to convey only a limited portion of their territorial sea and islands while retaining the rest. Probably the desire to allocate fishing rights was responsible for this type of differentiation. For example, when in 1622 the Council for New England granted its members tracts with boundaries "three leagues into the sea," it plainly regarded the grantees as having the exclusive right to the fisheries and islands within those three leagues, while the remainder of the territorial sea out to the Council's own 100-mile boundary was reserved as a resource of the Council, which doubtless wished to preserve the right to obtain revenue from licensing fishing there.

The legal effect, then, of the charters and other developments during the colonial period was the establishment of a uniform 100-mile territorial sea in the Atlantic along the coasts of all the Common Counsel States. In some cases, the crown granted this entire territorial sea to the colonial proprietor or government; in other cases, the crown granted only a limited part, retaining the remainder for itself until its rights and royalties passed to the States at the time of the American Revolution.

If it should be held that the evidence of record is not conclusive enough to establish a uniform 100-mile territorial sea all along the North American coast, it does not at all follow that the territorial sea was limited in the case of each colony to the width specified in its charter, since it cannot be doubted that the crown frequently granted less than all it possessed and that during the 17th century the crown never took the view that its territorial sea was as constricted as five or ten leagues. Rather, the proper conclusion would be that the territorial sea was regarded as not finally fixed and definite as to its width, but embraced all those areas of sea and seabed which could reasonably be said to be adjacent to the coast or which possessed valuable resources capable of exploitation from the coast.

As we shall see (p. 426-27, *infra*) that is precisely the situation today with respect to the continental shelf under contemporary international law. No one doubts that the exclusive rights of coastal nations extend to the point where the depth of the sea reaches 200 meters (a line which, as it happens, is approximately 100 miles offshore along most of the North Atlantic coast); but there is substantial doubt how much farther out than that the exclusive rights of the coastal sovereign extend, and resolution of the doubt hinges largely on the concepts of adjacency and exploitability. It is possible that the crown and the colonists avoided too-frequent or too-definitive articulation of a precise boundary in their marginal seas for similar reasons, wishing to preserve some degree of flexibility—though as we have said, we think the evidence is sufficient to establish a uniform 100-mile limit. Certainly the conclusion, if it should be reached, that the outer limit of exclusive rights was not fully fixed and definite would not lead to a conclusion that there were no such exlcusive rights, but rather to a recognition that the States at independence inherited a right to hold continental-shelf rights to whatever distance was then recognized, or would come to be recognized in the future.

as appropriate and proper for the exclusive seabed jurisdiction of a coastal sovereign. Plainly the fact that definition of the outer limit of exclusive rights to the continental shelf is an ongoing process, which even today is not fully completed, could not lead to the conclusion that no such rights exist or existed at a particular time in the past.

V.

RIGHTS OF SOVEREIGNTY AND DOMINION WERE EXERCISED OVER THE AMERICAN TERRITORIAL SEA DURING THE COLONIAL PERIOD.

The evidence as to the use and exploitation of the sea and seabed in North American waters during the colonial period demonstrates awareness and exercise of exclusive legal rights of sovereignty and property to the extent possible in view of the state of technology at that time. The evidence of colonial regulation of the sea and seabed resources, and the evidence of exclusion of foreigners from valuable fisheries, confirm that any important resource in the North American marginal sea would, as soon as discovered, be regarded as the exclusive possession either of the individual adjacent colony or, if "free fishing" clauses were applicable, of English subjects generally.

The evidence discussed in this section relates in part to the Common Counsel States and in part to the British colonies which are now included in Canada. For reasons of geography and the location of valuable resources in the American seas, certain issues arose more frequently or more sharply in the Canadian areas than to the southward. Precedents from Canada are equally relevant as those from the Common Counsel States themselves. There is no reason to believe that either the crown, the colonists or foreign states regarded the Canadian areas as in any way subject to different legal standards from those applicable to the areas now included in the United States. No distinction was made

between the two groups of colonies until they chose different paths at the time of the American Revolution. Indeed, in 1620-21 the Canadian maritime provinces were part of New England (p. 190, *supra*), and again after 1691 Nova Scotia was a part of Massachusetts, having been incorporated into it by the Massachusetts charter of that year. App. 319-20.

We think that plaintiff's argument that precedents from Newfoundland, Nova Scotia and other areas now in Canada are irrelevant is wholly unconvincing. Of course questions of maritime sovereignty and dominion arose most frequently where maritime resources were richest. But there is no reason for believing that Britain and the colonists would have changed or abandoned their claims if the richest fisheries had been located off, say, Virginia. The precedents from the areas where the relevant issues most clearly and most often arose are dispositive of the extent of British and colonial rights throughout the American marginal seas under British law and practice.

We are uncertain what plaintiff thinks it has proved by its assertion that during the colonial period fishing "was dependent upon the utilization of shore-based activities" (Pl. Br. 143). That is obviously a half-truth at best, having no application to whaling, to the Newfoundland banks fishery, or to many others. Even as to fisheries where plaintiff's assertion is accurate, the exclusive rights asserted by the crown and the colonies, documented in this section, unquestionably applied to the fishing as well as to ancillary activities on land.

A. THE FISHERIES WERE SUBJECTED TO EXTENSIVE REGULATION AND LICENSING, AND FOREIGNERS WERE EXCLUDED.

Alexander Hamilton, writing in 1795, well described the spirit in which the crown and the American colonies had

always approached the question of exclusive fisheries and fishing regulation:

> "Some nations, and among them Great Britain, have viewed the exclusive navigation and trade to their colonies, in the light in which they have seen their coasting trade and fisheries,—as a nursery for that body of seamen whom they have considered not only as necessary to the prosperity and protection of commerce, but as essential to the defense and safety of the state.
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> * * *
>
> "Is it then surprising, that we see her so anxious to encourage and extend her navigation, as to exclude, as far as practicable, foreigners from any share of her fisheries, her coasting, and her colony trade? Does not candor require us to admit, since her national defense rests upon her navy, which again depends on her seamen, which an extensive navigation can alone supply, that Great Britain, having more to risk, is among the last powers likely to break in upon or materially to relinquish that system of exclusive colony trade, that has so long and uniformly prevailed among the great colonizing powers?
>
> "America has her opinions, perhaps prejudices, on the subject of commerce: she is, and, at least until she shall become a naval power, will continue to be, without colonies. But her laws manifest a similar spirit with those of other nations, in the regulations which they prescribe for the government of her fisheries and her coasting trade. The object of these laws is an exclusion of foreign competition, in order to encourage and increase her own navigation and seamen; from which resources, not only in wars

between other nations, but likewise in those in which she may be engaged, important commercial and national advantages may be expected." Exhibit 697, pp. 488, 489-90.

1. The New England Fishing Controversy

Under the 1606 charter, the "northern," or Plymouth, company, while not making any permanent settlement, sent out a number of fishing expeditions under license between 1606 and 1620 to the coasts within its grant. Exhibit 663, p. 320. Certain other fishing expeditions, however, were sent to the same regions both by the "southern," or London (later Virginia), company, from its colony at Jamestown, and by the powerful fishing interests of southwestern England. The Plymouth Company took the view that such expeditions not licensed by it violated its exclusive rights. In 1619 the issue was formally precipitated by the grant of a license by the Virginia Company and a protest by the Plymouth Company against such encroachment. Exhibit 466, pp. 34-35 n. 330; Exhibit 734, pp. 98-99; Preston, *Gorges of Plymouth Fort* 167, 413 (1953).

The dispute was referred to the Privy Council, and was arbitrated in 1619 by the Duke of Lennox and the Earl of Arundel under delegation by the Council. Their decision of 1619 was confirmed by orders of 1620 and 1621 by the Council itself. The decision was that, "by the consent of both colonies," the two colonies "should fish at sea within the limits and bounds of each other reciprocally, with this limitation that it be only for the sustentation of the people of the colonies there." App. 678-79. This most interesting order (1) made it clear that both colonies did have "limits and bounds" in the sea, (2) provided a strictly limited right of reciprocal fishing by each within the seas of the other, and (3) by implication excluded all other Englishmen from fishing within the seas of either colony.

The latter implication was made explicit three months after the 1621 order, when the Council directed a letter to the mayors of the fishing towns of the southwest of England warning them against permitting their residents to invade the exclusive rights of the New England colonly. App. 1001-02. Such invasions, the Council declared, "would not only be a prejudice to the plantation adventurers who by their industry have discovered those remote places, and with the hazard of the lives of their people and with the expense of their estates have laid the first foundation of so honorable an enterprise, but would also bring a confusion to the said plantation and an overthrow unto that trade, and be likewise an utter discouragement to all future endeavors of the like kinds." See also App. 367-68; Tr. 2126-31.

It is universally recognized that the 1620 charter of New England, which was issued immediately following the above decision of the Privy Council, did confer a monopoly of fishing on the grantees, with the sole exception of the agreed concession to the Virginia colony. The Council for New England sold fishing licenses, and indeed its entire scheme of colonization was based on the far-sighted plan that the revenue derived from such licenses would provide the capital necessary to support plantations. App. 786-89; Exhibit 663, pp. 263, 322, 346; Exhibit 740; Exhibit 777, pp. 303-04, 311. The Council appointed Captain Francis West as admiral and sent him over to enforce the licensing requirement and to expel unlicensed fishers from the New England seas. App. 788-90.

While the problem of keeping large expanses of seas in a remote area free of trespassers was a most difficult one, the Council had some degree of success:

> "The policy which it [the Newfoundland Company] adopted after 1620 was directly in line with that followed by Sir Ferdinando Gorges and the New England Council during the same period. Sir

> William Alexander and his Scottish supporters also sought to establish a colony in Nova Scotia along similar lines. In all cases the scheme of creating feudal domains and disposing of them to persons favorable to their cause was followed. Although not identical in personnel, all these associations had a common purpose, the control of the fishery adjacent to their particular field of colonization. In both New England and Newfoundland the policy of excluding independent fishermen was tried, but Gorges' group was more successful in keeping out 'interlopers' than was the Newfoundland Company and its grantees, who had the well-established western adventurers to oppose them." Exhibit 465, p. 46.

See also App. 830.

The southwestern English fishing interests did not passively submit to their exclusion from the New England fishery, and they were likewise alarmed about the similar developments at the same time in Newfoundland. They took the question to Parliament, and in 1621 and 1624 introduced "free fishing" bills which passed the Commons but not the Lords. These bills would have allowed liberty of fishing to all English subjects in the seas of Newfoundland, Virginia, New England and all other English possessions; there was never, of course, any question of admitting foreigners. App. 87-90; Exhibit 719, pp. 50-54; Exhibit 734, pp. 100-01; Exhibits 733, 740; Exhibit 750, p. 82.

Gorges opposed these bills on the ground that a fishery in the seas of a new English dominion was a proper subject for monopolization under established principles. Sir Edward Coke, one of the principal proponents of the free-fishing bills, based his argument on the allegation that Gorges and the Council for New England had not discovered the New

England fisheries but that fishermen of both England and other nations had fished there before. Thus Coke, now in opposition to the crown, adhered to the same doctrine concerning monopolies which he had formulated as law officer to Elizabeth I many years previously. As a matter of legal analysis, then, the issue really boiled down to one of fact: whether fishing by the southwestern Englishmen prior to the 1606 charter had been extensive and regular enough to amount to an "established" fishery which it would be improper to cut off by a subsequent monopolization. All this makes it wholly clear that if, once a charter had been issued, an admittedly new resource had been discovered in the sea or seabed of the colony, it would have been regarded as properly falling within the monopoly without question.

2. The Anglo-French Struggle for Monopoly of Fishing in American Waters

(a) In General

By the mid-17th century France and England were well advanced in their rivalry for control of North America. From 1689 to 1783 that rivalry was a major factor in five great wars and frequent intermittent skirmishes. It is universally recognized that one of the principal motives and ingredients in the colonial rivalry for mastery of North America was the determination on each side to control the rich North American fisheries. Exhibit 664, p. 212; Exhibit 665, p. 344. Neither side was willing to share those fisheries; each wished to monopolize them. While this may seem selfish to us, it was an integral part of the reigning mercantilist theory of that era. Both sides agreed that as a matter of law the possessor of a sea coast had the right to exclude nationals of all other countries from the fisheries adjacent to that coast. Thus, over and over again, we find the desire to monopolize a rich fishery operating as a primary motive in efforts to secure the mastery of the adjacent

coast.[41] Once that mastery was secured, the exclusive legal right to fishing in the adjacent seas followed as a matter of course, and was rigorously enforced, unless a treaty provided otherwise. See generally Exhibit 664, p. 212; Exhibit 665, pp. 341-46; Exhibit 673, *passim;* Exhibit 719, pp. 61, 93-94, 182-84, 229-43; Exhibit 720, pp. 70-75, 78-81; Exhibit 742; Exhibit 768, pp. 92-93; Exhibit 794; Tr. 2284.

Throughout the period, the French excluded English fishermen from the sea fisheries of those parts of North America which they controlled, and asserted the legal right to do so in peacetime. App. 840, 882-83; Exhibit 673, pp. 37-39, 42-43; Exhibit 681; Exhibit 719, pp. 182-84; Exhibit 720, pp. 98-99; Exhibit 766, p. 603; Exhibit 803; Tr. 2284. On occasion, the French taxed the English fishermen instead of excluding them. App. 838-39; Exhibit 742, p. 284.

By the Treaty of Utrecht of 1713, an attempt was made to resolve the fisheries issue. By Article X, France undertook to restore to England "the bay and straits of Hudson, together with all lands, seas, sea-coasts, rivers, and places situate in the said bay and straits." Nova Scotia, in French hands until the war, was ceded to England; and by Article XII, French subjects " shall hereafter be excluded from all

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[41] During the American Revolution, "to enhance her fishing opportunities France hoped to acquire Newfoundland and her old possessions around the Gulf of St. Lawrence. It must be borne in mind that eighteenth-century statesmen looked upon the fisheries as the nursery of seamen and as holding one of the keys to a powerful maritime and naval establishment. In the light of this traditional point of view the French national interest in the North Atlantic fisheries seems perfectly comprehensible." Richard B. Morris, The Peacemakers 14 (1965). In 1779 France agreed with Spain that if France regained Newfoundland it "would admit Spanish subjects to the fishery there. [and] *presumably no one else.*" *Id.* at 15. (Emphasis added.)

kinds of fishing in the said seas, bays, and other places, on the coasts of Nova Scotia; that is to say, on those which lie towards the east within thirty leagues, beginning from the island commonly called Sable inclusively, and thence stretching along towards the southwest." By Article XIII, the French ceded to England that part of Newfoundland which they had thither-to occupied, "but it shall be allowed to the subjects of France to catch fish, and to dry them on land, in that part only, and in no other besides that, of the said island of Newfoundland, which stretches from the place called Cape Bonavista to the northern point of the said island; and from thence running down by the western side, reaches as far as the place called Point Riche." Exhibit 673, p. 45; Exhibit 719, pp. 239-40; Exhibit 768, p. 97; for the full text of the treaty see 1 Israel (ed.), *Major Peace Treaties of Modern History* 177 (1967).

The 30-league line thus established in the sea off Nova Scotia corresponded to the 30-league territorial sea established by the English charter of 1662 (p. 189, *supra*). The fact that in the treaty no line was specified on the western coast of Nova Scotia makes it clear that the entire Bay of Fundy was regarded as British territorial waters from which the French were excluded. While the text of the treaty would indicate that the 30-league line applied only to Nova Scotia, it appears that the British regarded such a line as continuing on southward all along the coasts of the British colonies as far as the Georgia-Florida border. App. Vol. III, Exhibit 327. That interpretation was never put to the test since there were never any substantial French fishing encroachments southwards from Nova Scotia. (See p. 233, *infra*.) It was natural, in any event, for the British to regard 30 leagues as the exclusive-fishing limit even apart from the treaty, because 30 leagues are the substantial equivalent of 100 miles, and the 30-league line was itself a frequently en-

countered limit for territorial waters among international-law scholars, particularly the French.[42]

By the Peace of Paris in 1763, the provisions of the Treaty of Utrecht relating to Nova Scotia and Newfoundland were confirmed (Articles IV, V). Canada (that is, Quebec), Cape Breton Island and all other islands and coasts in the Gulf of St. Lawrence were ceded to England, together with "in general, everything that depends on the said countries, lands, islands and coasts" (Article IV). Britain "consents to leave to the subjects of the most Christian king the liberty of fishing in the Gulf St. Lawrence, on condition that the subjects of France do not exercise the said fishery but at a distance of three leagues from all the coasts belonging to Great Britain" (Article V). As to the Cape Breton fisheries, the French were forbidden to fish within 15 leagues. *Ibid.* The islands of St. Pierre and Miquelon were ceded to France for the sole purpose of serving as a shelter to French fishermen (Article VI). The Spanish renounced all pretentions to share in the Newfoundland fishery (Article XVIII). Exhibit 673, pp. 83-85; Exhibit 674, pp. 422-23; Exhibit 742, pp. 197-98; Tr. 2297-2300.

As in Article XIII of the Treaty of Utrecht (p. 224, *supra*), the language regarding the French liberty of fishing in the Gulf of St. Lawrence is explicitly, indeed ostentatiously, permissive, making clear the understanding of both parties that no one had a *right* to fish in the territorial waters of another sovereign but could do so only if a "liberty," or license, were conferred by treaty.

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[42] Thirty English marine leagues equal 90 nautical miles or 103.5 statute miles. Thirty leagues was proposed as the normal limit for territorial waters by the French publicist Bodin in 1577, and achieved a wide currency. 5 La Pradelle, Revue Générale de Droit International Public 264 *ff.* (1898), reprinted in Crocker, *op. cit.* at 188-89. See also p. 277, *infra.*

The limits established for French fishing by the treaties of 1713 and 1763 were rigorously enforced by the British. Exhibits 766-774, 787, 789, 792-794, 798-800, 804, 805, 810-812.

The treaties were never regarded as establishing British rights to exclusive fisheries for the first time. To the contrary, the treaties were bitterly resented by Englishmen both in England and in North America as having made unnecessary concessions to the French. Exhibit 741, pp. 311-314; Exhibit 752, pp. 317, 322-23. The Common Council of London protested against the Peace of Paris on the ground that "the sole and exclusive right of fishing in the American seas should be reserved to the subjects of the British crown." Exhibit 741, p. 313.

The New Englanders, who were heavy users of the Newfoundland and Nova Scotia fisheries, were particularly vehement in denouncing concessions to the French. William Bollan, an able lawyer and colonial agent for the Massachusetts government in London from 1745 to 1762 (Exhibit 669), well expressed the New England attitude in a series of tracts published in London. His *Observations on the Preliminary Articles of Peace*, Exhibit 670, denounced the draft articles of 1762 for their concessions to the French. Previously, in 1746, after the first capture of Louisbourg by the New Englanders, Bollan had written desperately in an attempt to ward off its restoration to the French, highlighting the importance of the Cape Breton fisheries; in that work he also denied that the Spanish had any right to fish in the Newfoundland seas. Exhibit 671.

Bollan's most comprehensive work was *The Ancient Right of the English Nation to the American Fishery*, published in 1764. He traced the English title to the Newfoundland fisheries, as was conventional, from the Cabot discoveries and the Gilbert ceremonial acts of taking

sovereignty, and interpreted the Gilbert patent as including all the seas and fishing banks adjacent to Newfoundland. App. 771. Bollan was well aware of the English claims to sovereignty in the English seas, and maintained that the somewhat cryptic treaty of Whitehall (p. 176, *supra*), which confirmed English rights in the American seas without identifying them, should be interpreted in the light of English law and practice in the English seas themselves. Exhibit 673, pp. 40-41. Bollan denounced the Treaty of Utrecht on the ground of its fishing concessions to France, *id.* at 49, and continued to attack the Peace of Paris on the same ground. *Id.* at 85. Bollan urged that, at least, Britain should regulate the fisheries, including those which the French were allowed to enter, to prohibit fishing during the spawning time so as to avoid depletion of the resources. *Id.* at 104.

The New Englanders had taken an exclusionary position consistently since 1650, when the Plymouth colonists petitioned the English Council of State complaining that the Newfoundland government had allowed the French to fish in Newfoundland waters. U.S. Exhibit 266; Tr. 2197-98. In that same year of 1650 the Massachusetts government ordered the publication of Malynes' *Lex Mercatoria.* Exhibits 529, 530. It will be remembered that Malynes' influential work asserted maritime sovereignty and the 100-mile limit for territorial waters. See p. 67, *supra.* Much further documentation could be adduced, if the point were disputed, to demonstrate that throughout the 17th and 18th centuries the New Englanders were intensely zealous in asserting exclusive fishing rights and demanding the expulsion of the French from the fisheries on which their economy so heavily depended. See also Tr. 1696-97.

As late as 1816, John Quincy Adams, American minister to England, summed up the traditional New England view in a letter to Lord Castlereagh:

"The fisheries on the banks of Newfoundland, as well in the open seas as in the neighboring bays, gulfs, and along the coasts of Nova Scotia and Labrador, were by the dispensations and the laws of nature, in substance, only different parts of one fishery. Those of the open sea were enjoyed, not as a common and universal right of all nations; since the exclusion from them of France and Spain, in whole, or in part, had been expressly stipulated by those nations, and no other nation had in fact participated in them. It was, with some exceptions, an exclusive possession of the British nation . . . ." 7 *British and Foreign State Papers* 99, 107 (1834).

(b) Newfoundland

For the history of Newfoundland and its uniquely rich fishery, see generally Exhibits 465, 719, 741. The distinctive factor in the history of Newfoundland was the dominance of the fishery from early times not by settlers but by fishing interests based in southwestern England. For most of the period they were in control of the fishery, to the point where they were even able to discourage and in some cases to prohibit settlement on the island itself on the ground that such settlement would interfere with their monopolization of the fishery.

Other nations—principally the French, Portuguese and Spanish—fished in the Newfoundland seas from a very early date, though by the mid-17th century the Spanish and Portuguese had been effectively excluded and the seas divided into French and English zones. Exhibit 719, p. 55. The English at first pursued an ambivalent policy regarding attempts to exclude other nations, who after all had preceded them in exploitation of the fisheries. As we have seen, Raleigh's charter and the charter of 1610 (p. 207, *supra*)

reserved liberty of fishing both to English subjects and to aliens, though during Elizabeth I's reign the English did attempt to monopolize the fishery (pp. 43-45, *supra*).

Within the English zone, different groups strove for control and monopoly of the fishery. Under Governors Guy and Mason the settlers attempted to gain a monopoly, but were frustrated by the southwestern English. Exhibit 465, pp. 44-49. The southwesterners themselves obtained a substantial monopoly of the fishery in 1634. Exhibit 663, p. 313; Exhibit 719, pp. 76-77.

In 1637, a group headed by Sir David Kirke attempted to secure a monopoly, but was compelled to compromise with the west-country fishing interests, whose rights were preserved. However, Kirke did obtain the right to license and to tax foreign fishermen, which he exercised. Exhibit 719, pp. 78-82, 85-86, 137; Exhibit 784, p. 3; Exhibit 790, p. 4.

In 1671 the king in Council issued comprehensive regulations for the Newfoundland fishery, which was declared to be open to all English subjects. Aliens were excluded from the fishery between Cape Race and Cape Bonavista, that is, off the coast of that part of Newfoundland then occupied by the English. Exhibit 719, pp. 128-31. "The admirals were required to preserve peace and order among the fishermen and seamen ashore as well as at sea, to execute the royal charter concerning the fishery, and to apprehend and punish all offenders." *Id.* at 130-31. These regulations were confirmed by the crown in 1675. Exhibit 741, pp. 191-92. The royal instructions excluding aliens from the Newfoundland fishery were still in full force in 1749, Exhibit 795, and indeed down to the American Revolution.

In 1689 Britain, in its declaration of war against France, asserted ownership of all the Newfoundland fisheries and named French incursions thereon as one of the causes for

the war, which began the long series of conflicts to determine which nation should have supremacy in North America:

> "It was not long since the French took license from the Governor of Newfoundland to fish upon the coast and paid a tribute for such licenses as an acknowledgement of the sole right of the Crown of England to that Island; but of late the encroachments of the French on his Majesty's subjects trading and fishing there had been more like the invasions of an enemy than becoming friends, who enjoyed the advantages of that trade only by permission." Exhibit 741, p. 224; see also App. 893-94.

In 1698/9, Parliament enacted an Act To Encourage the Trade to Newfoundland, which excluded all aliens and strangers from fishing in Newfoundland, "the seas, rivers, lakes, creeks, harbours in or about Newfoundland or any of the islands adjoining or adjacent thereto." Exhibit 749, p. 515; see also Exhibit 671, p. 39; Exhibit 673, pp. 43-44. This act remained in force, and was enforced, throughout the century. Exhibit 714, p. 693; Exhibit 804, p. 7. " 'The Act of 1698 remained the fundamental law of Newfoundland for more than a century, that is to say, until its repeal in 1824' " 2b Parry (ed.), *British Digest of International Law* 428 (1967).

During the negotiations preceding the Treaty of Utrecht; the Guipuscoans or Biscayans, a fishing community of Basques in Spain, asserted an established right to fish for cod and whales in the Newfoundland seas. Exhibit 781, p. 2. The claim was referred to the Board of Trade, who reported that "some Spaniards have come hither with passes from her majesty, and others may have fished there privately, but never any that we can learn did do it as of right belonging to them." The Board pointed out that of

course the alleged right was inconsistent with the act of 1699, since the enactment of which "instructions have been given every year to the commodores of the convoy to prevent foreigners coming thither." Exhibit 781, p. 3. Article XV of the Anglo-Spanish Treaty of Utrecht dealt with the claim as follows: "And whereas it is insisted on the part of Spain that certain rights of fishing at the island of Newfoundland belong to Guipuscoans, or other subjects of the Catholic King, her Britannic Majesty consents and agrees that *all such privileges as the Guipuscoans and other people of Spain are able to make claim to by right* shall be allowed and preserved to them." Exhibit 790, pp. 2-3; 28 Parry, *Consolidated Treaty Series* 295, 334-35. (Emphasis added.)

Following ratification of the treaty, the Guipuscoans naturally again presented their claim. It was rejected in a most illuminating decision by the Board of Trade in 1719. Exhibit 790. The Board relied on the Cabot discoveries and Gilbert's symbolic acts of sovereignty as establishing an exclusive English right to the sea fisheries as well as to the island of Newfoundland. The Board asserted the English "undoubted right and interest over that country and fishery," Exhibit 790, p. 4, and declared that any Spanish fishery in Newfoundland waters had been conducted pursuant to English license. *Id.* at 5. The conclusion was that the Spanish had no legal right and their claim was denied. See also Exhibit 671, pp. 38-39; Exhibit 741, pp. 276-77; Exhibit 766, p. 401; Exhibit 768, pp. 90, 102, 104-05; Exhibit 810, p. 219. The Spanish claim was renewed later in the century on several occasions, Exhibit 770, p. 135; Exhibit 682, pp. 410-11, and was "justly resented." Exhibit 673, p. 82. The Spanish finally renounced their "pretention" by Article XVIII of the Peace of Paris of 1763.

This history of the Guipuscoans decisively refutes any argument by plaintiff that exclusive fisheries in American waters in the 17th and 18th centuries were established only

by treaty. To the contrary, the English legal position was clear throughout that England was sovereign over the land and the fisheries and that only a treaty or some other vested right could warrant any foreign fishing in the American seas.

In 1723 the British navy expelled French fishing ships from the great bank of Newfoundland, but the Board of Trade discountenanced this act on the ground that the great bank was 35 to 50 leagues distant from the land at its nearest point and was therefore considered free to all nations. Exhibit 769, pp. 49, 51-53, 124-25. The Board did not on this occasion state its belief as to the limits of the exclusive fishery; it was probably applying the 100-mile rule.

After the British acquisition of Labrador by the Peace of Paris in 1763, Labrador was annexed to Newfoundland and the Labrador fisheries were regulated in the same manner as those of Newfoundland. The French were, of course, excluded. Exhibits 800, 801, 805. In 1765 the Board of Trade, in an address to the king, urged even more diligence in ensuring the exclusion of the French from the fisheries of Newfoundland, Labrador and the Gulf of St. Lawrence, "*where both the territorial property and the sovereignty of the seas are vested in your majesty.*" Exhibit 805, p. 2. (Emphasis added.)

(c) Cape Breton and Nova Scotia

The French systematically, and under claim of right, excluded the British from the Cape Breton fisheries while that island was in French hands. Exhibit 783. Acquisition of the Cape Breton fisheries was one of the principal motives for the New England expeditions which twice seized the island during the wars of the mid-18th century. Exhibit 659; Greene, *The Foundations of American Nationality* 363-64 (1922).

Nova Scotia changed hands several times, becoming permanently British by the Treaty of Utrecht in 1713. Both the French and the English asserted the right to exclude, and did exclude, nationals of the other from the rich Nova Scotia fisheries during their respective possessions of the province. The New Englanders were most interested in the Nova Scotia fisheries, and solicited permission to fish there from the British crown. Exhibit 780. After the final change of sovereignty in 1713 the French never disputed the exclusive British right to the Nova Scotia fisheries, although there were nagging disagreements as to whether certain areas fell within that exclusive fishery or not. See Exhibit 768, pp. 43, 91.

(d) The Fisheries of the Common Counsel States

The colonists of what are now the Common Counsel States were no more prepared than their neighbors to the north to tolerate French intrusions upon their fishing, and one of the motives for the seizure of Louisbourg in 1745 by the New Englanders was to prevent French incursions on the New England fisheries. Exhibit 659, p. 9; see also App. 903-04. The issue rarely arose, however, because—except perhaps in Maine waters—French incursions were infrequent and on a small scale. This was so essentially for two reasons: the New England fisheries were distant both from France and from any French-occupied territory; and, while at first believed to be even richer than the Newfoundland fisheries, those of New England turned out to be relatively modest and not such as to attract foreigners in any significant number. Exhibit 663, p. 300; Exhibit 665, p. 345; Exhibit 671, pp. 88-90; Exhibit 673, p. 37; Exhibit 740, pp. 33-34; Tr. 2125-26. Also, the New England fisheries rarely required action by the authorities in England, "probably because the people of that region were conducting the industry so successfully that they had no cause to bring pressure upon the home government."

App. 831. In a notable understatement, Dr. Kavenagh conceded that if the French had attempted to fish in New England waters, the colonists would have "asked them to leave." Tr. 2061-62.

The Board of Trade was interested in the New England fishery and regularly collected information concerning it. Exhibit 766, p. 615; Exhibit 768, pp. 31, 34-35, 122; Exhibit 791; Exhibit 810, p. 288. If there had been any French or other foreign threats to the fishery it cannot be doubted that both the British government and the colonists would have taken steps to combat it, just as they did in more northerly waters where foreign incursions did take place.

Southward of New England, the fisheries were not so rich as to attract any French or other foreign interest at all, so that the necessity of excluding foreigners never arose there. App. 791; Tr. 2283, 2290.

Plaintiff herein has relied on a Massachusetts statute of 1646, which recited in its "whereas" clause that "it hath been a custom for foreign fishermen to make use of such harbors and ground in this country as have not been inhabited by English men." App. 706; Exhibit 724, p. 52; Tr. 2287-88. This act — which was repealed in 1661, Exhibit 724, p. 52 — indicates that some fishermen who in some sense were foreign had been tolerated at one period. An act of 1667 stated that the 1646 act had been in accordance with "a reservation in the patent," that is, the Massachusetts Bay charter of 1629. App. 708. As we have seen (p. 208, *supra*), that charter included a free-fishing clause for the benefit of "any of our loving subjects."

The fact that this reservation was for the benefit only of British subjects makes it plain that when in 1646 the Massachusetts legislature, acting as it later explained in accordance with that "reservation," spoke of "foreign fisher-

men" it was speaking of some class or classes of British subjects whom the legislature considered "foreign." If non-British subjects were included, the reference to "a reservation in the patent" simply made no sense. The reference in the 1667 statute to "strangers," as synonymous with "foreign fishermen" in the 1646 statute, and the distinction made between them and "inhabitants" of the colony, further demonstrates that the reference in the 1646 statute was to residents of British North American colonies other than Massachusetts itself, and to fishermen from the British Isles also if any were then coming so far to fish. On the basis of the behavior and attitude both of New Englanders and of other colonists throughout the colonial period we may be sure that if there ever was any "custom" of tolerating French or other non-British fishermen it was because very few of them came to be tolerated and that such toleration was regarded as a matter of permission rather than of right.

Instructions issued in 1683 for the settlement of the Duke of York's colony at Pemaquid, in Maine, prohibited all vessels "that do not belong to this government" from fishing for herring; vessels from outside the government could otherwise come to fish, but only after procuring licenses. App. 536-37, 849.

In 1693 the Pennsylvania government required a payment by all foreigners of a royalty of 10% of oil and bone for the killing of any whale within Delaware Bay. Exhibit 281; App. 334. The government of New Jersey adopted a similar measure the same year. App. 704. Both these acts applied to all persons not residing in Pennsylvania or New Jersey.

In 1700 the Massachusetts governor and legislature referred to "the undoubted right and privilege of your majesty's subjects to fish in the seas on the whole eastern

coast, conformable to your majesty's rights of sovereignty over the seas." App. 322, 680.

3. Licensing of Fishing by the Colonies

Most of the colonial governments at one time or another asserted the right to grant fishing licenses and to charge royalties or taxes therefor. The Virginia Company, even while embroiled with the Council for New England on the fishing issue, issued licenses; the Virginia Company's position was not that there was no licensing power, but that the two companies chartered in 1606 had the reciprocal right to fish in each other's waters. Preston, *Gorges of Plymouth Fort* 157, 167, 413 n.20 (1953). In 1622 certain foreigners wishing to settle in Virginia applied for permission to fish in the seas thereof. U.S. Exhibit 261; Tr. 2196.

Pennsylvania, in chartering a society of traders in 1682, included in the grant a license to fish for whale, sturgeon and all royal and other fishes in the main sea and bays of the province. App. 335, 683; Tr. 2194-96.

New Jersey on a number of occasions granted licenses and charged royalties for whale fishing. Exhibits 482, 483, 484.

The New York government over a period of many years sold licenses for whale fishing; this practice was challenged in court, but was upheld. Exhibits 470, 474, 478, 782, 785; Exhibit 748, p. 15.

The Plymouth colony licensed its mackerel and bass fisheries (p. 238, *infra*), and Nantucket licensed whale fishing. Exhibit 748, p. 16.

In Bermuda, a corporation was given the monopoly of whale fishing in Bermuda waters, and issued licenses to others in return for royalties. Exhibit 777, p. 294.

Nova Scotia by proclamation of 1665 ordained that no one should fish without license. Scott, *Hague Court Reports* 161 (1960).

Under the administration of Governor Pallisser in the 1760's, American participation in the fisheries of Newfoundland, Labrador and Canada was permitted only "within certain limits and under certain restrictions"; in general, Americans were licensed for the whale fishery only and were excluded from other branches of the fishing trade. Exhibit 801, pp. 3, 8; Exhibit 748, pp. 45-46.

Frequent colonial legislation licensed the taking of drift whales whether on the shore or at sea, typically requiring the payment of a royalty to the colonial government by anyone taking such a whale.[43] See App. 334, 875, 879-80; Exhibit 374; Exhibit 732, p. 134; Exhibit 748, pp. 4-9, 12; U.S. Exhibit 9, pp. 86-87, 98; U.S. Exhibits 195, 199, 200, 208; Tr. 2216, 2230-33, 2246-47. As we have seen (pp. 10-12, *supra*) the sovereign right to whales had been regarded from the earliest times in England as an attribute of sovereignty and property in the territorial sea.

4. Grants of Exclusive Fishery

The Plymouth colony regarded the rich mackerel and bass fisheries in the waters off Cape Cod as one of the important economic resources and rights of property

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[43] We know of no basis whatever for plaintiff's assertion (Pl. Br. 139) that such statutes related only to whales caught "within a short distance of shore"; even if they did, they would still be irreconcilable with plaintiff's position that colonial property rights stopped at the water's edge. Nor do we know of any basis for plaintiff's inconsistent and contrary, and incredible, assertion (Pl. Br. 149) that a New Jersey statute established jurisdiction over whales caught anywhere in the world. By far the more natural construction of all these statutes is that they applied to the territorial sea.

belonging to the colony. At times licenses were sold, but the usual procedure was for the government to lease the exclusive right to the fishery to entrepreneurs for a term of years. Such leases resulted in substantial receipts of revenue by the colony. App. 837-38, 876-80. 886-89; Exhibit 730.

In 1647 the Connecticut colony offered John Whiting a monopoly for the taking of whales within the colony. Tr. 2242-43.

In 1715, and again in 1726, New York created monopolies for the exclusive fishing for porpoises "in the seas, harbours, rivers and other waters within this colony." App. 333, 680-82, 703-04.

The whaling company licensed by New Jersey had apparently only a non-exclusive license to take whales in the sea, but an exclusive right to all drift whales coming on shore. Exhibits 484, 485, 490.

In 1763 the Board of Trade received an application for a grant of the Madeleine Islands in the Gulf of St. Lawrence and the exclusive fishing thereof. Disposition of the application does not appear in the record, but in 1766 the Board of Trade recommended to the crown that an exclusive fishery be established there. Exhibit 681, pp. 347-48; Exhibit 806, pp. 7-8. In 1770 the Board expressed its opinion that if an exclusive fishery were to be granted the crown should receive "a valuable consideration" therefor. Exhibit 774, p. 227.

When Labrador was ceded to Britain by the Peace of Paris of 1763, it was annexed to the government of Newfoundland for the express purpose "that the open and free fishery of our subjects may be extended to and carried on upon the coast of Labrador and the adjacent islands." U.S. Exhibit 367, p. 164. Governor Pallisser carried out this mandate with great vigor, to the extent of interfering with exclusive seal and sea-cow fisheries on the Labrador coast

which had been granted, together with posts or settlements on land, by the French government of Quebec and confirmed by the British on first taking possession. The owners of these exclusive fisheries protested to the Board of Trade. At first the Board was skeptical, regarding title to the property rights in question as unproved and taking the view that the initial British confirmation had only the nature of temporary licenses to carry on the fisheries. Exhibit 802, p. 9; Exhibit 806, pp. 7-8.

By 1772, however, the Board of Trade had become convinced that these exclusive fisheries were legitimate rights of property and also that the fisheries in question could as a practical matter be carried on only on an exclusive basis. Exhibit 786, pp. 2-4. The Board of Trade therefore memorialized the crown to re-annex the coast of Labrador to the province of Quebec. Exhibit 786, p. 6. This was done by the famous Quebec Act of 1774, which expressly declared the reason for the re-annexation of Labrador to Quebec to be the fact that under the Newfoundland regime the exclusive fisheries of the Labrador coast had been "subjected to regulations inconsistent with the nature of such fisheries." U.S. Exhibit 365, p. 549.

The instructions to the Quebec government in 1775 required that "the real and actual property and possessions" of the owners of fisheries on the Labrador coast should be "preserved entirely, and that they should not be molested or hindered in the exercise of any sedentary fisheries they may have established there." Exhibit 714. (Since these were seal and sea-cow fisheries, the word "sedentary" is obviously not used in the modern sense but appears to refer to a fishery carried on within a relatively restricted area from an established point on shore.) See also Exhibit 773, pp. 56, 76, 256, 266-67, 272-75, 277, 279-80; Exhibit 774, pp. 70, 308.

5. Regulation of the Fisheries

The record contains many examples of regulations enacted by every colonial government which had important fisheries, both surface and sedentary, within the seas of its province. Such regulations are found in Maine (App. 849), Massachusetts (App. 707-10; Exhibits 505, 511; Exhibit 724, pp. 53-54); the Plymouth Colony (App. 876-79); Rhode Island (App. 990); New York (App. 702); Nova Scotia (Exhibit 768, pp. 31, 34-35; Scott, *Hague Court Reports* 161), and Newfoundland and Labrador (Exhibits 465, 714, 719, 741; Exhibit 748, p. 45; Exhibit 766, p. 609; Exhibit 773, pp. 37, 259, 273-80; Exhibit 774, p. 62; Exhibits 798, 799, 801, 802, 804, 805, 806, 811).

The types of regulatory measures enacted, many of which we have previously encountered in England, included the chartering of fishery companies, the prohibition of certain types of nets and other methods of fishing, the specification of times and seasons for fishing, the prohibition of the taking of young fish, prohibitions of the dumping of garbage or waste in certain areas of the sea, exclusion of foreigners or of certain classes of subjects from fisheries, protection of foreigners where they enjoyed treaty rights to a fishery, suppression of one type of fishery in order to promote another conflicting type which was regarded as more valuable, protection and convoying of fishing fleets, and the encouragement and improvement of fisheries generally.

B. THE COLONIES ASSERTED AND EXERCISED CONTROL AND JURISDICTION OVER THE SEABED AND ITS RESOURCES WHENEVER THE OCCASION AROSE.

1. Sedentary Fisheries

On several occasions colonial legislatures asserted and exercised their jurisdiction over the seabed by regulation of sedentary fisheries. The New Jersey act of 1719 (App. 684,

705-06) prohibited the gathering of oysters within the province from May 10th to September 1st of each year; forbade all persons not living in that province to take any oysters; provided for the seizure of any oyster-raking equipment found on foreign ships and imposed fines for violations.

In New York there were four 18th-century statutes regulating the raking of oysters. Exhibits 277-280; App. 682-83. The first three of these dealt with oyster beds below low-water mark in the sea; the fourth dealt specifically with oyster beds "lying at and near Richmond county, within this colony." As Professor Smith testified, "this implies a distinction similar if not identical to that in English law: the 'body of a county' ended at low water mark but the sovereign's jurisdiction and prerogative extended much farther into the sea." App. 333.

Professor Henkin conceded (App. 541-42) that it is "likely" that foreigners seeking to exploit the sedentary fisheries in American colonial waters would have been driven off as late as 1765.

2. Grants of Submerged or Derelict Lands

Given the great wealth of unappropriated land in North America during the colonial period and the constant availability of land for expansion westward, it is not surprising to find few colonial grants of land covered with water. However, several examples of such grants have been found.[44] While most of these grants did not deal with land under the open sea, we have seen that English property law never made any distinction between the different classes of tide waters.

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[44]It can be stated with some confidence that there must be many such grants besides those here mentioned. Random searches through the deed books of every coastal county would be hopelessly time-consuming, and have not been undertaken. The few grants here mentioned were encountered essentially by chance.

In 1693 Sir Thomas Chicheley was granted derelict land in York County, Virginia. Survey Report No. 140, Virginia 350th Anniversary Corporation, Colonial Records Project, British Museum, Harleian MSS 7639.

In New York in the 1680's, the governor granted to the mayor and corporation of New York City lands reclaimed from the sea on which a dock was built. Exhibit 286, pp. 334, 367; App. 338.

A Rhode Island statute of 1707 authorized every town to develop the "waters" bordering thereon (without any limitation to internal waters) by constructing wharves or reclaiming the submerged lands. *Armour & Co. v. Newport*, 110 Atl. 645, 646 (R.I. 1920); *New York, N.H. & H.R.R. v. Horgan*, 56 Atl. 179 (R.I. 1903). A grant made under this statute conferred the right to build a wharf for 800 feet below low-water mark. U.S. Exhibit 11, pp. 18-19. A New Hampshire statute of 1763 was similar. *Id.* at 19.

Massachusetts statutes of 1641 and 1647 provided that the owner of coastal land had property in the foreshore (with no limitation to the foreshore of internal waters) down to the low-water mark. Exhibit 533. It is not to be supposed that the Massachusetts government were ignorant of the law of England that the foreshore partook of the nature of the sea and was a proper subject for ownership because of the crown's ownership of the seabed. The same statute cautioned that owners of the foreshore were prohibited from stopping or hindering the passage of boats "through any sea."

Grants of the foreshore were very frequent in New York. See Mershon, *The Power of the Crown in the Valley of the Hudson* 156-57, 166-68, 177-89 (1925). In New York we also frequently find grants of land under rivers, bays and Long Island Sound. *Id.* at 146, 169-76. An Indian deed of 1640 of what became the town of Southampton included "all

emoluments and profits thereto appertaining or in any wise belonging from sea or land within our limits." Exhibit 554.

Finally, Professor Smith testified as to a number of grants in the West Indian colonies of salt ponds and other waste lands below low-water mark. App. 336-38; Tr. 1268-69; and exhibits there cited.

3. Mining

The desire to discover and to exploit mines, particularly mines of precious metals, was of course one of the principal reasons for English colonization in North America. The colonial charters and instructions to governors contain frequent and pervasive references to mines and mining.

It is hardly to be supposed that the colonists would have turned a blind eye to mines below low-water mark, or would have regarded them as incapable of ownership. In 1630 Governor Harvey of Virginia hoped to discover a saltpeter mine in the Chesapeake Bay, and "will find out if there be any silver mines." Exhibit 233. Mining concessions in the royal colonies were frequently granted out to royal favorites. In 1687 the Duke of Albemarle received a grant of all mines of gold, silver, saltpeter, salts and any other minerals in Carolina "as largely as is in our power to grant such license or authority," he to pay a percentage of net proceeds to the crown. Exhibit 232. Thomas Neale, Master of the Mint, in 1691 received a 31-year lease of all mines and minerals belonging to the crown in Virginia, at a royalty of one-tenth. The following year Neale received a 51-year lease of all ungranted mines, including saltpeter, in the American colonies, with stated exceptions. Exhibit 751, pp. 352-53; Exhibit 752, pp. 10-11.

We have found no evidence of the actual discovery and exploitation of any subsea mines in the North American seas during the colonial period. This is not surprising, in

view of the state of technology at the time and the vast expanse of unexplored land to the west which naturally dominated the economic ambitions of the colonies. But as Professor Smith testified, the lack of exploitation for these reasons "is not at all inconsistent with a quite general awareness that the exclusive right of exploitation was vested in the adjacent sovereign" if such mines had been discovered. App. 332.

Professor Morris admitted that under the common law in force in the 17th and 18th centuries mining rights on land in the American colonies were proper subjects of ownership all the way down to the center of the earth, even though they were not exploited during that era to any great depth below the surface. Tr. 2293-97; see 2 Blackstone, *Commentaries* 18. Likewise, as we have seen, the English common law which was in force in colonial North America recognized the crown, or his palatine grantees, as owners in fee of the property of the soil of the seabed in marginal waters. That ownership of course entailed ownership of any minerals found in the seabed or subsoil.

Even on Professor Thorne's view that the coastal sovereign's rights in the adjacent seas were mere rights of jurisdiction and the right to ownerless property, and that seabed minerals were therefore ownerless until discovered, there can be no question that the prerogative right would have extended to any mineral resources discovered and exploitable there, just as it extended to wreck, flotsam, treasure trove and royal fish. Professor Thorne was at great pains to argue that the crown did not own the waters of the sea and the fish floating therein while they were still free, but that the prerogative attached only to things of value found in or extracted from the sea. While Professor Thorne's view has been shown to be erroneous as to the law of England at any time since the 16th century at the latest, that view, had it been the law, would still be entirely adequate to sustain the position of the defendant States in

this proceeding. Even if the sovereign's right in the American marginal seas were viewed only as an inchoate or potential right to assert ownership of things of value found therein or extracted therefrom, the States must prevail once such things of value *are* found or extracted.

In one sense there is an analogy here to the power of Congress under the Constitution of 1787 over interstate and foreign commerce. When that power was conferred, it did not apply to airplanes, railroads, radios and television, because those inventions were unknown at the time; but there was never any question that once they came into being they were embraced under the provisions of the commerce clause. Here the case is much stronger, since during the American colonial period mining was well known and even subsea mining was not unheard of (p. 107, *supra*). Thus to argue, as the United States does, that colonial ownership did not extend to subsea mines because there were no such mines in American waters prior to 1776 is *even more* preposterous than an argument that the commerce clause could not be applied to airplanes or to television. A closer analogy would be an argument that the commerce clause did not apply to traffic by sea between Georgetown, South Carolina, and New London, Connecticut, on the ground that no ships sailed between those two ports prior to 1787.

We submit that no one familiar with the English and colonial background can have the slightest doubt that in fact, if valuable mineral resources had been discovered in the seabed or subsoil of the American marginal seas during the colonial period, the adjacent colonial government or the crown would have asserted jurisdiction and ownership over them, the right to control or to license exploitation, and of course the right to exclude foreigners, and that these assertions would have been upheld in the courts in the unlikely event that any one had challenged them. There is an analogy to fishing, but the reasons for assertion of owner-

ship and exclusion of foreigners would have been much stronger in the case of mines than in the case of the fisheries.

Unlike fishing, which had been practiced for centuries, and as to which there were arguably vested rights, based on prescription, for subjects and possibly even for foreigners, such seabed mineral exploitation would have been a new industry or invention and therefore would have been plainly proper for monopolization or licensing under the established law. Likewise, the prevailing mercantilist theory would have required the orderly harnessing and exploitation of such resources as a part of the economy and wealth of the empire. Moreover, mining, which requires permanent and immobile installations, would have been far easier to regulate than was fishing; we have seen that licensing or exclusion of foreigners from the sea fisheries, while always insisted upon as a matter of legal right, was sometimes given up as more trouble than it was worth in view of the ability of illicit fishing boats to slip in and out of territorial waters undetected. No such difficulty would have arisen in the case of mining installations. Finally, it is inconceivable that a colony would have tolerated the construction of such installations by foreigners in its marginal waters; that would have been regarded not only as larceny of the colony's wealth but, even more seriously, as a threat to the security and defense of the colony itself.

The United States may say that all this is hypothetical. It is no more hypothetical than the application of the commerce clause of the 1787 Constitution to airplanes or television, or than the ownership by the surface proprietor of mining rights far below the level of exploitation possible at that time. Yet no one doubts how those questions would have been resolved had they arisen, and they were resolved without controversy or doubt once they did arise. There is no greater room for doubt here.

C. THE TERRITORIAL JURISDICTION OF ADMIRALTY EXISTED IN THE AMERICAN SEAS JUST AS IN THE ENGLISH SEAS.

As we have seen (pp. 25-31, 92-98, 132-35, *supra*), throughout the 17th and 18th centuries in England, as well as earlier, the admiralty jurisdiction was regarded as an attribute or corollary of the crown's sovereignty over the English seas. As the English colonies in North America sprang up, the admiralty jurisdiction was extended to their seas as a matter of course. All the colonial charters conferred admiralty jurisdiction; some (*e.g.*, Exhibit 683, p. 35) reserved part of the jurisdiction to the admiral of England, but there is no need to discuss the somewhat complex subject of the division of the jurisdiction among the Lord High Admiral, the colonial vice-admirals and the various admiralty courts. The patents of the English admirals included territorial jurisdiction over the seas of the colonies, which were listed by name. Exhibit 642; see also Exhibit 675, preface. The jurisdiction was exercised, except so far as it was reserved to the crown, by the colonial legislatures and courts throughout the 17th and 18th centuries, including of course jurisdiction over ships at sea. See generally Exhibits 502, 541, 633. Appeals from decisions of the colonial admiralty courts lay in the High Court of Admiralty. 3 Blackstone, *Commentaries* 69.

The patents of the colonial vice-admirals conferred jurisdiction in unmistakably territorial terms. For example, the patent to Thomas Boone as Vice-Admiral of New Jersey granted him jurisdiction "throughout our province of . . . New Jersey . . . and territories thereof and maritime parts whatsoever adjacent thereto and also throughout all and every the sea shores public streams ports fresh waters rivers and creeks and arms as well of the sea as of the rivers and coasts whatsoever of our said province . . . and maritime parts whatsoever of the same and thereto adjacent." U.S. Exhibit 322. The patent in several places

speaks of things to be done "within the maritime jurisdiction of our vice admiralty of our said province," and confers all that jurisdiction "which of right and by the statutes laws and ordinances and customs anciently observed were wont and ought to be enquired after," including wreck, manslaughter and other felony, royal fish, etc. *Ibid.* These formulas leave no doubt that the jurisdiction was territorial and that it was intended to be of precisely the same nature and scope as the jurisdiction in the English seas themselves. See also U.S. Exhibits 323, 324, 325.

The language differed slightly from patent to patent; for example, William Shirley's commission of 1741 as Vice-Admiral of Massachusetts conferred jurisdiction "in our province of Massachusetts Bay aforesaid and territories thereon depending and in the maritime parts of the same, and thereto adjoining, whatsoever," and so on. 2 *Collections, Colonial Society of Massachusetts* 237 (1913). Two commissions have been encountered which set express geographical limits on the territorial jurisdiction conveyed: Joseph Dudley's commission as Vice-Admiral of New England, in 1685, conferred jurisdiction "of our colony of New England and maritime parts to the same adjoining, that is, from New York and Long Island toward the south and southwest to 40 degrees of north latitude." *Id.* at 369. And the charter of the Providence Island Company, in 1630, granting certain islands off the coast of Central America, conveyed admiralty jurisdiction "in and upon the seas, rivers and coasts of the said islands, and every or any of them adjoining, within 40 leagues of the islands." 1 Marsden, *Law and Custom of the Sea* 471 (1915). As we have seen, the Maine charter of 1639 granted admiralty jurisdiction out to 20 leagues from the coast. Tr. 716.

There is substantial authority for the proposition that a principal purpose and function of the admiralty jurisdiction in colonial North America was the exclusion of foreigners and other unauthorized or unlicensed persons

from the fisheries in the territorial seas. App. 784-91. The New England colony unquestionably used the admiralty jurisdiction for that purpose, and the same was true of Newfoundland. App. 788-90; Exhibit 719, pp. 128-31. This was, of course, wholly consistent with the scope of the admiralty jurisdiction in English home waters at the time; see pp. 92-98, *supra*.

D. OTHER ASPECTS OF SOVEREIGNTY, OWNERSHIP AND JURISDICTION CONFIRM THAT THE AMERICAN SEAS WERE REGARDED AS SUBJECT TO THE SAME LAW AS THE ENGLISH SEAS.

1. Wreck and Other Admiralty Droits

In 1713 the British Parliament adopted an act, confirmed by another act in 1717, which codified the common law of wreck and was to be applied on the coasts both of Great Britain and "any other of her majesty's dominions." The act required royal officers to assist all ships, British or foreign, in danger of being wrecked on the shore, and provided for the custody of all wrecked goods and their appropriation by the crown if not claimed within 12 months. While these acts applied of their own force to all royal colonies, the New Jersey legislature in 1766 enacted a statute specifically recognizing their application there. Exhibit 492.

In 1692 the governor of Maryland appointed an officer to salvage all "drifts, wastes and wrecks," including whales, "as shall be driven or cast on shore or shall be found floating within the limits and bounds" of the colony. Exhibit 374; App. 334. The reason for the appointment was stated to be incursions of Pennsylvanians and other foreigners "upon and within the limits and bounds of this province at the seaboard side" to take drift whales. *Ibid.*

The right of wreck in the royal colonies was granted, leased or sold by the crown on various occasions. In 1691

Thomas Offley was granted one-half of any proceeds to be realized "from several Spanish wrecks in America." In 1690 Thomas Neale received a grant of all wrecks within 20 leagues of Bermuda, and another grant of wrecks in certain specified Caribbean waters. Also in 1692, the Duke of Leinster was granted wreck in America between the latitudes of 12 degrees south and 40 degrees north, except as already granted. Neale and a partner received a grant of wreck within 30 leagues of the isle of Sables, off the coast of Nova Scotia between 40 and 50 degrees of northern latitude. Exhibit 751, pp. 352-53; Exhibit 752, pp. 10-11. Neale's grant of wreck in the seas for 20 leagues around Bermuda included flotsam, jetsam and lagan as well as wreck properly so called, Exhibit 657; other grants doubtless did likewise.

In 1719 the North Carolina government claimed certain captured goods which had been seized "within the seas of the soil of the lords proprietors" of Carolina. App. 369.

The treatment of wreck and similar prerogative rights on the American seas and coasts is further confirmation that English law regarded those seas and coasts as subject to the sovereignty, jurisdiction and ownership of the crown in precisely the same senses as were the seas and coasts of England itself.

About 1615, the Bermuda (Somers Island) Company made substantial profits from "an immense piece of ambergris found on the coast." These profits supplied the capital which permitted the establishment and development of the Bermuda colony. Rowse, *The Elizabethans and America* 77 (1959).

2. Establishment of Ports

It is common knowledge, of which judicial notice can be taken, that the colonial governments as a matter of course

exercised the right to establish seaports and to define their limits.

It will be remembered that in England the right to establish seaports—which often extended quite considerable distances into the sea—was an undoubted prerogative of the crown, and was regarded as an attribute of, or evidence for, the crown's sovereignty and ownership of the sea and seabed, on the ground that if the king so chose he could designate ports covering the entire coastal seas. See pp. 102, 113, *supra*.

3. Regulation of Marine Pollution

Massachusetts enacted statutes against the throwing of ballast, dung or other matter from ships into the waters of roads, ports, harbors and coves within the province. Exhibits 507, 531, 537.

Other statutes of several colonies, already cited under the heading of fisheries regulations (p. 240, *supra*), forbade the dumping of garbage or waste by fishing boats in various other parts of the sea outside harbors.

4. Smuggling Jurisdiction

In 1764 the British jurisdiction over smuggling (pp. 137-39, *supra*) was extended to American waters by a "hovering act" of Parliament providing for the seizure and forfeiture of any foreign ships and all goods on board found within two leagues of the coast of any British colony or territory in America. Masterson, *Jurisdiction in Marginal Seas* 38-39 (1929).

E. SEVERAL MAPS MADE IN THE COLONIAL PERIOD PROVIDE ADDITIONAL EVIDENCE FOR THE AMERICAN TERRITORIAL SEAS.

In the colonial period as today, maps very rarely indicate maritime boundaries or the width of the territorial sea.

There are a few colonial maps, however, which do show such boundaries, and others which contain nomenclature evidencing recognition of maritime sovereignty.

Professor Flaherty offered a number of maps from the colonial period designating the waters off the Virginia coast as the Sea of Virginia or the Virginian Sea. Virginia Exhibits 2-8. While suggestive, such designations could be interpreted either as merely geographical or as indicative of a claimed sovereignty or ownership.

Two maps of 1726 and 1733, drawn up in connection with a Massachusetts-New Hampshire boundary controversy, show the colonial boundaries in New England as extending out into the sea. App. Vol. III, Exhibits 615, 616. An earlier, 17th-century map, by William Reed of Boston, does likewise. App. Vol. III, Exhibit 815.

Exhibit 816, App. Vol. III, is an English map of North America, made in 1680 by William Berry and dedicated to King Charles II. The map includes maritime boundaries, labeled the north and south "bounds of the dominion of the British seas," extending from Van Staten and Finisterre due westwards across the Atlantic Ocean to the coast of North America. This was in accordance with the then-current doctrine that a nation owning opposite coasts owned all the waters, no matter how extensive, between those coasts. The map thus shows the British seas, properly so called, as having their southwestern corner at a point on the North American coast due west of Cape Finisterre, that is, at approximately the present Maine-New Hampshire boundary. But the map also recognizes that the American colonies to the southwards had their own territorial seas, which are designated as the "sea of Carolina, Virginia, Maryland, New York, New England."

Exhibits 817, 818 and 819, App. Vol. III, are English maps deriving respectively from about 1685, about 1690 and 1715. The first two designate the marginal seas of the

North American Atlantic coast as the "Sea of the English Empire." Exhibit 819, which was dedicated to the president of the Privy Council, uses the term "Sea of the British Empire." These are quite obviously not mere geographical designations.

Exhibit 613, App. Vol. III, is an official map made about 1720 by Captain Cyprian Southack, who was a royal naval commander and Commissioner of Treaties of the province of Nova Scotia, and dedicated by him to Francis Nicholson, Governor and Vice-Admiral of South Carolina. Southack's map, which covers the American coast from Cape Breton Island to New York, divides the sea off each province by precise designations: "the Sea of Nova Scotia," "the Sea of the Province of Maine," "the Sea of New Hampshire," "the Sea of New England," "the Sea of Rhode Island," and "the Sea of New York." These are obviously recognitions of territorial sovereignty rather than mere geographical designations, because of their precision and the fact that the various "seas" are in no possible sense separate bodies of water, the divisions among them being purely artificial and political.

In the St. Croix arbitration under the treaty of 1794 between Britain and the United States, the United States regarded Southack's map as authoritative and relied on it heavily. The United States agent declared of Southack, "there was in that day no man who possessed more ability for such a work, who had a greater opportunity to acquire knowledge in the business or who, for such a business, in a higher degree possessed the confidence of his country." 1 Moore, *International Adjudications* 141-42 (1929); see also 2 *id.* at 284-88 (1930). One of Southack's naval duties was the seizure of any French ship caught fishing or trading in Nova Scotia waters. Exhibit 768, p. 54; Exhibit 789. Southack was in a good position to know just what Britain was claiming in that era regarding sovereignty and propriety in the American seas.

Exhibit 820, App. Vol. III, a portion of a map of 1720, shows the Carolina-Florida boundary, identified as the "limit of King Charles II granted to the present proprietors of Carolina in 1663." The line does not stop at the coast but rather extends a considerable distance into the sea.

Exhibit 821, App. Vol. III, is an early 18th-century French map of what is now the United States. The English possessions have been shaded in; most interestingly, the shading includes the marginal sea of each of the English colonies. While the boundaries of this maritime shading are somewhat eccentric—usually following north-south and east-west lines rather than the indentations of the coast, and therefore producing a curious notching effect—in most areas the shading extends approximately 100 miles from the coast.

In the arbitration of 1817 between the United States and Britain concerning the islands in Passamaquoddy Bay and the Bay of Fundy, the agent of the United States presented a rough map on which he drew a maritime boundary off the Maine coast to show his understanding of the Massachusetts charter of 1691. The line is labeled "an imaginary line ten leagues from the shore being the Province boundary of Massachusetts." 6 Moore, *International Adjudications*, map opposite p. 110 (1933).

These maps, especially when examined in the light of what we already know concerning the British attitude towards maritime sovereignty in the 17th and 18th centuries, furnish powerful supporting evidence for the existence of the territorial sea off the North Atlantic coast and of general awareness thereof.

F. THERE WAS NO CURTAILMENT OF COLONIAL RIGHTS IN THE MARGINAL SEA BETWEEN 1752 AND 1776, AND IF THERE HAD BEEN SUCH A CURTAILMENT IT WOULD NEVER HAVE BEEN RECOGNIZED IN AMERICAN LAW.

One of plaintiff's principal contentions is, in the words of Professor Morris, "that after 1752 there was a deliberate effort on the part of the Crown to reassert its claims to the unoccupied and undistributed lands of the colonies and to tighten royal authority over disposition by the colonies of public lands." Tr. 1701. Plaintiff seems to contend that the process of curtailment of colonial rights after 1752 was so drastic and comprehensive that by 1776 the colonies had virtually nothing left which could be inherited by the successor State governments. To this contention there are three short answers, each of which would be separately adequate to deprive Professor Morris' thesis of any benefit to plaintiff in this proceeding.

1. The attempted curtailment of colonial rights was the principal cause of the American Revolution, and such curtailment never became part of the law of this country. The statesmen of the Revolution continuously and vehemently asserted that the colonial charters, charter rights and charter boundaries were in full force and vigor and that any British attempt to curtail or abrogate them had been and was unlawful. Our courts have uniformly so held.

2. To the extent that the crown did curtail colonial rights, it did so for its own benefit and aggrandizement, not for the benefit of foreigners or the world at large. Professor Morris conceded that the crown never took away any territory or right from any colony in order to make it *res nullius*. Tr. 2331-32. And anything the crown took away from the colonies came back to the States individually at the Revolution. Professor Morris' theory is that rights which under British law had been taken away from the colonies by the crown by 1776 passed "directly to the

United States, not to the individual states." Tr. 1701. It would be difficult to formulate a thesis more alien or repugnant to the views of the revolutionary statesmen or to the legal doctrine on which the American Revolution and Constitution were founded. Professor Morris has not brought forward any judicial or jurisprudential pronouncement from 1776 until today in which any American authority has ever used any version, let alone the British version, of the division between crown and colonial rights in 1776 as a measure of the allocation of powers between the States and the Federal Government. In 1782 Madison called such a notion "so extravagant that it could not enter into the thought of man." Levitan, "The Foreign Relations Power," 55 Yale L.J. 467, 484 n. 67 (1946).

3. As Professor Morris admitted, Tr. 1877, 2331, there is not the slightest evidence or indication that the crown ever took away or curtailed any colonial rights of sovereignty or property in the seabed. With one interesting exception, there is no evidence that the crown ever attempted to curtail any colonial rights on the surface of the seas either.

The exception is the New England Restraining Act of 1775, which prohibited the New England colonists from fishing on the banks of Newfoundland and in all other American waters. Tr. 1697-98; App. 846-48; Exhibit 720, pp. 113-20; Exhibit 742, pp. 315-23. This was a war measure, based on a finding that the New England colonies were in a state of rebellion. Exhibit 742, p. 316. Obviously, it was never regarded as being any part of American law. Most interestingly, Lord North justified the act on the ground of British ownership of the fisheries in the American seas. App. 847; Exhibit 742, p. 316. Moreover, the government advocated the measure, aside from its principal purpose of injuring the New England colonies, on the ground that it would encourage and strengthen British fisheries in North American waters. Exhibit 742, pp. 322-24. Thus the significance of the act for this litigation is as evidence that

at the outset of the American revolution the British government still fully asserted that the American seas and their fisheries were subject to sovereign ownership and were not free to all. While there were bitter debates in Parliament on the wisdom and humanity of the measure, there is no record that anyone opposed it on the ground that the American seas and their fisheries were *res nullius.* Quite to the contrary, the opposition argued that "the people of New England, besides the natural claim of mankind to the gifts of Providence on their own coast, are especially entitled to the fishery by their charters, which have never been declared forfeited. These charters, we think . . . to be of material consideration. The bill therefore not growing out of any judicial process seems equally a violation of all natural and all civil right." 3 *Parliamentary Papers* 519 (1797).

A few other observations are in order concerning plaintiff's curious thesis as to the events of 1752-1776 and their legal implications. While at times plaintiff argues sweepingly that the crown had the absolute right to revoke charters and to change colonial boundaries, plaintiff elsewhere admits, Tr. 2541, and it is in fact clear, that such measures could be taken only by legal proceedings such as *quo warranto* or *scire facias,* which required proof that a charter had been breached by the grantees. Exhibit 711, pp. 42-43. The crown never claimed the power to interfere with vested rights of proprietary colonies. *Johnson v. McIntosh,* 21 U.S. (8 Wheat.) 543 (1823) (Marshall, C.J.); *Rhode Island v. Massachusetts,* 37 U.S. (12 Pet.) 657, 739 (1838). In the Passamaquoddy Bay arbitration of 1817, the United States unequivocally took the position that the crown had no power to change any charter boundary without the consent of the colony involved. 6 Moore, *International Adjudications* 47, 126-29 (1933).[45] Jurisdiction in the crown

[45] "[T]o dispossess the government and province [of Massachusetts] of any part of this territory [the territory included in the Massachusetts

over boundary disputes among colonies—which disputes were invariably resolved on the basis of construction of the colonial charters—is of course a wholly different matter. See Tr. 2332-33.

As to property rights, Professor Morris admitted that the crown could not and did not interfere with private property rights either in the proprietary colonies, Tr. 1876, or in royal colonies, Tr. 2300-03. Professor Morris' contention therefore amounts to no more than that the unappropriated lands in *royal* colonies became crown lands. But this is meaningless, since they had always been crown lands! The most that happened is some reallocation, as between the royal governments in the colonies and the authorities at Westminster, of control over the management and distribution of such lands. Such a reallocation, to the limited extent it occurred, has nothing to do with any issue in this proceeding.

Plaintiff relies especially on four documents: the Albany plan of union of 1754, the royal proclamation of 1763, the Board of Trade's proposal of 1768 for the erection of interior colonies, and the Quebec Act of 1774. Each of these documents avails plaintiff precisely nothing.

The Albany plan of union (U.S. Exhibit 366) proposed a federation of eleven of the British North American colonies. Each colony would retain its "present constitution," and the federation was proposed by the colonies themselves—hardly an imposition on them from above. In fact the plan was never implemented. The only significant fact about the plan for purposes of this proceeding is that it spelled out the colonies' charter boundaries, extending as

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charter of 1691] required an explicit renunciation on the part of Massachusetts, either expressed or necessarily and fairly implied . . . . And . . . no act has ever been done by Massachusetts from which her relinquishment of sovereignty over the islands in question can be justly inferred." "Case of the United States," *id.* at 126.

far as the Pacific, and regarded them as still in force. *Id.* at 885-86.

The proclamation of 1763, U.S. Exhibit 367, imposed, on a provisional basis, limits of western settlement into areas beyond the Appalachians then occupied by the Indians. Tr. 1706-07, 2308-13. This was a temporary measure adopted to allow time for the working out of a comprehensive plan for the administration and settlement of all the western territories, including those just acquired from France by the Peace of Paris, and for a peaceful settlement with the Indian tribes. The proclamation did not purport to change the boundaries of any colony; it was not contemporaneously construed as changing any such boundaries (U.S. Exhibit 368, last page; Exhibit 662, p. 83; Tr. 2325-27), and the official position of the United States taken during the peace negotiations of 1781-83 was that it changed no boundaries and that the charter boundaries survived as the foundation of the States' title to their territories. Exhibit 661, pp. 129-30; Exhibit 707; Tr. 2322-23; Greene, *The Foundations of American Nationality* 518 (1922).

The Board of Trade's proposal of 1768, U.S. Exhibit 368, envisaged the creation of new colonial governments in the western territories. The proposal, which like the Albany plan was never adopted, included elements devastating to plaintiff's position. First, the proposal acknowledged that the charter boundaries extending to the Pacific were still in force and had never been altered. U.S. Exhibit 368, p. 22. The map attached to the report, U.S. Exhibit 368, last page, Tr. 2325-26, shows the colonies with their ancient charter boundaries as far as the Mississippi, proving that they were still in force in 1768. Second, one of the principal reasons which the Board of Trade put forward for the erection of new colonies in the interior was in order not "to divert your majesty's subjects in America from the pursuit of" the "important objects" for which the original colonies had been founded. *Id.* at 29. *First* among those objects was

listed "*promoting the advantageous fishery carried on upon the northern coast.*" *Id.* at 27. (Emphasis added.) Thus in the Board of Trade's view, if expansion of the Atlantic colonies to the westward was curtailed or was sought to be curtailed, one of the prime objects was to avoid diverting those colonies from their proper and originally intended concerns, chiefly the exploitation of the sea fisheries. This is hardly consistent with Professor Morris' thesis that curtailment of colonial rights westwards necessarily entailed their curtailment on the coasts and in the seas also. See Tr. 2329-31.

The Quebec Act of 1774, U.S. Exhibit 365, purported to incorporate the territory north of the Ohio River and west of Pennsylvania into the province of Quebec. Curiously, the act expressly provided that nothing therein contained "shall in any wise affect boundaries of any other colony," *id.* at 550, though of course it was well known that the territory in question was within the charter boundaries of Virginia. The act also provided that nothing contained therein altered the status of any lands previously granted by the crown. *Id.* at 552. In any event, the Quebec Act, being one of the principal causes of the American Revolution, Tr. 2335-38, and adopted on the eve thereof, was never regarded as part of the law of this country. The Declaration of Independence listed the Quebec Act as one of the unlawful and tyrannical acts of George III that justifed revolution. The official United States position in 1781-83 was that the act was unlawful when adopted and had always been a nullity. Tr. 2335-38. Finally, the act said nothing with respect to the sea and seabed.

In sum, despite plaintiff's earnest contention, it is plain that nothing happened between 1752 and 1776 which in any way altered, voided or curtailed the rights of the American colonies in their marginal seas and the seabed thereof.

VI.

THE ENGLISH LAW OF MARITIME SOVEREIGNTY AND DOMINION WAS NOT INCONSISTENT WITH INTERNATIONAL LAW IN THE PERIOD 1606-1783, AND NO BRITISH OR AMERICAN COURT COULD OR WOULD HAVE SO HELD.

Plaintiff contends that, even conceding that maritime sovereignty and dominion were fully established in English and American colonial law in the 17th and 18th centuries, all the vast body of law and practice proved by the record herein should be ignored or regarded as a nullity on the ground that under the international law of that period sovereign nations were forbidden to claim and exercise such rights.

A. NO BRITISH OR AMERICAN COURT WOULD HAVE QUESTIONED ITS GOVERNMENT'S TERRITORIAL CLAIMS ON THE BASIS OF ALLEGED CONTRARY DOCTRINES OF CUSTOMARY INTERNATIONAL LAW.

Even if the international law of the period had been as plaintiff contends, it is beyond dispute that no British or American colonial court would have presumed to set aside provisions of English law, or to impeach the official acts of the executive organs of the state—particularly with respect to territorial claims—on the ground of alleged inconsistency with customary international law. It has always been, and still is, the law in both Britain and the United States that courts will do nothing of the kind, but rather that such territorial claims, and particularly claims to maritime sovereignty, by the proper governmental organs are conclusive on the courts and are not to be questioned. *Poll v. Lord Advocate*, (1897) 5 Scots L.T. 167, 3 British Int'l Law Cases 747 (1965); *Peters v. Olsen*, (1905) 4 Adam's Justiciary Reports 608, 3 British Int'l Law Cases 750; *Mor-*

tensen v. Peters, (1906) 8 F.93, 3 British Int'l Law Cases 754; *Sim's Lessee v. Irvine*, 3 U.S. (3 Dall.) 424, 464, (1799) (Iredell, J.); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 306-09, 314 (1829) (Marshall, C.J.); *Williams v. Suffolk Insurance Co.* 38 U.S. (13 Pet.) 415, 420 (1839); *In re Cooper*, 143 U.S. 472 (1892); *Wilson v. Shaw*, 204 U.S. 24 (1907); *United States v. The James G. Swan*, 50 F.108 (1892); *United States v. The Kodiak*, 53 F.126 (1892); *The Grace and Ruby*, 283 F.475, 478 (1922); Scott, *The Declaration of Independence, the Articles of Confederation, the Constitution of the United States xvi-xvii* (1917). See also Exhibit 813, pp. 130-37, and authorities there cited.

In this country, even a treaty is overruled by a subsequent act of Congress, and treaties derive what status they do have in our domestic law from their position as part of "the supreme law of the land" pursuant to Article VI, Clause 2 of the Constitution. See *Restatement (2d), Foreign Relations Law of the United States* §§ 141, 145 (1965). Neither in this country nor in Britain has the judiciary ever been regarded as having the power to overrule acts of the executive or legislative branches on the grounds of inconsistency with customary international law. Thus if maritime sovereignty and dominion were established in English law and state practice in the 17th and 18th centuries—as they clearly were—the question of consistency *vel non* with customary international law is irrelevant.

Nevertheless, we shall proceed to examine the rather academic question whether an international court—if one had existed, which it did not—would have held Britain's claims to maritime sovereignty and dominion invalid if a case presenting such an issue had come before it.

B. PLAINTIFF'S CONTENTIONS REGARDING INTERNATIONAL LAW CANNOT BE SUSTAINED.

In contending that international law was inconsistent with English law, plaintiff bears a heavy burden of proof. As Judge Jessup has explained (App. 108-11), sovereign states are placed under restraints by international law only (apart from treaty) if there is a generally recognized and accepted international legal doctrine, forbidding the national conduct in question, which has achieved a consensus among civilized nations. *Accord, The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825) (Marshall, C.J.); *The Scotia*, 81 U.S. (14 Wall.) 170, 187 (1871). Thus the question is not whether in the 17th and 18th centuries international law affirmatively recognized or permitted claims by nations to maritime sovereignty and dominion, but rather whether international law definitely and positively, and by consensus, precluded them. When it is further recognized that Great Britain has since the very beginning of international law been one of the most active and influential nations in contributing to the establishment of that law in general, and to the establishment of international law dealing with maritime affairs in particular, plaintiff's task in proving that in the 17th and 18th centuries there existed an international consensus among civilized nations which outlawed Britain's claims and conduct is an arduous one indeed.

In fact, history and the record show that prior to and during the 17th and 18th centuries maritime sovereignty and dominion were claimed and exercised by the overwhelming majority of civilized nations bordering on the sea—probably, indeed, by *every* such nation—and that international law, so far from forbidding such sovereignty and dominion, affirmatively countenanced it. Never at any relevant time has international law failed to recognize the validity of national sovereignty and dominion in coastal

waters. In the 17th century there was no recognized limit to such waters, and whole seas were claimed and appropriated. By the 18th century it was generally (though far from universally) recognized that there was some limit on the maritime sovereignty and dominion which a nation could lawfully claim, but there was no consensus as yet on what that limit was; 100 miles was the limit most in favor, except with respect to neutrality, where a cannon-shot rule was beginning to develop. Other intermediate limits—particularly a 60-mile rule—had substantial currency as well, both in doctrine and in the practice of nations.

The situation in the second half of the 18th century—the period of the establishment of American independence—was that international law had long recognized the legitimacy of maritime sovereignty and dominion in coastal waters; that most certainly there was no established rule of international law forbidding such sovereignty and dominion; that there was universal recognition that a coastal state possessed sovereignty and dominion in its coastal waters; that there was no generally recognized principle of international law setting a limit on the geographical extent to which sovereignty and dominion could be established; that various distances were advocated, and that 100 miles was a limit very much in favor and in fact the limit most frequently encountered and advocated in this period. No consensus had developed by 1776 or 1783 which rejected 100 miles as too wide.

At the very end of the 18th century and thereafter, as we shall see later (pp. 409-14), international law developed some distance towards a consensus that for purposes of full territorial sovereignty of surface waters the older rules such as 100 miles were too expansive, and that the territorial sea should be considerably more limited. The motivating force in this development was the desire of the great maritime powers, and especially Great Britain and the United States,

to make as much of the seas as possible free for navigation, for naval operations and to some extent for surface fishing. The reasons for the more restrictive modern rules therefore had nothing to do with claims to the seabed or subsoil.

Plaintiff earnestly contends that prior to American independence the modern restrictive rules—the cannon-shot limit or the three-mile belt—had achieved the status in international law of obligatory limitations on the width of the territorial sea. That contention is demonstrably unsound; but the issue of exactly when (if ever) the cannon-shot or three-mile rule achieved the status of an obligatory maximum is academic, since those rules apply to the surface of waters only and not to the seabed or subsoil. Thus, even if the more expansive 100-mile territorial sea conferred by the colonial charters had been lost through operation of international law prior to American independence, that would avail plaintiff nothing unless it could show that the restrictive rules appropriate to navigational uses of surface waters applied with equal force to the seabed and subsoil. This it cannot do.

1. Broad Claims to Territorial Seas Were Fully Sanctioned by State Practice.

The situation prior to and during the 17th century has been accurately described as follows:

> "At the beginning of the seventeenth century it is probable that no part of the seas which surround Europe was looked upon as free from a claim of proprietary rights on the part of some power, and over most of them such rights were exercised to a greater or less degree. In the basin of the Mediterranean the Adriatic was treated as part of the dominion of Venice; the Ligurian sea belonged to Genoa, and France still claimed to some not very well-defined extent the waters stretch-

ing outwardly from her coast. England not only asserted her dominion over the Channel, the North Sea, and the seas outside Ireland, but more vaguely claimed the Bay of Biscay and the ocean to the north of Scotland. The latter was disputed by Denmark, which considered the whole space between Iceland and Norway to belong to her. Finally, the Baltic was shared between Denmark and Sweden. In their origin these claims were no doubt founded upon services rendered to commerce. It was to the advantage of a state to secure the approaches to its shores from the attacks of pirates, who everywhere swarmed during the Middle Ages; but it was not less to the advantage of foreign traders to be protected. A right of control became established and recognized; and in attendance upon it naturally came that of levying tolls and dues to recompense the protecting State for the cost and trouble to which it was put. From this, as a dissociation of the ideas of control and property was not then intelligible, the step to the assertion of complete rights of property was almost inevitable. The acts of control, it must be remembered, apart from those required for the protection of commerce, were often not only very real, but quite as solid as those upon which a right of feudal superiority was frequently supported." Hall, *A Treatise on International Law* (7th ed. 1917), republished in Crocker, *op. cit.* at 65-66.

In addition to the examples given, Turkey claimed and exercised sovereignty in the Aegean. Many of these claims were uncontested down to the mid-18th century. Crocker, *op. cit.* at 71-72.

The above statement by Hall, and particularly the first sentence, has been quoted with approval or paraphrased by many eminent modern international-law authorities. *E.g.*,

Scott, *The Classics of International Law*, introduction to Bynkershoek's *De Dominio Maris* 15; Colombos, *The International Law of the Sea* 48 (6th rev'd ed.). Colombos adds that this situation obtained "up to the end of the eighteenth century." *Ibid.* Fletcher noted that, as an international lawyer as well as an English common lawyer, "Selden based his treatise on the positive practice of the day. He stated the law as he found it . . . ." Fletcher, "John Selden (Author of *Mare Clausum*) and His Contribution to International Law," 19 Transactions of the Grotius Society 1, 11 (1962).

The only nation which appears at any time ever to have denied the existence of any territorial sea was the Netherlands. Tr. 2590-91. The Dutch were driven to this extreme position by the fact that the richest of the North Sea herring fisheries were within a very short distance of the British coast, so that admission by them of any territorial sea at all would have seriously impaired their fishing industry. However, even the Dutch were by no means consistent; at the outset of the Anglo-Dutch fisheries dispute the Netherlands contended for the cannon-shot rule, Swarztrauber, *op. cit.* at 25, and shortly thereafter they acquiesced in the line-of-sight rule, at least in practice (p. 81, *supra*). They also claimed the entire Zuyder Zee as internal or territorial waters of their own. Crocker, *op. cit.* at 71.

By the Treaty of Tordesillas of 1494, Spain and Portugal purported to divide all the seas of the world between them, subject only to the right of innocent passage. Swarztrauber, *op. cit.* at 13. These ultimate claims to maritime sovereignty and dominion were of course resisted by other nations, and the reaction to them may be said to have been the beginning of the development of international law towards the establishment of some limits on exorbitant maritime claims.

There was a consensus in the 16th and 17th centuries among civilized nations on one relevant point of international law: that sovereignty and dominion over new areas could be established by discovery and the performance of symbolic acts of sovereignty, not requiring effective occupation or possession of the entire area claimed. App. 821-23.

"The three-mile limit of territorial seas, as a rule of international law, did not surface until the 18th century, but the concept of territorial seas had developed much earlier." Swarztrauber, *op. cit.* at 10. There is universal agreement among historians of international law that the concept of territorial sovereignty and dominion in marginal waters had developed long prior to 1700. One of the few authorities ever to doubt this proposition was the Supreme Court in the *California* and subsequent cases, which declared that "the concept of the territorial sea did not arise in international law until after this country achieved its independence." *United States v. Louisiana,* 363 U.S. 1, 74 (1960). Judge Jessup has testified, and indeed wrote long before the commencement of the present litigation, that this was a wholly erroneous view. App. 117-18. The Court seemed not fully to appreciate the demonstrable fact that the three-mile limit and the cannon-shot rule represented a curtailment, not an expansion, of the right to maritime sovereignty and dominion as previously recognized. App. 132-34.

In 1909 the Permanent Court of Arbitration, an international tribunal applying international law, recognized that the doctrine of full territorial maritime sovereignty and dominion was no recent invention. The court referred to

> "the fundamental principles of the law of nations, *both ancient and modern,* in accordance with which, the maritime territory is an *essential appurtenance of land territory,* whence it follows

> that at the time when, in 1658, the land territory called the Bohuslan was ceded to Sweden, the radius of maritime territory constituting an inseparable appurtenance of this land territory must have automatically formed a part of this cession." The Grisbadarna Case (Norway v. Sweden), Scott, *Hague Court Reports* 121, 127 (1916). (Emphasis added.)

In the 18th century it became more customary than previously for nations to agree by treaty, on a bilateral basis, on limits of national maritime jurisdiction for various purposes. The cannon-shot rule was used in many of these treaties dealing with the subject of neutrality. Swarztrauber, *op. cit.* at 30-32; Crocker, *op. cit.* at 253, 300. We have found no 18th-century instance of the application of the cannon-shot rule, either by treaty or by national regulation or other action, to any subject other than neutral rights and duties. In particular, the cannon-shot rule was never applied during this period as a measure of exclusive fishing rights. Professor Henkin admitted this, and conceded that the concept of the cannon-shot rule and the reason therefor had nothing to do with the question of exclusive fishing rights. Tr. 2579-80. *A fortiori*, the cannon-shot rule has never had anything to do with the question of the exclusive right to explore and to exploit seabed and subsoil resources.

Even for purposes of neutrality, the cannon-shot rule was far from the only criterion applied in 18th-century treaties. As we have seen (pp. 136-37, *supra*), the British treaties with North African states generally used the line of sight for that purpose; so did other treaties, such as that between the Turks and the Kingdom of the Two Sicilies, and national ordinances adopted by such nations as Spain and Denmark, which regarded the line of sight as equivalent to 16-20 miles. Swarztrauber, *op. cit.* at 36-37. Other limits sometimes used for neutrality in treaties were ten leagues

(Crocker, *op. cit.* at 183) and three leagues. *Id.* at 182. Franco-Moroccan treaties of 1685 and 1767 excluded all Moorish ships for 30 miles from the French coast. Crocker, *op. cit.* at 253, 300.

As stated above, no 18th-century treaty has been found which used the cannon-shot rule as a measure of exclusive coastal fisheries. In the relatively rare instances where fishing rights were regulated by treaty, much broader limits than cannon-shot were used. We have already discussed the Treaty of Utrecht and the Peace of Paris of 1763, both of which used 30 leagues for that purpose with respect to the North American coast, and the 1790 treaty between Britain and Spain, which recognized ten-league exclusive fisheries in the coastal waters of all Spanish possessions in the Pacific (p. 130, *supra*).

Denmark collected tolls for passage between the North Sea and the Baltic from early times until 1857. In the 17th century Denmark claimed full sovereignty and exclusive fishing in all the waters between Norway, Iceland and Greenland, and Denmark sold licenses to foreigners for fishing there well into the 18th century. Danish ordinances established a six-league exclusive fishing belt around Iceland in 1631, and a four-league belt was in force from 1682 to 1836. As to Greenland, a thirteen-league belt was established in 1738, which was expanded to fifteen leagues in 1740 and 1751 and reduced to four leagues in 1758. On the Norwegian coast, a ten-league exclusive fishing belt was established in 1692. Swarztrauber, *op. cit.* at 44-47; Crocker, *op. cit.* at 513-15. Neither Iceland nor Norway has ever been willing to accept a rule as restricted as three miles or cannon shot for its exclusive fisheries, and their insistence on wider maritime belts has given rise to considerable controversy down to our own century, which persists to this day.

In the 17th century, a decision of the Supreme Court of Piedmont, which then included Genoa, cited Bartolus and Baldus in upholding national sovereignty of the Ligurian Sea; the issue involved the capture of a Spanish ship at a distance of 50 miles from the coast. Swarztrauber, *op. cit.* at 11.

The sole instance of any three-mile limit for any purpose anywhere prior to the American Revolution which Professor Henkin was able to cite (Tr. 2575)—and we have encountered no other—was an instruction from King Adolph Frederick of Sweden in 1758 adopting three miles for neutrality purposes. In fact there is a learned debate as to the relationship between the Swedish mile and the modern nautical mile, and the better view appears to be that King Adolph Frederick's three miles actually amounted to 12 or 18 nautical miles. Swarztrauber, *op. cit.* at 52-53. The United States' three-mile limit of 1793 was the first clear use of such a limit in history, and as we shall see it was regarded as tentative, a minimum, and for the purpose of neutrality only (pp. 393-97, *infra*).

2. The Views of Publicists Recognized the Right to Territorial Seas with Virtual Unanimity, and No Consensus Had Developed Restricting Such Seas to Any Limit Less than 100 Miles.

Since until recently there were no international tribunals declaring and dispensing international law (and even today their jurisdiction and effectiveness are quite limited), the views of eminent scholarly authorities, or "publicists," have always been regarded as somewhat more important in international law than in most systems of municipal or national law. Such views, however, as Judge Jessup has pointed out, have always been considered *subsidiary* means of establishing international law, much less conclusive than

treaties[46] or general principles or customs recognized as obligatory by the consensus of civilized nations and applied by them in their state practice.

Fenn, Exhibit 690 (excerpts at App. 791-818), has ably described the doctrinal development of the concept of maritime sovereignty and dominion in the mediaeval and post-mediaeval period. He has shown how what was originally regarded as "jurisdiction," not all the attributes of which were wholly clear, took on more and more aspects of sovereignty and dominion until eventually it was recognized that marginal waters are part of the territory of a coastal state in the same sense as the land, subject only to the right of innocent passage for foreign navigation. This development was substantially complete prior to 1600; and ever since there has been an overwhelming consensus among scholars recognizing the legitimacy of the territorial sea. The proper extent of that sea, on the other hand, was the subject of violent disagreement, and many conflicting views were advanced. It cannot be said that by the second half of the 18th century any obligatory rule of international law had developed which limited the extent of the territorial sea, except that the 15th-century claims of Spain and Portugal to all the oceans of the world had been rejected.

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[46] A treaty, of course, makes law as between the parties to it. It may or may not be evidence of a general principle, since nations are at liberty to contract by treaty either in accordance with or in derogation from principles of customary international law. Treaties may be used as evidencing a general customary principle only where there is a large number of treaties whose provisions conform to the principle and where there is other evidence that the parties entering into the treaties recognized that they were acting in accordance with a general principle considered as binding, or at least as a customary norm, even apart from treaty. *E.g.*, 1 Hackworth, Digest of International Law 17-21 (1940); Schwarzenberger, A Manual of International Law 28-33 (5th ed. 1967).

Fenn thus summarizes the 17th-century situation, with particular reference to the Anglo-Dutch dispute:

> "The *right* of ownership, then, in *territorial* waters, was not the fundamental dispute in the controversy referred to, except in so far as unsound definitions of territorial waters made it so. The *extent* of ownership over the sea was the kernel of the dispute. What the owner could do with his sea became of crucial importance because of the amount of sea claimed by him and not because he claimed some part of the sea. That he should claim any part of the sea at all (excepting gulfs, bays, and inlets) scandalized the Dutch and became an issue only because the waters immediately off shore [from Britain] were abundantly supplied with herring, and *not* because the claim marked a departure from accepted or familiar legal theory." App. 810-11.

> "The evidence produced in the foregoing pages points to the conclusion that the somewhat uncritical praise which has been given occasionally to Grotius's essay on the freedom of the sea is not altogether warranted. The freedom of the high seas was not disputed by the advocates of a state's ownership of its territorial waters, with the possible exception of Selden. And even he conceded that, in practice, freedom of trade and of navigation should not be violated. His point that there is nothing in the *nature* of the sea to prevent its appropriation is sound. That the sea has not in fact been appropriated by the Powers is due to reasons of an entirely practical character. The only two countries which attempted to put into practice their claims to a monopoly of the western highways of traffic found that their case fell of its

own weight. The fiats of the *ius gentium*, of the *ius naturale*, and of the *ius civile* simply had nothing to do with it. The reason why Spain and Portugal failed to make good their claim was this, that it was unworkable. At the other extreme lay the claims to absolute rights in territorial waters. Here, the weight of opinion is overwhelmingly in favor of the thesis that a state has the rights of ownership in the sea adjacent to its coasts. Grotius's position on the matter is ambiguous. He separated gulfs, bays and inlets from the main sea; but he failed to clothe the state with tangible rights in these waters. He failed also to distinguish between that strip of coastal waters which had become known as the adjacent sea, and the main body of the sea. In his later work on the law of war and peace he modified his position somewhat on this latter question, but he failed there also to make any concession which would seem to countenance the existence of property rights in the sea. So far as can be gathered from his cautious statements on the whole subject, he seemed to think that the rights of the state in the waters in question extended only to the maintenance and enforcement of a certain jurisdiction over these waters, and to the protection of navigation and fishing therein. It may be said with some certainty that this is the view of 'Mare liberum.' When it is said that Selden and his colleagues were quick to see that Grotius had attacked the British claims in 'Mare liberum,' it should be remembered that it is his position on the adjacent sea which constituted the attack, and not his position on the high seas. For the Continental lawyers, also, who were not parties to the British controversy, the question concerned the adjacent sea only. Outside of

> Holland, the Grotian position found no support. Legal theory pronounced against the community of ownership, against a common proprietorship, of the littoral sea. The British claims, and, to a less degree, the Scandinavian claims, were extravagant to the point where they encroached upon the high sea. When Grotius denounced such pretensions, he spoke to the mark. But he denounced them for the wrong reason. This question is essentially different from the former one. That is to say, that the question, how far out to sea territorial waters extend, is essentially different from the question, whether there can be territorial waters. Grotius, in denouncing the pretensions referred to, denounced them on the ground that there could be no territorial waters .... The real problem was, to restrict territorial waters within reasonable bounds." App. 813-15.

Accord, O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 313 (1971): "the real question, as everyone in the seventeenth century recognized, was whether the extensive claims of England, Sweden, Venice and other nations to *Mare Clausum* in neighboring seas were intellectually defensible in respect of their distance, not their nature, which was undisputed."

Grotius' position was somewhat equivocal, and by no means remained consistent throughout his life. While in *Mare Liberum* he appeared to deny any territorial sea, that position was substantially qualified in his later work, *De Jure Belli ac Pacis*. There he admitted that some territorial sea was appropriate, and appeared to regard the line of sight as its proper limit. Exhibit 693, p. 347; Crocker, *op. cit.* at 189; Swarztrauber, *op. cit.* at 20. He agreed that a coastal sovereign could tax fishing by its own subjects; at

one point he recognized that fishing resources could be exhaustible, and therefore that it might be lawful to exclude foreigners as well. Exhibit 690, pp. 155-57; Tr. 2592. He never dealt at all with the seabed, the resources of which are obviously exhaustible. Exhibit 739, p. 67. Finally, after he left the Dutch service for the Swedish, he never opposed Sweden's maritime claims in the Baltic, and indeed is stated to have written on the publication of Selden's *Mare Clausum* that he had written his own *Mare Liberum* "as a Hollander, and is exceeding glad to see the contrary proved." Fulton, *op. cit.* at 375. In any event, Grotius appears to be the only publicist at any time since 1500—at least the only one of any importance—who even seriously entertained the notion of denying the territorial sea altogether.

Every jurist and publicist recognized as an international-law authority who wrote between 1670 and 1800 recognized the existence of the territorial sea and the entitlement of the coastal nation to full sovereignty and dominion therein. U.S. Exhibit 17 (Vol. 15), second pagination, pp. 18-21.

We shall now mention briefly the principal scholarly views as to the width of the territorial sea which were dominant in the 18th century, with mention of some of the principal authorities prior to and during that century who advocated them. English authorities have already been discussed. For the views held by scholarly American statesmen during the American Revolution, see pp. 368-72, *infra*.

The 100-mile limit for territorial waters, first proposed, at least as to jurisdiction, by Bartolus in the 14th century, was adopted by the great majority of jurists throughout the 15th, 16th and 17th centuries and was still distinctly the majority view as late as 1795. Among the great number of publicists who adopted the 100-mile limit, aside from the English writers whom we have already discussed, were

Caepolla (15th century), Stypmann (died 1650), Gentili, Loccenius (1651), Casaregis (1740), Abreu (1746), and many others. App. 798-803; U.S. Exhibit 7, p. 121; Crocker, *op. cit.* at 72, 183, 188-89; Swarztrauber, *op. cit.* at 11, 27, 33, 250, 424; Bustamante, *The Territorial Sea* 22-23 (1930). The 100-mile limit is sometimes described as a two-day voyage, which is the basis on which Bartolus arrived at it. Many other writers referred to the 100-mile limit as well known and customary without explicitly endorsing it. In view of the status of the 100-mile limit down through the 18th century, it is impossible to maintain that prior to the American Revolution a general consensus among civilized nations had developed which established an obligatory rule of customary international law requiring that territorial waters be narrower than 100 miles in extent.

Other writers, beginning with Bodin in 1577, described the limit of territorial waters as 30 leagues. U.S. Exhibit 7, p. 120; Crocker, *op. cit.* at 188. As we have seen (pp. 223-25, *supra*), the 30-league limit, which is virtually identical to 100 miles, was adopted for exclusive fishing purposes in the American seas by Britain and France in the treaties of 1713 and 1763.

After the 100-mile or 30-league limit, the next most frequently encountered proposal for the limit of territorial waters was 60 miles, which originated with Baldus in the 14th century. The 60-mile limit was referred to without disagreement in 1672 by Puffendorf, one of the best-known and most influential international publicists. U.S. Exhibit 7, p. 120; Crocker, *op. cit.* at 250, 425; Swarztrauber, *op. cit.* at 11, 15, 28. Sixty miles is the equivalent of 20 leagues, which as we shall see (pp. 333-36, *infra*) was adopted in the Peace of Paris between Britain and the United States in 1783. The 60-mile rule was frequently referred to well into the 19th century. *E.g.*, 1 Chitty, *The Laws of Commerce* 93 (11th ed. 1857).

The three rules described above—100 miles, 30 leagues (which is virtually identical) and 60 miles—enjoyed the approval of the overwhelming majority of publicists down through the 18th century. These can be grouped together as the broad-limit rules. There were also several versions of what may be called the narrow-limit rules, namely line of sight, three leagues, two leagues, cannon shot and finally three miles. All these narrow-limit rules had their primary, and generally their only, application to neutrality—the distance into the sea where the coastal nation had the right and the duty to protect belligerent ships from one another.

As we have seen in the case of England (pp. 121-24, *supra*), nations could and did establish much more modest limits for neutrality than for other aspects of sovereignty and dominion, and indeed were quite inclined to do so, since neutrality limits imposed onerous obligations upon them, without any corresponding benefits except as to hostilities committed so close to shore as to endanger the land territory. See also Tr. 1153. Moreover, powerful maritime nations had a strong interest in limiting the extent of neutral waters, in order to minimize those areas of the sea where their weaker enemies could find sanctuary in time of war. Down through the 18th century, the narrow-limit rules were rarely if ever regarded by publicists as reasonable obligatory limits for exclusive fisheries or for other aspects of sovereignty and dominion aside from neutrality.

The line-of-sight rule appears to have originated in a neutrality proclamation of King Philip II of Spain in 1565. Swarztrauber, *op. cit.* at 36. It was rejected by Bynkershoek as too indefinite, *id.* at 38, but was championed by Rayneval in 1803 for neutrality purposes. *Id.* at 39; Crocker, *op. cit.* at 72, 250. Unlike the other narrow-limit rules, the line-of-sight principle did have some limited application in fisheries matters, by virtue of treaties and pragmatic compromises; but we have encountered no

publicist who advocated line-of-sight as an obligatory maximum for exclusive fishing rights, let alone for seabed and subsoil rights.

Galiani, writing in 1782, appears to have been the first to suggest three miles as equivalent to the range of cannon. He considered that the limit for neutrality purposes should be two leagues, twice the range of cannon. Fulton, *op. cit.* at 563. Valin suggested that for exclusive fishing purposes the rights of the coastal state should be limited to two leagues or to as far out to sea as bottom soundings can be obtained, whichever is farther. Swarztrauber, *op. cit.* at 33.

The cannon-shot rule for purposes of neutrality was advanced by Bynkershoek in 1702, and won the adherence of many other 18th-century publicists, including the influential Vattel. Vattel, however, believed that the neutrality belt could be broader than cannon shot if the power of the coastal state permitted and some lawful purpose was involved; and he was clear that seabed resources such as the Ceylon pearl fisheries were proper subjects of ownership, even though they extended much farther out than cannon shot. Crocker, *op. cit.* at 84, 251, 458; Swarztrauber, *op. cit.* at 28-30. The geographical extent of cannon shot was frequently regarded as three leagues (not three miles) down to the end of the 18th century. Crocker, *op. cit.* at 254.

Martens, writing in 1785, was one of the many publicists who identified cannon shot with three leagues; he was also, as best we can establish, the *only* publicist prior to 1800 who regarded the cannon-shot or three-league limit as a boundary applicable not only to neutrality but also to full territorial sovereignty, including exclusive fishing rights.[47]

[47] O'Connell seems to assume that the cannon-shot rule was regarded in the 18th century as applicable to aspects of sovereignty and dominion other than neutrality. "The Juridical Nature of the

Apparently, however, Martens regarded the three-league rule not as an obligatory maximum but as a sort of obligatory *minimum:* he declared that the three-league belt "is the least that a nation ought now to claim as the extent of its dominions of the seas." U.S. Exhibit 17 (Vol. 14), pp. 65-66. It was well into the 19th century before cannon shot and three miles came generally to be identified, and that identification was never at any time universally agreed upon. William Paley's *Moral and Political Philosophy,* published in New York in 1824 and well known in this country, still identified cannon shot with three leagues (p. 77).

We have encountered no publicist prior to 1800 who advocated a three-mile rule for any purpose, even neutrality. As we shall see, Chancellor Kent, the first American international publicist of stature, recognized its adoption by Jefferson in 1793 but criticized it as much too narrow (p. 441, *infra*). Even when, after 1800, the three-mile rule became more popular, for some years it was regarded as applicable to neutrality only. One of the first treaties which used three miles for any purpose other than neutrality was the Anglo-French Treaty of 1839, which established three miles as the limit of exclusive surface (not sedentary) fishing rights. U.S. Exhibit 7, p. 139.

Territorial Sea." 45 British Yearbook of International Law 303, 320-23, 382 (1971). On the evidence, that assumption has no basis whatever in state practice and none, or very little, in the views of publicists aside from Martens. The assumption is a natural anachronism: in the *19th* century the cannon-shot and three-mile rules were frequently applied to surface maritime claims for purposes other than neutrality.

3. No Narrow-Limit Rule Was Applied to Seabed Claims.

No instance has been found during the period under discussion of any authority who denied the right of a coastal state to the exclusive ownership and use of the resources of the seabed and subsoil under its marginal sea. To the contrary, those writers who addressed the question, including Puffendorf and Vattel, fully recognized that the considerations militating towards freedom of the seas—the desirability of free navigation, the natural capacity of the sea to be used by nations in common, and the inexhaustibility of at least some of the fisheries—had no application whatever to the resources of the seabed and subsoil, and thus that there was no reason or necessity for any doctrine of *res communis* to be applied there. Crocker, *op. cit.* at 68, 312, 457; Colombos, *op. cit.* at 69; Tr. 477-79.

Judge Jessup, witness for the Common Counsel States, testified that the resources of the seabed and subsoil have always been regarded as subject to the exclusive ownership of the coastal nation as far out as such resources are exploitable. He summarized his views in a passage important enough to deserve quotation in full from the transcript:

> "To give a hypothetical example: suppose that in 1720, or 1770, or 1785, a pearl oyster bed or a tin deposit, technologically and economically exploitable, had been discovered on the seabed ten miles off the coast of Massachusetts (or any other of the Atlantic colonies). If the Massachusetts authorities had consciously permitted free exploitation of that resource by persons of all nations, and that license had ripened by passage of time into established custom, Massachusetts might well have been limited, as a matter of international law, in later asserting exclusive rights—just as the United States argued respect-

ing Argentina. But I regard it as virtually inconceivable that as a matter of fact, in 1720, 1770 or 1785, Massachusetts *would* have consciously permitted internationally free exploitation on these hypothetical facts. From what I know of the international law climate of that era, both generally and with particular respect to British and American attitudes, I believe it virtually certain that on the discovery of the resource Massachusetts would have asserted the exclusive right to regulate the resource, on behalf of itself, and the exclusive right to exploit it, either on behalf of its own citizens alone or on behalf of all British subjects. (Of course it might have bargained away part or all of its exclusive right by treaty, in return for other benefits.) I do not believe there would have been any significant international protest against that assertion. And I believe that assertion would have been fully in accordance with the international law and practice of the time. I think other sovereigns would have been bound to respect it, and I think they would have respected it. And I do not think the legal situation was significantly different at any more recent time, including the 19th and early 20th centuries." App. 229-30.

Plaintiff's witness Professor Henkin conceded that the practice of nations has been in accordance with Judge Jessup's views:

"Q. . . . Can you give me a single example from anywhere in the world within, say, the last 300 years where a valuable resource has been discovered on the seabed within, say, 60 miles of the coast of one state and no closer to the coast of any state, when the coastal state has not claimed and exercised the exclusive right to exploit it?

"A. I don't know of any such examples." App. 541.

Judge Jessup gave a wealth of examples of seabed and subsoil exploitation in many parts of the world, dating back long before 1800, demonstrating that wherever and whenever exploitable resources have been discovered in the seabed and subsoil of the marginal sea they have been regarded, more or less without question, as the exclusive property of the coastal state. App. 173-214.

In view of all the above, the United States cannot possibly sustain its position that exploitable resources in the seabed and subsoil of the North American marginal seas would have been regarded as incapable of ownership in the 17th and 18th centuries, let alone that there was any established rule of international law which prohibited the coastal state from asserting and exercising exclusive rights over them.

VII.

AT THE AMERICAN REVOLUTION THE STATES INDIVIDUALLY SUCCEEDED TO THE MARITIME TERRITORIAL SOVEREIGNTY AND DOMINION BOTH OF THEIR PREDECESSOR COLONIAL GOVERNMENTS AND OF THE BRITISH CROWN.

Plaintiff's position is that at American independence the United States, as an entity distinct from the States, succeeded in some fashion to the maritime sovereignty and dominion of the British crown and, apparently, even to those rights in the marginal sea and seabed which prior to 1776 belonged to the colonial and proprietary governments. The Common Counsel States maintain, to the contrary, that maritime crown and colonial rights, both territorial

and proprietary in nature, passed at independence to the States individually, just as did the equivalent rights on land.

Plaintiff's position is based entirely on the argument that the States never possessed "external sovereignty," which plaintiff appears to equate with sovereignty in the international-law sense. Plaintiff asserts that the United States, as an entity distinct from the States, acquired "external sovereignty" from the crown even prior to the Declaration of Independence, and that such sovereignty was therefore antecedent to and a limitation on whatever sovereignty the States acquired individually in 1776.

In our submission the concept of external sovereignty, or international personhood, is really irrelevant to any issue in this proceeding. States which consider themselves sovereign, and are sovereign by their own laws, may or may not be recognized as sovereigns by the international community; but to the best of our knowledge no nation claiming sovereignty has ever permitted its sovereign status under its own law to be determined by whether the international community recognizes it or not.

More importantly, sovereignty in the abstract is not the issue here: the question is whether it is the States or the Federal Government which succeeded to certain quite specific territorial and proprietary rights in the seabed and subsoil of the marginal sea, which rights prior to independence had belonged in part to the crown and in part to the colonial governments. Neither in international law nor in our own constitutional law apart from the *California* line of cases—not even in the eccentric *Curtiss-Wright* dicta, see pp. 371-75, *infra* — is there the slightest intimation that external sovereignty, in a nation where sovereign powers are divided, automatically means that the Federal Government necessarily divests the State governments of territorial jurisdiction and proprietary rights in any part of

the national domain, whether on land or at sea or under the sea.

In the case of the United States, it really makes very little difference whether the Federal Government acquired powers of external sovereignty prior to 1789 or not. The pertinent question is whether in our constitutional history the Federal Government was at any time regarded as the direct successor either of the crown or of the colonial governments to immediate territorial jurisdiction over, and proprietary rights in, any geographical area, and particularly over the marginal seas and their seabed and subsoil. We think it readily demonstrable that the Federal Government was never so regarded.

When plaintiff's contentions are translated from abstract terms like "external sovereignty" into concrete propositions, it is seen that plaintiff contends little more than that during the revolutionary and Confederation periods the United States possessed and exercised power over foreign relations and power to make war and peace; that is, to conduct hostilities and to terminate them. Tr. 2377. Plaintiff interprets the historical evidence in much too simplistic and categorical a fashion; the key to an understanding of what superficially is conflicting evidence is that in these periods the "United States" were not considered as having any identity separate from, let alone superior to, the 13 independent sovereign States; the "United States" *were* those States, acting in concert by virtue of an alliance, league or federation to win the war. In any event, it is entirely clear that the States individually succeeded to all the territorial boundaries and rights of property which had existed prior to the Revolution. Plaintiff has suggested no way whatever in which it can bridge the historical and logical gulf between "external sovereignty" on the one hand and, on the other, the alleged succession of the United States, considered as a separate en-

tity, to territorial and property rights in the marginal sea and seabed.

A. THE STATES WERE INDIVIDUALLY SOVEREIGN IN THE REVOLUTIONARY AND CONFEDERATION PERIODS.

In an attempt to make the national sovereignty antedate the independence of the States, plaintiff traces its concept of external sovereignty back to the first Continental Congress of 1774. Pl. Br. 176-77. The short answer is that the first Continental Congress did not regard itself or any authority in this country as possessing independence or powers of external sovereignty. Reconciliation with the crown was hoped for and earnestly sought, and the intent to seek independence was expressly disclaimed. Exhibit 757, pp. 529-35; Levitan, "The Foreign Relations Power," 55 Yale L.J. 467, 480-81 (1946). Independence did not come until 1776, and it came then as a wholly conscious revolutionary decision to make a fundamental alteration in the state of affairs that had existed until that date.[48]

It would be a mistake, if we wish to understand the thinking of the revolutionary statesmen, to speak of sovereignty, whether external or otherwise, as residing in any governmental body. In Europe, monarchs were the sovereigns; in England, the crown had anciently been considered the sovereign, but since the Revolution of 1688 sovereignty was generally regarded as residing in Parliament, consisting of King, Lords and Commons. The first article of the political philosophy which prevailed among our revolutionary statesmen was that sovereignty

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[48] For a thorough discussion of the nature and acts of the first Continental Congress, and a demonstration that it was not even a governmental body, let alone a union in any sense, see Small, "The Beginnings of American Nationality," 8 Johns Hopkins University Studies 14-42 (1890).

resided in the people, and in the people of each State. See, *e.g.*, Levitan, *op. cit.* at 480. Sovereignty was ultimate and indivisible. Sovereign *powers*, on the other hand, were divisible, and could be exercised by agents—governmental bodies. But those bodies—whether State legislatures, Congress or any others—were never regarded as themselves sovereign; they were only agents of one or more sovereigns.

Sovereignty remained with the people of the States, and the agents—the governmental bodies—served only at the sovereign's pleasure. Those powers which a sovereign had delegated to agents could be taken back and exercised by the sovereign acting directly. That was done through a convention of the people of a State, such as those which initiated the revolutionary State governments and those which later ratified the Constitution of 1787. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819). The theory further held that each original colonial charter was a compact, which British violations entitled the State to dissolve in favor of its full powers of self-determination.

Finally, it was considered that prior to the Revolution legislative power had been in each colonial legislature, not in Parliament, and that independence meant simply that the crown's executive and judicial powers were removed. McIlwain, *The American Revolution: a Constitutional Interpretation* 18-185 (1923); Patterson, *"In re* United States v. Curtiss-Wright Corp.," 22 Tex. L. Rev. 286, 302-04 (1944). Since prior to independence the colonies had had no legislative or governmental connection with one another, it followed, and was recognized to follow, that removal of the crown's paramountcy left the States separately independent.

The theory held that prior to the Revolution

> "the colonies in America were in fact states in the political sense, that they were what are commonly

> known as 'nations,' that their local legislatures were the supreme power over them, under the crown; that their sole connection with Great Britain lay in the crown; that the parliament at Westminister was but one of many co-equal legislatures, analogous, for example, to the General Court of Massachusetts Bay. The logical consequence of such a conception of the empire was complete independence, whereby the colonies would become units in international law, separate so-called sovereign states in the society or family of nations." Adams, *Political Ideas of the American Revolution* 17-18 (1939).

See also *id.* at 40-61, 86-181; Scott, *The United States of America: a Study in International Organization* 15, 33, 133 (1920); Scott, *Sovereign States and Suits* 5-24 (1925).

These propositions could be confirmed, if questioned, by a host of quotations from the writings of the revolutionary statesmen. The Declaration of Independence itself is steeped in these concepts.

The Declaration was the act of thirteen sovereigns acting together. It is entitled "The Unanimous Declaration of the Thirteen United States of America," and it declared those States to be "free and independent States." Several of the States had declared their independence even prior to the adoption of the Declaration. Every State had authorized its delegates to Congress to vote for the Declaration, which indeed had to be postponed until all the instructions had been received. Exhibit 757, p. 537; Burnett, *The Continental Congress* 154-81 (1941). The concept was that each State was declaring itself independent, through its delegates in Congress, and recognizing the independence of the others. During the debates on the Declaration it was declared by James Wilson, Robert R. Livingston, John Dickinson and others "that if the

delegates of any particular colony had no power to declare such colony independent, certain they were the others could not declare it for them; the colonies being as yet perfectly independent of each other." 6 *Journals of the Continental Congress* 1088; Levitan, *op. cit.* at 483. The Declaration, after its promulgation, was ratified by every State. Exhibit 757, pp. 537-38.

President James Monroe, in his annual message of 1823, described the results of the Declaration as follows:

> "The first is that in wresting the power, or what is called sovereignty, from the Crown it passed directly to the people. The second, that it passed directly to the people of each Colony and not to the people of all the Colonies in the aggregate; to thirteen distinct communities and not to one. To these two facts, each contributing its equal proportion, I am inclined to think that we are in an eminent degree indebted for the success of our Revolution." 6 Hamilton (ed.), *The Writings of James Monroe* 224 (1902).

In September, 1776 a committee of Congress appointed to confer with Lord Howe, consisting of Franklin, John Adams and Rutledge, explained to him that every colony had approved of the Declaration "and all now considered themselves as independent States." Exhibit 758, p. 140. Adams was even more explicit:

> "The resolution of the Congress which declared independency was not taken up upon its own authority. Congress had been instructed so to do by all the colonies. It is not in our power, therefore, my lord, to treat otherwise than as independent States. . . ." *Id.* at 143.

The congressional resolution preceding the conference had referred to Congress as "the representatives of the free and independent States of America."

The early State constitutions likewise make it clear that each State regarded itself as separately independent. Exhibit 700, p. 290; Scott, *Sovereign States and Suits* 50-52 (1925).

Both before and after the Declaration of Independence, and both before and after the Articles of Confederation, Congress was a league or alliance of the States, meeting together for the purpose of prosecuting the war. Congress was not regarded as an entity separate from the States, let alone superior to them; Congress *was* the States, acting together for common purposes. Each State had one vote, and action by Congress required the unanimous consent of all except in cases where each State had agreed to be bound by a non-unanimous vote. The reason invariably given for each State's having a single and equal vote was that each State was a sovereign, and under international law sovereigns are equal. Exhibit 687, p. 181; Exhibit 757, p. 542. When Benjamin Rush sought to attack the equal-vote principle, he felt it necessary to attack the State-sovereignty principle on which it was based. While Professor Morris relies heavily on Rush's statement, the fact is that his view did not prevail and his proposal was rejected. Tr. 1747-48, 2377-78.

The congressmen were appointed by the States, were removable at will, and were totally subject to whatever instructions the States gave them. Tr. 2382-83. The Journals do not even name what individuals were present in Congress, but rather what *States* were present. Exhibit 709, pp. 8, 109; Tr. 2384. The term *United States* was *always* used as a plural noun, followed by a plural verb; and the synonym "these States" was often used instead. Tr. 2430-31. The "United States" were not regarded as having any

reality separate from the States acting in alliance: "when a minister plenipotentiary or envoy shall arrive within *any of the United States*. . . . . " Exhibit 745, p. 94. (Emphasis added.) In the Continental Congress, "each State is considered as present, and its will expressed by the vote of its delegates. The Congress of States are left . . . to perform such duties as are enjoined, and execute such powers as are given to them, by their respective and varying instructions. . . . " Baldwin, *A General View of the Original Nature of the Constitution and Government of the United States* 16 (1837).

John Adams, Randolph and others described Congress as a diplomatic body or assembly, Exhibit 757, p. 542; and scholars have habitually done the same, though plaintiff's witness Professor Morris could not remember encountering that view. Tr. 2383.[49]

Since Congress *was* the States, had no existence apart from them, and possessed no powers except by their delegation and acquiescence, it is really irrelevant how extensive or limited Congress' powers were.[50] In fact, however, those powers were extremely limited. Congress was not a law-making body or a legislature. It had no courts, with the single exception of the prize appeal court (pp. 292-93, *infra*). It had no property or territory until the States ceded their western lands. It had no executive or en-

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[49] In assessing the candor, expertness and persuasiveness of Professor Morris' testimony, the Common Counsel States respectfully refer the Court in particular to Tr. 2271-73, 2280-83, 2285-86, 2309-12, 2328-29, 2378 (compare with U.S. Exhibit 388), 2385-87, 2389-91, 2394-2402, 2410-11, 2414-20, 2433-34.

[50] It could hardly be contended, for example, that the sovereignty of the allied nations in World Wars I and II was destroyed because by mutual consent they had integrated their military commands and performed other war-making functions in common.

forcement power within the States; for example it was the States individually, not the Congress, which seized the property of British subjects and Tories. As has universally been recognized, Congress had no power to impose its will upon the States, even with respect to "external" matters such as compliance with a treaty. Congress had no taxing power, and relied entirely on the States and on credit for the financial resources necessary to support the army. "The concurrence of 13 distinct sovereign wills is requisite under the confederation to the complete execution of every important measure that proceeds from the union." *The Federalist*, No. 15, p. 98 (Cooke ed. 1961).

There is nothing to the contrary of any of this in Congress' circular letter to the States of 1779, on which Professor Morris has placed primary reliance, Tr. 2381. The letter deals mostly with finance, and shows the total dependence of Congress in that respect on State taxation and on borrowing. The letter declares the purpose of the war to be "the independence of these States," 15 *Journals of the Continental Congress* 1059, and points out that that goal had been declared by the representatives of the States in the Declaration of Independence and had been ratified by each State. Finally, the letter observed that while the Articles of Confederation had not yet come into formal effect, the confederation already existed *de facto*. *Ibid.* There is nothing in any of this inconsistent with the position of the Common Counsel States in this proceeding.

The establishment by Congress of a prize appeal court, with power to reverse decisions of State admiralty courts, was not inconsistent with the preservation of State sovereignty.[51] Establishment of the court was purely a war

[51] No one has suggested that the existence of the international courts of today extinguishes the sovereignty of nations submitting to their jurisdiction. James Brown Scott (who among his other diplomatic accomplishments was a United States delegate to the Hague Conference

measure, and was acquiesced in by the States as a necessary corollary of the war in which they were engaged in alliance. Proof that the court was not regarded as derogating from State sovereignty is found in the fact that those most suspicious of any hint of encroachment on State sovereignty, such as Thomas Burke and Richard Henry Lee, voted to uphold its jurisdiction. Tr. 1742, 2376. The court had no power to enforce its decisions, and when it reversed a judgment of the New Hampshire Court of Admiralty that reversal remained a nullity until after the Constitution of 1787 went into effect, because New Hampshire simply declined to take any steps to implement it.

When eventually the Supreme Court under the Constitution held that the prize appeal court had had jurisdiction, it did so on the basis that establishment of the court was a war measure and that New Hampshire had expressly acquiesced in it and thus agreed to be bound by its judgments. *Penhallow v. Doane;* see pp. 344-50, *infra.* Julius Goebel's recent first volume of the Oliver Wendell Holmes History of the Supreme Court contains a definitive analysis of the prize appeal court and demonstrates that it was not, and was not regarded as, inconsistent with complete State sovereignty. Exhibit 694. Goebel regards Justice Paterson's statements in the *Penhallow* case (pp. 345-48, *infra*) as dicta and historically unsound, and observes that almost a century and a half later "they were made to buttress a historically indefensible judicial pronouncement on the control of

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of 1907, which revised the constitution of the Permanent Court of Arbitration, and who edited the Hague Court Reports) regarded the prize appeal court as a direct predecessor of and precedent for such international tribunals: the judicial provisions of the Articles of Confederation "are as capable of application to the sovereign, free and independent states forming the society of nations as they were to the sovereign, free and independent States forming the Confederation." Scott, The United States of America: a Study in International Organization 213 (1920).

foreign affairs," that is, Justice Sutherland's dicta in the *Curtiss-Wright* case. Exhibit 694, p. 768.

The Articles of Confederation in the most explicit terms confirmed and retained the sovereignty and independence of the separate States. Article II provided that "each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this confederation expressly delegated to the United States in congress assembled." Article III provided that those sovereign States enter into "a firm league of friendship with each other," thus characterizing the Confederation as a league or alliance. The equality of sovereigns as evidenced by the equal vote of each in the Congress was retained (Article V). Professor Morris' only explanation of these provisions was that the "nationalists," whom he regards as the only eminent statesmen, were off fighting for their country or abroad on foreign missions, and that those remaining in Congress to write the Articles of Confederation were in his opinion second-rate thinkers. Tr. 2387. What legal conclusion Professor Morris thinks can be drawn from this assessment of his is at best opaque.

The original draft of the Articles, introduced by John Dickinson, provided for "an alliance of sovereign States," Exhibit 666, p. 421, but contained no express declaration of State sovereignty and independence. An amendment so providing was promptly presented; it was debated for two full days and was adopted by a vote of 11 states to one, with one divided. Exhibit 704, pp. 122-23, footnote; Tr. 2379-80; McLaughlin, *Constitutional History of the United States, 118-20 (1936); Burnett, The Continental Congress* 237-38 (1941). Thus it is plain that this was no meaningless or rhetorical formula but was given the most serious consideration and was regarded as a matter of critical importance.

Congress' concern for State sovereignty, and its view that Congress under the Articles remained identical with the States themselves, are also shown by the drafting history of the provision of Article IX establishing a Committee of the States, consisting of one delegate from each State, to act on certain matters when Congress was not sitting. The name first proposed for this body was the Council of State, but it was carefully changed to "Committee of the States" by amendment. Exhibit 744, p. 339; Tr. 2385.

Madison's view was unequivocal that the Articles of Confederation created a league or alliance between independent States. In No. 43 of *The Federalist*, pp. 297-98 (Cooke ed. 1961), he addressed himself to the argument that the Articles could not be replaced by the new Constitution without the unanimous consent of the States. Madison's answer was that in many of the States the Articles had been adopted only by the legislature, not by the people, and "a compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties." Madison is here drawing on the doctrine that it is the people of each State who are sovereign, and that all governmental bodies possess powers only by delegation from them. The legislatures had not been delegated power to do anything more than to enter into treaties—not the power to change the organic law, let alone to surrender the sovereignty of the States. Only conventions of the people could do that. Since the State constitutions had been adopted by such conventions, Madison regarded those constitutions as superior to the Articles of Confederation. See also Exhibit 688, pp. 521-22. Both Madison and Randolph made the same point on the floor of the Convention of 1787, Exhibit 687, pp. 26, 122-23, in insisting that the new Constitution be ratified by State conventions rather than by the legislatures.

Paterson agreed at the 1787 Convention that the States under the Articles were sovereign and independent. *Id.* at 182. So did Alexander Hamilton, *id.* at 283; and indeed that view was "asserted from every quarter of this house," *id.* at 500, except for James Wilson and one or two others. Hamilton took the same position in his political writings in New York during the Confederation period. In 1784 he wrote that in 1776 "the late colony of New York became an independent State." Exhibit 696, p. 253. In 1787, a few months before the Federal Convention, Hamilton made a lengthy speech in the New York Assembly advocating a bill to accede to the independence of Vermont. Exhibit 698. Hamilton regarded Vermont as already independent *de facto, id.* at 45, and referred to it as a "country." *Id.* at 47. In arguing that the New York Legislature had power to enact the bill, Hamilton relied on its sovereign powers and on the doctrine of international law that a sovereign has authority to cede part of its territory. *Id.* at 49-50. Finally, in dealing with property owned by New York citizens but confiscated by Vermont, Hamilton regarded the international law of war and of requisition of alien property as applicable. *Id.* at 60-61. Plainly, Hamilton regarded the States as fully independent in every sense.[52]

Professor Morris has quoted a few "nationalist" statements, Tr. 1747-53, though a glance at them will demonstrate that they prove far less, even as to the views of those who made them, than Professor Morris claims. Of course there were such statements. There was always one faction among the revolutionary statesmen who wanted a national government; these were mostly persons who had long opposed independence and who were distrustful of the

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[52] New York and Vermont were close to a state of war in 1784. Massachusetts recognized the independence of Vermont in 1781, and in 1784 issued a proclamation of neutrality in the dispute. These are classic acts of international sovereigns. Scott, Sovereign States and Suits 61-62 (1925).

democratic tendencies in the State governments. The point is that this faction was entirely unsuccessful in achieving its ends down to 1787, when a permanent compromise was arrived at between them and their opponents. The issue was fought out on the text of the Articles of Confederation, on the western lands issue (pp. 316-28, *infra*), and on other matters, and invariably the nationalists suffered defeat. They were always in a minority in Congress, except for a brief period in 1781-83, and even during that period they failed to achieve any of their important goals. The whole subject has been exhaustively analyzed by Merrill Jensen, Exhibit 703.

Plaintiff insists that, though the States may have been and remained sovereign in every other sense, they never possessed "external sovereignty," that is, they were never recognized by international law or the international community as sovereign States. Even as to this irrelevant point, the weight of authority is clearly to the contrary.

We have seen that the States formed, first *de facto* and later *de jure* by the Articles of Confederation, a federated or federal league, a confederation. Such a phenomenon was well known in international law; the Dutch, Swiss and German confederations were the best known examples and were constantly cited as precedents by the revolutionary statesmen for what they were creating. International law fully recognized the nature of such a confederation as consisting of multiple sovereign states. Vattel, who was the international publicist best known and most often quoted in America during the revolutionary period (App. 174-75; McLaughlin, *Constitutional History of the United States* 33, 44, 69, 73, 315 (1935)), had this to say on the subject:

> "Sovereign and independent states may unite themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect state. They will together constitute a federal

> republic: their joint deliberations will not impair the sovereignty of each member, though they may, in certain respects, put some restraint on the exercise of it, in virtue of voluntary engagements. A person does not cease to be free and independent, when he is obliged to fulfill engagements which he has voluntarily contracted." Vattel, *The Law of Nations* 3 (6th American ed., 1844).

Vattel mentions the Greek, Dutch and Swiss confederacies as examples of this class. He also points out that two or many sovereign states may, without any impairment of their sovereignty, "be subject to the same prince." *Ibid.* That was, of course, the situation of England and Scotland in the 17th century, and of Britain and Hanover in the 18th. In fact *most* states in the 17th and 18th centuries were linked in one fashion or another to others, either in a federation, through a joint personal sovereign, by a protectorate, or by the duty of homage to an overlord. Vattel recognizes each of these types of affiliation and is clear that none of them entails the loss of international personhood. *Id.* at 2-3. All this was wholly familiar to any 18th century scholar or statesman.[53] Plaintiff's assumption that sovereigns recognized by international law are normally or invariably wholly unitary is a gross oversimplification even today, and as applied to the 18th century is the crudest of anachronisms. See, generally, Greaves, *Federal Union in Practice* 9-12 (1940).

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[53] The prevalent view among our revolutionary statesmen was that *before* the Revolution the British Empire had been a federation of States or even had consisted of unfederated separate States linked only by a joint personal sovereign. This is exhaustively demonstrated in Adams, Political Ideas of the American Revolution 17-18, 40-61, 86-152 (1939); see also Hardwicke, "The Constitution and the Continental Shelf," 26 Tex. L. Rev. 398, 410-11 (1948); McLaughlin, Constitutional History of the United States 15 (1935); McIlwain, Federalism as a Democratic Process 35 (1942).

Montesquieu, one of the most potent of all influences on the revolutionary statesmen, likewise analyzed the legal nature of a federal or confederate republic, and declared that "the confederates preserve their sovereignty." *The Spirit of the Laws,* Book IX ch. 1, p. 146 (1873 ed.).

Plaintiff is on unsound ground when it contends that a state must conduct its own foreign relations singly and separately in order to be recognized as a sovereign in the international-law sense. All sovereigns conduct their foreign affairs through agents, and particular persons or bodies can be agents for more than one sovereign at the same time. Certainly in the 18th-century view, a federal republic consisted of several sovereignties conducting foreign affairs through joint agents. Indeed, international law goes much farther and recognizes that a state may retain its international personality even if it delegates and transfers the conduct of its foreign affairs to a distinctly different state and its agents. As Judge Jessup pointed out, the Permanent Court of International Justice so held with respect to Morocco when it was a French protectorate and had turned over the conduct of its ofreign relations to France. App. 235-36. Morocco was by no means a unique situation; many countries from time to time have been regarded, and some are today regarded, as sovereigns in the international-law sense even though their foreign affairs are conducted by another country. A host of examples could be given. Cf. *Restatement (2d), Foreign Relations Law of the United States* § 4 (1965).

The American States did not go nearly so far; they never surrendered their foreign relations to a different state and its agents, but rather carried on their foreign affairs (for the most part) through joint agents of their own. Each diplomatic agent appointed by Congress was informed by his instructions that he was "the representative of sovereign States," and his first order of business was to procure

recognition of that status by the nation to which he was accredited. Exhibit 705, p. 521. The instructions to Francis Dana as minister to Russia required him to inform the Russian Empress of the "sovereignty, rights and jurisdiction of each of the thirteen States inviolably," and of the refusal of the States to make peace with Britain without an acknowledgment of the sovereignty of each and every one. U.S. Exhibit 351, p. 1171. The letters of credentials delivered by Congress to its diplomatic representatives named each State and appointed the diplomat the agent of each. Exhibit 705, pp. 521-22; Exhibit 706, p. 547; 15 *Journals of the Continental Congress* 1116. The "letters of credence" carried by Franklin and the other Commissioners to France ran from "the delegates of the United States of New Hampshire, Massachusetts Bay," etc., Congress as such not even being mentioned. 5 *Journals of the Continental Congress* 828, 833.

The treaties of 1778 with France, the only treaties made by the States prior to the entrance into force of the Articles of confederation, named as parties the thirteen States separately. App. 231-33. Professor Henkin concedes that "in various respects the terms of the treaties seem to treat each of the thirteen as a separate sovereign." Exhibit 700, p. 291. The naming of each state in treaties is wholly inconsistent with plaintiff's theory that the States were not internationally known or recognized. The treaties were made by the agents of the States, and were ratified by Congress, which as we have seen *was* the States acting together in alliance. That ratification would seem to have been entirely adequate, without any derogation of State sovereignty; nonetheless, the Virginia legislature ratified the treaties separately, App. 233-35, and according to Professor Henkin all the other States did so as well. Exhibit 700, p. 291; Tr. 2643-44.

The several treaties made during the Confederation period likewise named each State separately, and thus con-

stituted further international recognition of the independence and sovereignty of each State. App. 236-38. By the Peace of Paris Great Britain acknowledged the thirteen United States, each named, "to be free, sovereign and independent States," App. 230, and relinquished its claims "to the government, propriety and territorial rights of the same, and every part thereof." As in other treaties, the form used is the "United States, vis. . . .", followed by the name of each (Article I), confirming that the term "United States" *meant* the thirteen States, not any entity different from them.

The instructions to Oswald, the British commissioner, had empowered him to treat with commissioners of "the thirteen United States of America," naming each one separately. 5 Wharton, *Revolutionary Diplomatic Correspondence of the United States* 749 (1889). Oswald's prior instructions had authorized him to agree in a treaty to "the complete independence of the thirteen colonies," 6 *id.* at 17. As is well known, the American commissioners refused to treat with Oswald until he was able to acknowledge and to recognize the independence of the thirteen States prior to and separately from a treaty provision. In 1777 Congress had declared that it would reject any treaty between Britain and the United States "inconsistent with the independence of the said States."

John Adams considered that it was the States, not one State, which carried on foreign relations: "we are young States, and not practiced in the art of negotiations." 2 Wharton, *op. cit.* at 755. In diplomatic and foreign documents *United States* always take a plural, not a singular, verb, just as in documents relating to domestic affairs. Jefferson, writing in 1786 to Madison regarding the projected Constitutional Convention, stated its proper objective as "to *make* us one nation, as to foreign concerns, and to keep us distinct in domestic ones." 2 Washington (ed.), *The Writings of Thomas Jefferson* 66 (1853). (Em-

phasis added.) Hamilton considered that under the Articles the powers of external sovereignty were exercised *by the States:* "under the old Constitution the important powers of declaring war, making peace etc. can be exercised by nine States." 2 *Elliot's Debates* 263; Goebel, "Constitutional History and Constitutional Law," 38 Col. L. Rev. 555, 572 (1938). A Pennsylvania court held that under the Articles the States were sovereigns in the international-law sense. *Nathan v. Commonwealth,* 1 Dallas 77 (1781); see Scott, *The United States of America: a Study in International Organization* 58-59 (1920).

While the Articles of Confederation conferred upon Congress the power to make treaties, that power was regarded as severely limited. The provision of the Peace of Paris "that creditors on either side shall meet with no lawful impediment to the recovery" of debts (Article IV) was considered to be beyond the power of Congress, and some of the States disregarded it. Exhibit 686, p. 15. As to the return of confiscated property to British subjects, the American peace commissioners successfully insisted that they had no power to bind the States to such an obligation, and the provision of the treaty (Article V) was stated as merely a recommendation by Congress to the States. Exhibit 761, p. 793; Tr. 2410-11.

While as we have seen international law fully recognized the individual sovereignty of states conducting their foreign affairs solely by means of a confederation, it is the fact, though not at all necessary to sustain the position of the Common Counsel States in this proceeding, that the States individually did engage in substantial conduct of the type plaintiff associates with external sovereignty. Virginia had agents in Europe and carried on "diplomatic activities . . . so extensive as to necessitate the setting up of a special office, a 'Clerkship of Foreign Correspondence.'" Levitan, *op. cit.* at 487. Other States were also active abroad in various ways. As to the conduct of the war, also, it would

be absurd to say that the States were inactive and relied solely on Congress to defend them. The States individually had their own armies and navies (not subject to orders from Congress or its commanders), conducted individual campaigns, and were active in every phase of war operations. *Ibid.;* see also Exhibit 700, p. 290; Exhibit 757, pp. 540-42. The Articles of Confederation did not prohibit individual States from dealing directly with foreign powers, making war, sending ambassadors or concluding treaties, but merely required the consent of Congress therefor, and provided that individual States could make war *without* the consent of Congress in case of emergency (Article VI).

Nor is it the case, as plaintiff contends, that Europe was oblivious to the States and was aware of the existence only of Congress. A host of documentation could be produced to show the falsehood of that allegation. For example, John Adams wrote in 1780 of great curiosity throughout Europe "to see our new constitutions," by which he meant the State constitutions. Exhibit 759, p. 527. Later the same year, Adams requested copies of the constitutions with which to satisfy the European interest, and said as an afterthought that "it would be proper to print the Confederation in the same volume." Exhibit 760, pp. 67-68. The constitutions were accordingly published by order of Congress, in a volume entitled *The Constitutions of the Several Independent States of America* (1781). See also Greene, *The Foundations of American Nationality* 547 (1922).

When a court of commissioners appointed by Congress, pursuant to a power conferred by the Articles of Confederation, adjudicated a boundary dispute between Connecticut and Pennsylvania, Robert R. Livingston, Secretary of Foreign Affairs, reported the decision to LaFayette in the following striking terms:

> "The great cause between Connecticut and Pennsylvania has been decided in favor of the latter.

> It is a singular event. There are few instances of independent states submitting their cause to a court of justice. The day will come when all disputes in the great republic of Europe will be tried in the same way, and America be quoted to exemplify the wisdom of the measure." 6 Wharton, *Revolutionary Diplomatic Correspondence of the United States* 202 (1889).

Plaintiff claims the use in diplomatic instructions and treaties of the terms "both nations" and "both countries" as proof that the States were not sovereign. But similar terms were used in 17th-century treaties made with various countries by the kings of Great Britain at times when, beyond question, England and Scotland were separate states, being linked only by a joint personal sovereign. Exhibit 674, p. 361 ("both sides," "both Parties"); Exhibit 674, pp. 711, 714, 733, 734 ("either Party"). Moreover, while plaintiff admits at P.R.B. pp. 124-25 that the Dutch confederacy was composed of units which were "sovereign and independent under international law," the Treaty of 1654 between England and The Netherlands uses the terms "either side," "neither republic," "either republic," "either State," "the respective States," "either party," and "both parties." 3 Parry, *Consolidated Treaty Series* 248-52. The British-Dutch Treaty of 1674—England and Scotland still being separate sovereign states, and the Dutch confederacy still consisting by plaintiff's own admission of units "sovereign and independent under international law"—uses the terms "both parties," "both sides," "both nations," "either party," and "the two nations." 13 Parry, *Consolidated Treaty Series*, 136-39. This type of usage, which could doubtless be found in many other treaties as well, makes it wholly clear that the use of such terms was in no way inconsistent with the fact that a contracting party consisted, and was well known to consist, of more than one sovereign state.

Professor Morris alleged that there was a common United States citizenship during the revolutionary and Confederation periods. Tr. 2378. He placed his sole reliance on a letter from Jay to Franklin of May 13, 1781, and Franklin's reply of August 20, 1781. U.S. Exhibit 388. Professor Morris' interpretation of these letters is incomprehensible. Jay's letter declared, "though a person may by birth or admission become a citizen of one of the States, I cannot conceive how one can either be born, or made a citizen of them all." Franklin replied that he thought "your objections reasonable." This shows how far John Jay, that great nationalist, was from thinking of the United States as an entity distinguishable from, let alone superior to, the thirteen States of which they consisted. For Jay, as for everyone else during this period, the United States simply had no existence apart from its constituent sovereigns. Even the 1787 Constitution did not create any federal citizenship, but merely provided (Article IV, Section 2), as the Articles had done, that the citizens of each State were entitled to all the privileges and immunities of citizens in the several States.

The government established by the Constitution was not the same government which existed under the Articles, and the new government was in no sense the legal successor of the old one or the inheritor of any powers from it, except that debts of the old Congress were assumed (Article VI). With that one exception the Constitution does not even refer to the old government or to the Articles. It was a new compact among the States, and the government it established derived all its power and authority from a new act of delegation by the people of the States.

Innumerable writers have demonstrated that the 1787 Constitution had the nature of a compact entered into by independent sovereigns. The extent to which the States retained their sovereignty *after* the Constitution came into

force has long been debated, but few have been so reckless as to deny the compact theory of its inception. The 1787 Convention was "an international conference." Scott, *The United States: a Study in International Organization* 145, 148-56 (1920).

It has sometimes been contended that the preamble to the Constitution ("We, the people of the United States") suggests that the Constitution was the act of, or was to be adopted by, the people collectively. In fact, the preamble, as it unanimously passed the Convention on August 7, 1787, was in these words: "We, the people of the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, do ordain, declare, and establish the following Constitution," etc. 1 *Elliot's Debates* 224, 230-31 (2d ed. 1836); Scott, *The United States of America: a Study in International Organization* 541, 552 (1920). The change to the final phraseology was made by a subcommittee on style, and was obviously not intended to affect the substance. The reason for the change was that there was no assurance that every State would ratify the Constitution, and it would plainly have been inappropriate for it to go into effect purporting to be the act of States which remained outside it. Scott, *Sovereign States and Suits* 71-72 (1925). In fact two States did remain outside for quite some time; if they were not independent sovereigns during that period, it is difficult to know what status to assign them. See Tr. 2669-70. And it was never suggested that the United States had any right to coerce them if they did not choose to come in voluntarily.

Plainly, the framers regarded the people of each State, in their conventions which were regarded as the direct expression of their sovereignty, as those on whom adherence or non-adherence of each State to the Constitution, and therefore its legitimacy as a governmental charter, de-

pended. Article VII of the Constitution, providing that the ratification by nine States "shall be sufficient for the establishment of this Constitution between the States so ratifying the same," confirmed the nature of the Constitution as a compact between sovereigns; the word *between* was put in on special motion, which shows how closely words were watched at the time. 1 *Elliot's Debates* 277. And the final act of the 1787 Convention made it clear that the delegates regarded themselves as acting on behalf of the States: "done in convention, by the unanimous consent of the *States present*, the 17th day of September, in the year of Our Lord 1787." *Id.* at 317. "On the question to agree to the Constitution, enrolled in order to be signed, all the States answered, 'Ay.'" *Id.* at 318.

At the Convention, as in the Continental Congress, each State had a single equal vote, and the vote on each article of the Constitution was recorded by State, individuals not even being mentioned. *Id.* at 155-318. A great wealth of additional evidence could be adduced from the proceedings in the State ratifying conventions, and from many other contemporary and later sources, confirming the nature of the Constitution as a compact among sovereigns.

Even after the 1787 Constitution, the theory was that the States preserved their participation in the international act of treaty-making through the requirement of ratification by the Senate, senators being regarded as representatives of their States. Goebel, "Constitutional History and Constitutional Law," 38 Col. L. Rev. 555, 572 (1938).

In 1837 the Senate adopted, by a large majority, a resolution declaring "that in the adoption of the Federal Constitution the States adopting the same acted, severally, as free, independent and sovereign States." *Congressional Globe and Appendix*, 25th Cong., 2d Sess., p. 98. Again in 1860, the Senate resolved "that, in the adoption of the Federal Constitution, the States adopting the same, acted

severally as free and independent sovereignties, delegating a portion of their powers to be exercised by the Federal Government for the increased security of each against dangers, domestic as well as foreign." *Congressional Globe*, 36th Cong., 1st Sess., pt. 3, p. 2321.

We will not discuss the views which political figures have taken from time to time on this question, except to make one observation about Daniel Webster. Webster's reply to Calhoun is perhaps the most famous denial in American history that the Constitution was a compact among sovereigns. But Webster very materially changed his views in his later life. In arguing to the Supreme Court in *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839), Webster declared:

> "I am not prepared to say that the States have no national sovereignty [as distinguished from 'municipal sovereignty']. The laws of some of the States — Maryland and Virginia, for instance — provide punishment for treason. The power thus exercised is, certainly, not municipal. Virginia has a law of alienage: that is, a power exercised against a foreign nation. Does not the question necessarily arise, when a power is exercised concerning an alien enemy—enemy to whom? The law of escheat, which exists in all the States, is also the exercise of a great Sovereign power.
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> * * *
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> "The States of this Union, as States, are subject to all the voluntary and customary laws of Nations. [Mr. Webster here referred to, and quoted a passage from Vattel (p. 61), which, he said, clearly showed that states connected together as are the States of this Union, must be considered as much component parts of the law of nations as any

> others.]" 13 Pet. at 559-60. (Bracketed matter in original.)

(The Court fully accepted Webster's argument; see p. 404, *infra.*) And in giving legal advice to foreign bankers, Webster declared

> "Every State is an independent, sovereign, political community, except in so far as certain powers, which it might otherwise have exercised, have been conferred on a general government, established under a written Constitution, and exerting its authority over the people of all the States. This general government is a limited government. Its powers are specific and enumerated. All powers not conferred upon it still remain with the States and with the people." 57 *Niles's National Register* 273.

On the basis of all the evidence, the vast majority of scholars in every period have agreed on "an all but unanimous conclusion" that during the revolutionary and Confederation periods the States individually possessed independence and full sovereignty, including external sovereignty, and were nations recognized as such by international law. David M. Levitan, "The Foreign Relations Power," 55 Yale L.J. 467, 488 (1946). These scholars include: James Sullivan, *History of Land Titles in Massachusetts* 60 (1801); Henry Baldwin (Justice of the Supreme Court of the United States), *A General View of the Origin and Nature of the Constitution and Government of the United States* 79-81 (1837); John Lothrop Motley, 1 *Rebellion Record* 210 (1861); 10 George Bancroft, *History of the United States* 421-22 (1874); Small, "The Beginnings of American Nationality," 8 *Johns Hopkins Studies in Historical and Political Science* 7-77 (1890); Henry Cabot Lodge, *A Fighting Frigate* 225 (1902); Van Tyne, "Sovereignty in the American Revolution: an Historical

Study," 12 *Am. Hist. Rev.* 525 (1907); James Brown Scott.[54] *The Declaration of Independence, the Articles of Confederation, the Constitution of the United States* iii-iv (1917); Robert M. Hughes, *Handbook of Admiralty Law* 9 (2d ed. 1920); James Brown Scott, *The United States of America, a Study in International Organization, passim, e.g.*, pp. 45, 50-51, 58-60 (1920); R.L. Schuyler, *The Constitution of the United States, an Historical Survey of Its Formation* 16-17 (1923); Samuel Eliot Morison, *Sources and Documents Illustrating the American Revolution 1764-1788 and the Formation of the Federal Constitution* xl (1923); Allan Nevins, *The American States During and After the Revolution 1775-1789*, pp. 660-61 (1924); James Brown Scott, *Sovereign States and Suits* 28-30, 35-80 (1925); James Brown Scott, "Treaty Making Under the Authority of the United States," 28 *Proceedings, Am. Soc. Int'l. L.* 2 (1934); Evarts Boutell Greene, *The Foundations of American Nationality* 460-61, 558-59 (1922); Andrew C. McLaughlin, *Constitutional History of the United States* 83, 106, 118-36 (1935); Julius Goebel, "Constitutional History and Constitutional Law," 38 Col. L. Rev. 551 (1938); H.R.G. Greaves, *Federal Union in Practice* 23-32 (1940); C. Perry Patterson, *"In re* United States v. Curtiss-Wright Corp.," 22 Tex. L. Rev. 286 (1944); James Quarles, "The Federal Government: as to Foreign Affairs, Are Its Powers Inherent as Distinguished from Delegated?", 32 Georgetown L.J. 375 (1944); Robert E. Hardwicke, "The Constitution and the Continental Shelf," 26 Tex. L. Rev.

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[54] James Brown Scott (1866-1943) was Solicitor of the Department of State (1906-10), a delegate to the Paris Peace Conference of 1919, special advisor to the Department of State and Chairman of the Joint State and Navy Neutrality Board (1914-17); president of the American Society of International Law (1929-39), president of the Institut de Droit International (1925-27, 1928-29), editor in chief, American Journal of International Law (1907-24). He served as a member of many international commissions for the conciliation of disputes between nations. See also footnote p. 292, *supra*.

398 (1948); Ernest R. Bartley, *The Tidelands Oil Controversy* 29-30 (1953); Merrill Jensen, *The New Nation* (1965), Exhibit 703; Thomas A. Bailey, *A Diplomatic History of the American People* 52 (8th ed. 1968); 1 Julius Goebel, *History of the Supreme Court of the United States* (1971), Exhibit 694; Raoul Berger, "The Presidential Monopoly of Foreign Relations," 71 Mich. L. Rev., 1, 28-33 (1972); Judge Philip C. Jessup (in his testimony in this proceeding, Tr. 644).

The United States have officially taken this position on at least two occasions in a diplomatic context. In the St. Croix River Arbitration under the Treaty Between Great Britain and the United States of November 19, 1794, the United States contended that on July 4, 1776 Massachusetts became "a free sovereign and independent State, . . . and in consequence thereof, was the legal successor of the said province of the Massachusetts Bay in New England," and that from 1783 to 1789 Massachusetts was in confederation with the other twelve States, "all which states were, and before had been, free sovereign and independent States." 1 Moore, *International Adjudications* 110 (1929). And in 1807, a treaty between the United States and Great Britain (never ratified) laid down a maritime boundary in Passamaquoddy Bay and provided that the islands and waters west of the line were "within the jurisdiction and part of Massachusetts, one of the . . . United States." 6 Moore, *International Adjudications* 344 (1933).

In opposition to the great weight of authority among scholars, Professor Morris adduced precisely four writers: Story in the early 19th century, and a group of three writers between 1865 and 1890: Pomeroy, von Holst and Burgess. Tr. 1728, 1732-34, 2369-72. Professor Morris conceded that he had been able to cite no constitutional scholar writing since 1890 who supports his position. Tr. 2375. We submit that the few writers cited by Professor Morris are wrong on the record and the evidence.

Story was too young to have any first-hand knowledge of the facts, and wrote before most of the sources became available. He "was thought to be capable, on occasion, of putting his erudition to work in furtherance of essentially political ends," and "was a staunch advocate of a thoroughly centralized legal system," culminating in his decision in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), *overruled, Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Robertson, *Admiralty and Federalism* 31 (1970).

The ulterior motive of Pomeroy, von Holst and Burgess is obvious; they were writing in an attempt to justify the Northern position during the War Between the States; the pro-secession argument had begun with sovereignty of the States prior to 1789; and the Reconstruction writers felt called upon to dispute that rather than confining themselves to arguments as to the status of the States *after* the Constitution, as they could have done. Pomeroy was quite frank about his motive: "grant that in the beginning the several States were, in any true sense, independent sovereignties, and I see no escape from the extreme positions reached by Mr. Calhoun." Pomeroy, *Introduction to the Constitutional Law of the United States* 39 (5th ed. 1880).[55]

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[55] Pomeroy, moreover, wrote a book on water law, in which he declared:

> "In England, the title to the alveus, or bed, of all navigable streams is vested in the crown. . . . To these sovereign rights the several states succeeded upon the establishment of American independence. The shores of navigable waters and the soil under them were not granted by the constitution to the United States, but were reserved to the several states respectively." Pomery, A Treatise on the Law of Water Rights 468 (1893).

The same was true, he said, of "tide-waters on the borders of the sea." *Id.* at 505.

Burgess, in addition, had other fish to fry: he was an extreme Hegelian, a devotee of German absolutist philosophy, whose example "we shall do well to imitate"; he regarded the centralized national state as the highest achievement of mankind, "the highest good," "the highest entity," possessed of "infallibility," which "can do no wrong"; he also held that the Teutonic race was uniquely qualified to govern, and was justified in denying inferior peoples political participation, and eliminating them if need be. 1 Burgess, *Constitutional Law* v, 1-4, 37-58 (1890). For Burgess, ultimate sovereignty resided not in the people, as our political tradition has always held, but in the national state, and consists of "original, absolute, unlimited, universal power over the individual subject and over all associations of subjects." *Id.* at 52. For an excellent summary of Burgess' views, see 21 *Dic. Am. Biog.* 132-34. "He repudiated the doctrine of natural law, social contract, and the federal state" (*id.* at 133)—*i.e.*, he repudiated precisely those doctrines most fundamental to the views of our revolutionary statesmen and to our constitutional history.

Von Holst was a German professor; his work had to be translated into English. These writers are far from the mainstream of the American tradition of political philosophy and constitutional law. Even Professor Morris could not bring himself to assert the contrary. Tr. 2371.

Moreover, Burgess, Pomeroy and von Holst each declared that, while Congress was sovereign in the early revolutionary period, that sovereignty collapsed and disappeared on the entrance into force of the Articles of Confederation in 1781, and was not resurrected until 1789. Burgess, *op. cit.* at 101; Pomeroy, *Introduction to the Constitutional Law of the United States* 40-42 (9th ed. 1886); 1 von Holst, *Constitutional and Political History of the United States* 27-29 (1876); Tr. 2370, 2372. Story came at

least close to agreeing: "Congress in peace was possessed of but a delusive and shadowy sovereignty. . . . It has been justly observed that 'a government authorized to declare war, but relying on independent states for the means of prosecuting it, capable of contracting debts, and of pledging the public faith for their payment, but depending on thirteen distinct sovereignties for the preservation of that faith, could only be rescued from ignoring and contempt by finding those sovereignties administered by men exempt from the passions incident to human nature.' " 1 Story, *Commentaries on the Constitution* 174, 177 (5th ed. 1905). Thus even Professor Morris' few favorite authorities desert him on a point which is fatal to his contention that the States never possessed sovereignty and independence.

B. THE STATES, WHETHER "EXTERNALLY SOVEREIGN" OR NOT, SUCCEEDED INDIVIDUALLY TO THE TERRITORIAL BOUNDARIES AND PROPERTY RIGHTS BOTH OF THE CROWN AND OF THE COLONIAL AND PROPRIETARY GOVERNMENTS, INCLUDING RIGHTS IN THE MARGINAL SEA AND SEABED.

The Revolution was in substantial part fought and won to vindicate the colonial charters. Parliament's attempt to alter the Massachusetts charter in 1774—by the Massachusetts Government Act,one of the "intolerable acts," as was the Quebec Act — was the immediate cause for the convocation of the first Continental Congresss in that year. Greene, *The Foundations of American Nationality* 428-29 (1922). The Declaration of Rights and Grievances of the first Congress insisted on the rights of the colonies both to the common law and to the provisions of the charters. 1 *Journals of the Continental Congress* 67; McIlwain, *The American Revolution: a Constitutional Interpretation* 18 (1923). The bill introduced by Lord Chatham in Parliament in 1775—the last attempt by the colonies' friends in England to ward off the Revolution—provided that "the

colonies in America are justly entitled to the privileges, franchises and immunities granted by the several charters or constitutions, which ought not to be invaded or resumed, unless for misuse, or some legal ground of forfeiture." See also Adams, *Political Ideas of the American Revolution* 97, 155-56 (1939).

President Monroe's special message of 1822 declared as follows:

> "And that the power wrested from the British Crown passed to the people of each colony the whole history of our political movement from the emigration of our ancestors to the present day clearly demonstrates. What produced the Revolution? The violation of our rights. What rights? Our chartered rights. To whom were the charters granted, to the people of each colony or to the people of all the colonies as a single community? We know that no such community as the aggregate existed and of course that no such rights could be violated." 6 Hamilton, *The Writings of James Monroe* 225 (1902).

It cannot be questioned without frivolity that whatever the locus of the abstract concept of "external sovereignty," at independence the States succeeded individually to their boundaries, their charter rights, and their common law, all as enjoyed by the antecedent colonial and proprietary governments, and in addition assumed the territorial and property rights of the crown. Tr. 837-45. Professor Morris conceded that the States succeeded individually to their public lands, which prior to independence had belonged to the proprietors or to the crown, and that the boundaries among the States were determined by their charters. Tr. 2303-07. Professor Henkin further conceded that the States succeeded individually to property *outside* their boundaries

which had belonged to their antecedent colonial governments. App. 543.

Article IX of the Articles of Confederation expressly provided that "no State shall be deprived of territory for the benefit of the United States." As Professor Smith testified, "it is hard to imagine any language which could more conclusively or expressly negative any notion of an implied transfer of territorial rights." App. 346. This language was not non-controversial or *pro forma;* to the contrary, it represented the victory of the adherents of State sovereignty in a hard, most bitterly fought battle which divided the revolutionary statesmen both during the war itself and thereafter. This was, of course, the dispute over the western lands. While no one ever attempted to take from the States for the benefit of the United States their rights in the marginal sea and seabed, there was a concerted effort on the part of the States not possessing western lands by their charters to appropriate the western lands of the other States, without consent or cession by those States, for the benefit of the entire Confederation. That effort was repeatedly, decisively and categorically rejected.

The landless States, led by Maryland, during the debate on the Articles repeatedly attempted to insert provisions which would have stripped the other States of their western lands or would have given Congress the power to revise the boundaries of the States. All these attempts were voted down. Exhibit 744; see also Exhibit 703, pp. 23-25.[56] It was for that reason that Maryland withheld adoption of the Articles for three long years of wartime, from 1778 to 1781.

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[56] Dickinson's original draft of the Articles had given Congress the power of "limiting the bounds of those colonies, which by charter or proclamation, or under any pretence, are said to extend to the South Sea." Burnett, The Continental Congress 217 (1941). This was promptly stricken. *Id.* at 250.

The other landless States had long since conceded defeat; and when Delaware, in adhering to the Articles, attached resolutions grumbling about that defeat, Congress permitted the paper to be filed only with an express proviso "that it shall never be considered as admitting any claim by the same set up or intended to be set up." Exhibit 744, pp. 427-30.

The subsequent history of the controversy is summarized by Professor Smith at App. 346-47. See also Exhibit 707, pp. 693-94; 6 *Journals of the Continental Congress* 1077-79, 1082-83; 19 *id.* at 208-13; 26 *id.* at 118-21. Professor Morris testified that on September 13, 1783 Congress passed a resolution declaring the western lands "without the boundaries of the several States" and appropriating them to the United States "as one undivided and independent nation." Tr. 1772-73; the resolution in question, without its context, is U.S. Exhibit 356. On cross-examination Professor Morris, after considerable sparring and with great reluctance, was compelled to admit that he was entirely mistaken, and that the resolution in question was not *adopted* but was *rejected*. Tr. 2397-2402. In fact the resolution obtained the votes only of three States. Exhibit 708, p. 559; see also Tr. 2394.[57]

Instead, Congress accepted a voluntary cession by Virginia of some of its western lands[58] and rejected an

[57] Professor Morris' attempted use of this resolution is far more significant than merely showing a careless mis-reading of the record. The fact that he believed Congress ever could or would have adopted such a resolution demonstrates a profound ignorance of the entire congressional attitude towards the western-lands question throughout the revolutionary and Confederation periods.

[58] Virginia never ceded its western lands south of the Ohio River, and retained them until parts of them became the States of Kentucky and West Virginia. To this day, Virginia, as well as North Carolina and

amendment by New Jersey providing that by such acceptance Congress was not necessarily recognizing Virginia's charter claims to its western lands. Exhibit 709, pp. 112, 116-17; Tr. 2403. Virginia had imposed certain conditions on its cession; Congress accepted some of these and Virginia withdrew the others, but even those withdrawn were tacitly accepted and complied with. Exhibit 662, pp. 272, 365. The entire history of the western-lands dispute shows a steady refusal by Congress, even at times when the result was substantial impairment of the unity of purpose of the alliance in wartime, to cast the slightest doubt on the validity of charter claims, or to admit the possibility of any acquisition by the United States of any territorial or property rights other than those voluntarily ceded by the States which owned them.

There is also substantial evidence that, even after the western lands were ceded, it was the general opinion that the United States had no constitutional power to hold permanently any territories not within one of the States, but that territory acquired by the United States collectively was held only temporarily until it could be erected into new States. App. 347; Tr. 2432; *The Federalist*, No. 38, pp. 248-49 (Madison) (Cooke ed. 1961). That view found substantial support in Supreme Court decisions. *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 4-5 (1955); *Dorr v. United States*, 195 U.S. 138, 148 (1940); *Snow v. United States*, 85 U.S. (18 Wall.) 317, 319-20 (1873); *Scott v. Sanford, 60 U.S. (19 How.) 393 (1856); United States v. Nelson*, 30 F. 112 (Ore. Cir. 1887); *Ex parte Morgan*, 20 F. 298, 304-05 (W.D. Ark. 1883).

Georgia, retain territories which would have been taken from them if Professor Morris were correct that the Proclamation of 1763 or the Quebec Act of 1774 had curtailed their boundaries. See U.S. Exhibit 368, last page.

In *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 221, 222-24, 229-30 (1845), the Court combined this doctrine with the doctrine that the federal title to the western lands derived from the acts of cession by the States within whose charter boundaries they lay, and applied both principles to the bed of navigable waters, including the seabed:

> "We think a proper examination of this subject will show, that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama, or any of the new states were formed; except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French republic of the 30th of April, 1803, ceding Louisiana.
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> * * *
>
> "When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new states, and to invest them with it, to the same extent, in all respects, that it was held by the states ceding the territories.
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> * * *
>
> "By the 16th clause of the 8th section of the 1st article of the Constitution, power is given to Congress to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of particular states, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by the consent of the legislature of the state in which the same may be, for the erection

of forts, magazines, arsenals, dock-yards, and other needful buildings. Within the District of Columbia, and the other places purchased and used for the purposes above mentioned, the national and municipal powers of government, of every description are united in the government of the union. And these are the only cases, within the United States, in which all the powers of government are united in a single government, except in the cases already mentioned of the temporary territorial governments, and there a local government exists.

* * *

"In the case of *Martin and others v. Waddell*, 16 Pet., 410, the present chief justice, in delivering the opinion of the court, said: When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution. Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States. . . .

* * *

"For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, and the laws which shall be made in pursuance thereof." 3 How. at 221, 222-24, 229-30.

When, in the late 19th century, the United States began to acquire far-flung territories not adjacent to the con-

tinental United States, for which statehood was not envisaged, the problem was resolved by a doctrinal distinction between "incorporated" territories, which had the potentiality of statehood and to which the Constitution fully applied, and "unincorporated" territories, which were not thought of as future states. *Granville-Smith v. Granville-Smith, supra; Balzac v. Porto Rico,* 248 U.S. 298, 305-11 (1922); *Hawaii v. Mankichi,* 190 U.S. 197, 218-19 (1903). Up until the Spanish-American War, no doctrine of "unincorporated" territories was necessary, because the United States was universally understood to hold no territory other than States and potential States. This evolution of doctrine respecting territories in our constitutional law is wholly inconsistent with the notion that from the time of the Constitution, or even earlier, the United States possessed in its own right territorial and property rights in the marginal sea and seabed which were not part of or the property of any State. See Hardwicke, "The Constitution and the Continental Shelf," 26 Tex. L. Rev. 298, 423-26 (1948).

It has always been established doctrine that the original States were the owners of their public lands, except to the extent that they had alienated them or ceded them to the United States, and that the title of the United States to the western lands did not derive directly from the crown, but rather depended on the acts of cession by the States which owned them. The United States has officially taken this position. Donaldson (U.S. Public Land Commission, Committee on Codification), *The Public Domain* (1884), Exhibit 684. *Accord,* 2 Shalowitz, *Shores and Sea Boundaries* 442 (1964). The Supreme Court so held in *Johnson v. McIntosh,* 21 U.S. (8 Wheat.) 543, 586 (1823), and *Harcourt v. Gaillard,* 25 U.S. (12 Wheat.) 523 (1827); see pp. 358-62, *infra.*

The sanctity-of-charters position was fully maintained during the negotiations preceding the Peace of Paris. The

instructions of 1779 to John Adams, sole peace commissioner, defined "the boundaries of these States" as including both the western lands and all islands within 20 leagues of the coast, and demanded that Britain evacuate all those areas, yielding "to the powers of the States to which they respectively belong." Exhibit 745, pp. 225, 227.

Professor Morris made much of a letter of instructions from Congress to John Jay dated October 4, 1780, U.S. Exhibit 386; Tr. 1800-02, which he contends indicated that the United States claimed the western lands under a common title rather than by virtue of the individual colonial charters. The letter in fact said nothing about a common title; it invoked the provisions of the Peace of Paris of 1763, to which Spain had been a party, in contending that Spain had renounced any claim to the western lands in favor of Britain. While Professor Morris has attempted to describe this letter as an instruction to the peace commissioners, it was actually a letter to Jay in his capacity as minister to Spain; Adams was the sole peace commissioner until Jay and others were added to the delegation on June 15, 1781. Tr. 1783.[59] In 1780 Spain was claiming certain lands east of the Mississippi which it had occupied during the war. Obviously an argument based on the colonial charters would have carried no weight with Spain, which was wholly unconcerned with and not bound by a purely municipal deed from the British crown to some of its subjects. As against Spain, the United States' title depended on the Peace of Paris of 1763, by which Spain and France had renounced the lands in question. Professor Morris' argument that by relying on the 1763 treaty vis-a-vis Spain the United States were somehow asserting a common title, or repudiating the colonial charters, has no substance whatsoever. See also Tr. 2407-09.

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[59] Professor Morris was well aware of this when he wrote The Peacemakers, pp. 215-16 (1965).

On October 17, 1780, Congress wrote again to Jay, amplifying its prior instructions and setting out the reasons therefor. Exhibit 661, pp. 127-35; Exhibit 745, pp. 326-39. In this letter, drafted by Madison, Congress went out of its way to refer frequently to the charters and to the rights of the States individually, to an extent quite extraordinary given the fact that the recipient of the letter was the minister to Spain, which could legitimately reply that the charters were of no concern to it. Congress wrote:

> "[I]t must be observed that it is a fundamental principle in all lawful governments and particularly in the constitution of the British Empire, that all the rights of sovereignty are intended for the benefit of those from whom they are derived and over whom they are exercised. It is known also to have been held for an inviolable principle by the United States whilst they remained a part of the British Empire, that the sovereignty of the King of England with all the rights and powers included in it, did not extend to them in virtue of his being acknowledged and obeyed as king by the people of England or of any other part of the empire, but in virtue of his being acknowledged and obeyed as king by the people of America themselves; and that this principle was the basis, first of their opposition to, and finally of their abolition of, his authority over them. From these principles it results that all the territory lying within the limits of the States as fixed by the sovereign himself, was held by him for their particular benefit, and must equally with his other rights and claims in quality of their sovereign be considered as having devolved on them in consequence of their resumption of the sovereignty to themselves." Exhibit 661, p. 128.

"If the occupation by the King of Great Britain of posts within the limits of the United States as defined by charters derived from the said king when constitutionally authorized to grant them, makes them lawful objects of conquest to any other power than the United States, it follows that every other part of the United States that now is or may hereafter fall into the hands of the enemy is equally an object of conquest." Exhibit 661, p. 129.

"As this territory [the western lands] lies within the charter limits of particular States and is considered by them as no less their property than any other territory within their limits, Congress could not relinquish it without exciting discussions between themselves and those States concerning their respective rights and powers which might greatly embarrass the public councils of the United States and give advantage to the common enemy." Exhibit 661, p. 130.

See also Tr. 2349-55. As Irving Brant, one of the authors relied on by plaintiff, has recognized, this letter, which was written by Madison, rejected any "claim that the king's title had devolved on the United States collectively." U.S. Exhibit 391, p. 81. Professor Morris' allegation that the charter arguments were ever "dropped," Tr. 2354, is utterly without foundation.[60]

[60] At the hearings Professor Morris read a passage from his book The Peacemakers briefly describing the October 17 letter, though not mentioning its repeated references to the charters. Tr. 2346-48. (There he gives the date as October 16; the letter was presented to Congress on that day, and approved on the 17th. Exhibit 661, p. 127.) When shown a copy of that letter from the Secret Journals, he questioned the authenticity of the text and asserted that the passages damning to his position were "dropped" before the letter was sent. Tr. 2349, 2354. We thereafter presented as Exhibit 661 the text of the letter from Hutchinson and

Brant's chapter on the instructions to Jay is well worth reading in its entirety. 2 Brant, *James Madison* 70-88 (1948). He shows in detail that the instructions represented yet another victory for the sanctity-of-charters position; Congress was unwilling, as Marbois wrote, to "let the least doubt of the validity of the charters appear." *Id.* at 74. And Madison used the charter claims to refute the theory that "France ceded the land in 1763 to the king, not to the colonies," and therefore that Spain had a right to conquer it as a belligerent against Britain. *Id.* at 80.

In August 1782 Congress considered the matter of instructions to the peace commissioners for the last time. Before Congress was a report by a committee consisting of Daniel Carroll, Randolph and Montgomery. This report is included in the record from the *Secret Journals* of Congress as Exhibit 746, pp. 161-201, and from the *Journals* at Exhibit 707, pp. 482-521. The report, in its *Journals* version, which Professor Morris regards as authoritative (Tr. 2349), devoted 29 pages, Exhibit 707, pp. 488-516, to an exhaustive argument that by virtue of the colonial charters, which were described at length and were repeatedly asserted to be in full force and effect with respect to boundaries, the States whose charter boundaries included western lands, "considered as independent sovereignties, have succeeded to those rights." *Id.* at 490. At the very end of the report, in a final brief paragraph occupying half a page, it was suggested that "if the vacant lands cannot be deman-

Rachal's Madison Papers, which Professor Morris considers "very accurate," Tr. 2349, and indeed is the source he cited in The Peacemakers, pp. 239, 511 n. 67. The passages quoted above are taken from this source, and were never "dropped." Professor Morris' response was to present the letter to Jay of October 4, 1780 (p. 360, *supra;* U.S. Exhibit 386) as the one he really meant to rely upon. Plainly that letter is not the one referred to in the passage from The Peacemakers which Professor Morris read; in any event, (1) nothing was "dropped," since the October 17 letter came later, and (2) the October 4 letter did not rely on any common title.

ded upon the titles of individual States, they are to be deemed to have been the property of his Britannic Majesty, as sovereign of the thirteen colonies immediately before the revolution, and to be devolved upon the United States collectively taken." *Id.* at 516-17.

One would think that the Congress would have been willing to make any argument that might have been successful in extending the boundary of the United States to the Mississippi, and it would be difficult to argue that if it had accepted this report Congress would have prejudiced, as a matter of internal law, the claims of the individual States to their western lands. However, on presentation of the report the delegates of Virginia immediately moved to strike the offending paragraph on the ground that "the claim to the western territory rested solely on the titles of individual States. That Congress had no authority but what it derived from the States. The States individually were sovereign and independent, and upon them alone devolved the rights of the crown within their respective territories." U.S. Exhibit 374, p. 448. Because of these objections the report was not adopted, but was committed, and never received the approval of Congress. U.S. Exhibit 374, p. 449; Exhibit 707, pp. 523-24; see Tr. 2321-22, 2394-96. This episode graphically confirms that Congress was never at any time willing to admit the slightest implication, even a far-fetched one, which could derogate from the continuing validity of the territorial and property rights of each State individually as established by its charter.

Finally, in October 1782, Congress adopted resolutions to be given to the French minister to the United States which insisted on "the territorial claims of these States." Exhibit 761, p. 793. A motion was made to insert the word "United" before the word "States," and *the motion was rejected. Id.* at 795.[61]

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[61] In The Peacemakers, p. 440, Professor Morris was well aware that by this act Congress "avowed the territorial claims of the states."

In view of this history, it is not surprising that the peace negotiators in Paris contended that the right of the United States "to extend to the Mississippi was proved by our charters." 6 Wharton, *Revolutionary Diplomatic Correspondence* 31 (1889). Jay wrote that during the negotiations he had used every one of the arguments in the letter of October 17, 1780, which as we have seen included the charter claims and deliberately *excluded* any reliance on a common title. 2 Brant, *James Madison* 87 (1948).

The entire history of the western-lands question, both with respect to controversies among the States in Congress and with respect to the diplomatic negotiations leading to the Peace of Paris of 1783, can leave no doubt that, even where State charter claims were bitterly contested, they were upheld as part of our law. And *except* with respect to the western lands, nobody ever questioned for a moment at any time the proposition that each State succeeded to its charter boundaries and to all territorial and property rights formerly possessed by the crown and by the antecedent colonial or proprietary government. Thus any assertion that during the revolutionary period the crown and colonial rights to the marginal sea and seabed in the Atlantic somehow passed to the United States collectively is wholly frivolous.

James Sullivan of Massachusetts correctly stated the universal understanding in 1801:

> "The legal aspect of sovereignty and titles referred to by Samuel Adams was again stated by James Sullivan, in his History of Land Titles in Massachusetts published in 1801. Sullivan was a supreme court judge from 1776-1782, Attorney General 1790-1807, first president of the Massachusetts Historical Society, founded in 1791, Governor of Massachusetts 1807, and the leading

supporter in Massachusetts of Thomas Jefferson. He said, (p. 60)

> 'The thirteen original States claimed and had a cession of sovereignty and independence, each in its several capacity, by the mother country. They remained sovereign separate powers until the present constitution was formed. That constitution formed a nation; but it was a creature of 1789. It had then no public property, nor did the people, whose authority gave it existence, make it the proprietor of any other lands, than such as had been ceded, under the old confederation, to the United Colonies.'

"The only property thus 'ceded', was (as pointed out by Sullivan) 'their remote territories' following an invitation to make such cessions from the Continental Congress.

> 'Massachusetts ceded all beyond a line, falling from the Lake Ontario to the State of Pennsylvania, which now forms the east line of what is called, in the general government, The Western Territory.'

"Massachusetts 'ceded' nothing else (see Sullivan 57-60).

"Sullivan's statement reflects the common understanding as well as the obvious meaning of Articles I and II of the Treaty of Peace." Wait, "The Muniments of Title of Massachusetts to Her Submerged Lands," 35 *Mass. L. Q.* 1, 19 (1950).

C. THE PEACE OF PARIS OF 1783 AND THE NEGOTIATIONS PRECEDING IT DEMONSTRATE AMERICAN AWARENESS OF MARITIME RIGHTS AND SHOW NO AMERICAN DISAGREEMENT WITH TERRITORIAL SEAS 100 MILES OR 30 LEAGUES IN WIDTH.

Article III of the Peace of Paris of 1783 provided as follows:

> "It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the gulph of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used at any time heretofore to fish; and also that inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island); and also on the coasts, bays and creeks of all other of his Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours, and creeks of Nova-Scotia, Magdalen islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement for that purpose with the inhabitants, proprietors or possessors of the ground."

Agreement on this provision was preceded by extensive deliberations in Congress and negotiations with the British, which revealed an intense awareness on the part of the American statesmen of the importance of maritime rights.

General surveys of these developments are found at Exhibit 720, pp. 125-27, and Exhibit 748, pp. 68-71.

In 1776 and again in 1778, the Americans proposed that they and the French divide the Newfoundland and Canadian fisheries between them, excluding the British altogether, Exhibit 742, p. 199. The French failed to respond favorably. Thereafter the American position was to demand a common right of fishing in Newfoundland and Canadian waters. The French declined to support this American position, on the ground that "coastal fishing belongs by right to the proprietor of the coast"; since by this time it was understood that Britain would retain Canada and Newfoundland, the French recognized no American right to claim a share of the fisheries there. U.S. Exhibit 334, pp. 7-9; Exhibit 748, pp. 69-70.[62]

The American reply was based not on "freedom of the seas" arguments but on the contention that the historic practice of American fishing in Canadian waters had given rise to a vested, established right. U.S. Exhibit 375, p. 79. While ultimately, by virtue of John Adams' eloquence, the United States were able to obtain "liberty" of fishing right up to the Canadian coasts, in 1779 Congress was quite willing to accept a provision that would have reserved the fisheries out to three leagues for the British alone. Exhibit 745, pp. 202, 208, 230-32; U.S. Exhibit 347, p. 961.

The Peace of Paris carefully distinguished between the American "right" to fish on the outer banks of Newfoundland and other non-coastal waters, and the "liberty" to fish in coastal waters. This point of terminology was the

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[62] The French legal position was clear: the British crown was "the sole and undoubted proprietor of the Island of Newfoundland, and consequently of the fishery upon its coasts." Richard B. Morris, The Peacemakers 326 (1965). The French position extended both to "shore rights for drying fish" and to "fishing within coastal waters." *Id.* at 330.

subject of considerable discussion. Exhibit 720, p. 126. Of course no provision at all was needed unless the Americans believed that Britain had or would claim an exclusive right in the absence of a treaty provision to the contrary. In 1816 John Quincy Adams, then Minister to Britain, made that point in a letter to Lord Castlereagh:

> "If the United States would have been entitled, in virtue of a recognized independence, to enjoy the fisheries to which the word *right* is applied, no article upon the subject would have been required in the treaty. Whatever their right might have been, Great Britain would not have felt herself bound, without a specific Article to that effect, to acknowledge it as included among the appendages to their independence." 7 *British and Foreign State Papers* 105 (1834).

Adams regarded the 30-league exclusive-fishing limits in the treaties of 1713 and 1763 as evidence of what the British considered to be their exclusive right, and concluded: "that Great Britain would not have acknowledged these rights, as belonging to the United States in virtue of their independence, is evident." *Ibid.* In Adams' view, the American "right" was founded not "as a necessary result of their independence" (that is, by virtue of any principle of freedom of the seas), but rather as a vested right deriving from the established and historic use of fisheries: "a right which they have theretofore enjoyed, as a part of the British nation, and which, as an independent nation, they were to enjoy unmolested." *Id.* at 106.[63] Adams continued with the passage quoted at p. 228, *supra*, declaring the exclusive nature of both the coastal and the banks fisheries. Finally,

[63] As Judge Jessup testified, in this period vested or established fishing rights in favor of a non-coastal nation were regarded as exceptions to the recognition of broad territorial waters and the concomitant exclusive rights of the coastal sovereign. App. 132-33, 227-29.

he recognized that fisheries were the subject of exclusive ownership under both British and American law:

> "It was precisely because they [the United States] might have lost their portion of this joint national property, to the acquisition of which they had contributed more than their share, unless a formal article of the treaty should secure it to them, that the article was introduced. By the British municipal laws, which were the laws of both nations, the property of a fishery is not necessarily in the proprietor of the soil where it is situated. The soil may belong to one individual and the fishery to another. The right to the soil may be exclusive, while the fishery may be free or held in common. And thus, while in the partition of the national possessions in North America, stipulated by the Treaty of 1783, the jurisdiction over the shores washed by the waters where this fishery was placed, was reserved to Great Britain, the fisheries themselves and the accommodations essential to their prosecution, were, by mutual compact, agreed to be continued in common." *Id.* at 108.

In all this John Quincy Adams was faithfully adhering to the argument his father successfuly made in 1782. The senior Adams had said not a word about freedom of the seas, even as to the fisheries on the outer banks of Newfoundland, but by his own account claimed the "right" to those fisheries solely on the basis of occupation and use. U.S. Exhibit 375, p. 79; see also Greene, *The Foundations of American Nationality* 520 (1922).

In the report submitted to Congress in August 1782 regarding the peace negotiations, a committee set out arguments which the commissioners might use in seeking participation in the Newfoundland banks fisheries. The

report acknowledged that "a reasonable tract" of coastal fishery belong to the owner of the coast, and discussed the various doctrines and precedents of international law as to the distance to which that exclusive right extends: 100 miles, 60 miles, the 14 miles of Scottish "reserved waters," the 30 leagues of the treaties of 1713 and 1763, and the three leagues and 15 leagues applied to the St. Lawrence and Cape Breton fisheries by the 1763 treaty. Exhibit 707, pp. 482-85. The report is entirely devoted to the outer banks of Newfoundland, and its argument is that those banks, being 35 leagues from land at their closest point, were outside all the conventional limits used for the measurement of exclusive fisheries. *Id.* at 482, 485. Reliance was also placed on the long-established and therefore vested nature of the American right to the fishery. *Id.* at 485. While the report contains general language about the freedom of the seas, it is impossible to find any language in it contending that the 30-league/100-mile limit was discountenanced by English or international law; the argument was that the fishery to which the report related was outside that limit.

D. THE PEACE OF PARIS ESTABLISHED, FOR AT LEAST SOME PURPOSES INCLUDING EXCLUSIVE FISHERIES, A 20-LEAGUE MARITIME BOUNDARY OFF THE COASTS OF THE DEFENDANT STATES.

As to the coastal waters of the United States themselves, the Peace of Paris provided (Article II) that the "boundaries" of the United States should be on land as defined, and "comprehending all islands within twenty leagues of any part of the shores of the United States." That formula was proposed by Congress in its first instructions to the peace commissioner in 1779, Exhibit 745, pp. 139, 226, and was accepted by the British without change and, so far as appears, without discussion. It seems highly improbable that the commissioners on either side were unaware that

ownership of islands to a certain distance in the sea had always been regarded as including the seas out to that distance; moreover, 60 miles (20 leagues) was one of the measurements then most in vogue in international law for the extent of territorial waters (p. 277, *supra*). The Americans were well aware of that, 60 miles in the exclusive-fishery context having been mentioned in the report to Congress of August 1782. Exhibit 707, p. 482. The record contains copies of the maps used by both the British and American commissioners in the negotiations, on which they marked the boundaries established by the treaty; both maps show a boundary line in the sea, obviously intended to be 20 leagues out, all along the coast of the United States. Exhibits 327, 339 (App., Vol. III); Exhibit 355; Tr. 1194-1206.

Quite plainly, as Judge Jessup and Professor Smith have testified, the treaty did establish, and was understood to establish, a boundary line 20 leagues out in the sea for some purposes other than mere ownership of islands. App. 134-36, 342-44; Tr. 1194-1206, 1271-77. As Judge Jessup has emphasized, in view of the long history of fisheries disputes, treaties and regulations in North Atlantic waters, it seems unquestionable that at the very least the provision was intended to recognize exclusive American fisheries out to the 20-league line. Tr. 1195. That conclusion is confirmed by the fact that the British copy of the map also shows, obviously for comparative purposes, the 30-league Treaty of Utrecht line, which dealt with exclusive fisheries.

It seems fairly apparent that in 1779 Congress picked one of the conventional distances in vogue for territorial waters and proposed it (in the conventional "islands" language) for inclusion in the treaty; the British, who were not users of the coastal fisheries off the United States, probably accepted it more or less without question. The retreat from the 100-mile boundaries of the charters to 60 miles for ex-

clusive fisheries was probably influenced by the freedom-of-navigation theories coming into vogue at this period among maritime powers. Plainly, seabed and subsoil rights would have been regarded as no more restrictive; and if we are correct that the reason for the retrenchment to 60 miles related to freedom of navigation, the provision carries no implication that the 100-mile charter boundaries did not remain in effect as to the seabed and subsoil, and perhaps as to surface rights other than navigation and exclusive fisheries. On the whole, therefore, the 20-league provision of the Peace of Paris is most reasonably regarded as a confirmation of the charter claims out to 60 miles, without impairing the charter boundaries of 100 miles with respect to the seabed and subsoil.

Professor Morris makes two arguments against the construction of the 20-league line as a sea boundary: first, that it did not appear on subsequent maps; second, that it would produce the preposterous result of leaving to Britain a 10-league belt between that line and the 30-league line of the Treaty of Utrecht. Tr. 1814-16. Both arguments are frivolous. As to the first, very few maps at any time in history have shown maritime boundaries, as a glance at any map or atlas of any period will show. Indeed, such boundaries on maps are virtually unheard of. Rather remarkably, an official British map of 1785 did show the 20-league boundary line, Exhibit 614 (App. Vol. III), as did a map published in 1876 in connection with the centennial celebration of American independence. Exhibit 822 (App. Vol. III).

As to the professor's second argument, it is based on a studied unwillingness to accept the elementary proposition that the right to territorial waters is dependent upon the sovereignty of a coastline; of course Britain lost its territorial waters off the coast of the United States when it lost sovereignty over the land. Moreover, the argument is based on the assumption that the 30-league line of the

Treaty of Utrecht extended south of Nova Scotia; by the terms of the treaty itself it did not do so, and the British view that a 30-league/100-mile line extended down the coast of the United States was obviously based on general English and international law. See pp. 212-13, 276-77, *supra*.[64]

Finally, Professor Morris contends that "the United States was negotiating for territory and other rights in collectivity and not for the individual and separate States." Tr. 1788-89. If he means that the commissioners were negotiating "in collectivity" as to the territorial waters of the United States, the argument is far-fetched in the extreme, and Professor Morris gives no evidence for it. His only argument is that the rights to the Canadian fisheries were negotiated for collectively; of course they were, since they were not within or appurtenant to the territories of any State, and all the States claimed equal rights to them. As we have seen (pp. 321-28, *supra*), the only occasion when negotiation "in collectivity" was ever proposed for any rights to which individual States had charter claims related to the western lands, and there the proposal was decisively rejected. There is not a word in Professor Morris' book *The Peacemakers* which suggests any negotiations "in collectivity."

[64] If Britain did have a treaty right, as against France, to a 30-league exclusive-fisheries zone off the coasts of the United States, the succession of the defendant States to Britain as sovereigns of those coasts entailed, under established principles of international law, their succession to the treaty right also. The general rule is that a successor State inherits those treaty rights and obligations of its predecessor which pertained to, were for the benefit of, or constituted a burden upon, the territory subject to the State succession. 5 Hackworth, Digest of International Law 360-77 (1943); 2 Whiteman, Digest of International Law 936-1028 (1963); O'Connell, The Law of State Succession (1956).

VIII.

THE EXCLUSIVE RIGHT OF THE STATES TO EXPLORE AND TO EXPLOIT THE RESOURCES OF THE CONTINENTAL SHELF WERE NOT TRANSFERRED TO THE UNITED STATES BY THE CONSTITUTION.

A. THE CONSTITUTION EXPRESSLY PRESERVES STATE TERRITORIAL BOUNDARIES AND PROPERTY RIGHTS.

Clause two of Article IV, Section 3 of the Constitution declares in the most explicit language that no constitutional provision may affect the claims of the States to territory or property. The clause provides as follows: ". . . nothing in this Constitution shall be so construed as to prejudice any Claims of the United States, or of any particular State." Clearly prohibited would be the interpretation of the powers of the Federal Government over defense and foreign relations, or any other federal powers, in such a way as adversely to affect the claims of the States to the submerged lands off their shores.

The history of this provision of the Constitution demonstrates that the intent of the framers was to use the term "any claim" in a broadly inclusive sense. According to Madison's notes on the proceedings of the Federal Convention, the provision was debated only once, on August 30, 1787. On that occasion Daniel Carroll of Maryland proposed the following amendment:

> "Provided nevertheless that nothing in this Constitution shall be construed to affect the claim of the U.S. to vacant lands ceded to them by the Treaty of peace." 2 Farrand, *Records of the Federal Convention* 465 (1911).

Madison thought such a provision unnecessary but harmless, but proposed that "to make it neutral and fair, it ought to go farther & declare that the claims of particular States also should not be affected." *Id.* at 465. Since this was generally accepted, Carroll withdrew his amendment and substituted the following:

> "Nothing in this Constitution shall be construed to alter the claims of the U.S. or of the individual States to the Western territory, but all such claims shall be examined into & decided upon, by the Supreme Court of the United States." *Id.* at 465-66.

The Carroll substitute was thereupon postponed and the convention took up, and adopted, a similar amendment proposed by Gouverneur Morris of Pennsylvania:

> "The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the U. States; and nothing in this constitution contained, shall be so construed as to prejudice any claims either of the U - S - or of any particular State." *Id.* at 466.

The debate then continued over an amendment which provided that "all such claims" be examined and decided upon by the Supreme Court. It was eventually decided that such a provision was superfluous since the Supreme Court already had jurisdiction over suits to which the United States or a State was a party.

It is important to note that the Convention moved from a very specific provision, dealing with vacant lands ceded by the Treaty of Peace, to a very inclusive provision dealing with "any claims." The central purpose behind the substitution of the Morris amendment was to include all con-

ceivable claims of either the United States or of the individiual States. The substitution was activated by the same sentiments expressed by Madison: the desire to be inclusive and to make certain that the adoption of the Constitution would have no effect on any territorial or property claims.

B. SEVERAL OTHER PROVISIONS OF THE CONSTITUTION AND THE DEBATES AT THE FEDERAL CONVENTION INDICATE THE INTENTION NOT TO CHANGE OR TO AFFECT STATE BOUNDARIES OR THE OWNERSHIP OF PROPERTY.

It is inconceivable that any of the framers believed that territorial or property rights were being ceded implicitly and without discussion, in view of the long and critical debate over cessions during the Confederation period, and the full awareness by all participants of cession and territorial questions.

At one point during the Convention Rufus King of Massachusetts suggested that, if the debts of the states were to be assumed, then in return all unallocated lands of the States should be given up to the Federal Government. 2 Farrand, *Records of the Constitutional Convention* 328 (1911). Significantly, this proposal received almost no support among the delegates and was never even seriously considered.

Article IV, Section 3 of the Constitution provides, of course, that new States may be admitted to the Union by Congress, but that no new State shall be formed within the jurisdiction of any other State or States without the consent of those States. It is interesting to note that Roger Sherman of Connecticut opposed this provision as unnecessary; to him it was self-evident that "the Union cannot dismember a State without its consent." *Id.* at 455. However, the representatives of Maryland vigorously urged that the

provision be deleted for the opposite reason, namely, that Congress *should* have the right to dismember the larger States without their consent. *Id.* at 461-62. There was a full debate on this question and the provision was retained by a vote of 8 to 3. *Id.* at 462. Again Maryland attempted to delete the provision, *id.* at 463-64; and again the proposal was rejected by the same vote. *Id.* at 464.

Also of importance in ascertaining the intent of the framers is the provision of Article I, Section 8, giving Congress legislative powers over a federal district for the seat of government and over all places purchased for the erection of forts, magazines, arsenals, dockyards and other needful buildings. The section expressly provides that the federal district and the other places mentioned may be acquired only with the consent of the legislatures of the States in question. The clause as first proposed, while providing that the federal district could be acquired only by the cession of particular States, did not require the consent of the legislatures for the purchase of places for forts, etc., over which federal legislative authority was to be exercised. This omission was promptly pointed out by Gerry of Massachusetts, who contended that "this power might be made use of to enslave any particular State by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the Genl. Government." *Id.* at p. 510. The matter was immediately resolved by the addition of the words "by the Consent of the Legislature of the State," after which the clause was adopted unanimously.

These constitutional provisions, and the debates leading to their adoption, are inconsistent with any notion that the framers intended that the adoption of the Constitution involved the implicit transfer by the States to the Federal Government of any territorial or ownership rights whatever, in the seabed of the continental shelf or elsewhere. Article

IV, section 3 expressly protected the States against dismemberment and provided that nothing in the entire Constitution should be so construed as to prejudice any territorial or property claim of any State. It is difficult to imagine how the intent could be more clear.

The argument that the States' continental-shelf rights were transferred to the United States as a corollary of "external sovereignty" or of the foreign-affairs and defense powers is discussed at pp. 428-43, *infra*.

C. THE GREAT WEIGHT OF SUPREME COURT AUTHORITY HAS RECOGNIZED STATE SOVEREIGNTY IN THE PERIOD 1776-1789, AND STATE SUCCESSION TO ALL TERRITORIAL AND PROPERTY RIGHTS OF THE CROWN AND THE COLONIAL GOVERNMENTS WAS UNIFORMLY UPHELD UNTIL THE *CALIFORNIA* CASE.

We shall now summarize (and usually quote) all the language we have encountered in Supreme Court opinions which bears on the locus of sovereignty and State succession to territorial and property rights during the revolutionary and Confederation periods.[65] Professor Morris gave (Tr. 1729-32) a grossly distorted and incomplete version of the substance of the early Supreme Court decisions on these points.

In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the question was whether the Supreme Court had jurisdiction over an action brought by a citizen of one State against another State. Since Article III of the Constitution expressly gave the Court jurisdiction over controversies between a State and citizens of another State, the issue does not seem to have been very difficult; even so, the Court's

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[65] Cases dealing specifically with State succession to tide waters and the bed and subsoil thereof are referred to at pp. 376-78, *infra*.

judgment was overruled by the Eleventh Amendment to the Constitution. Three of the opinions contain language relevant to the question here. Justice Iredell, dissenting, contended that the jurisdictional provision of the Constitution was not self-executing, and that in the absence of an act of Congress the Court should follow the common-law principle of immunity of the sovereign from suit. Iredell was at pains to point out the reception of the common law in all the States. His conclusion was that the States were successors to the immunity from suit of the crown along with other attributes of sovereignty:

> "No other part of the common law of England, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown. Every state in the Union, in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered: each state in the Union is sovereign, as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the states have surrendered to them: of course, the part not surrendered must remain as it did before." *Id.* at 435.

Justice Wilson, who decided with the majority, and who as Professor Morris has pointed out was one of the most extreme nationalists prior to 1787, nonetheless sharply distinguished between the locus of sovereignty, at least in fact, during the Confederation period and under the Constitution:

> "With the strictest propriety, therefore, classical and political, our national scene opens with the

most magnificant object, which the nation could present: 'The People of the United States' are the first personages introduced. Who were those people? They were the citizens of thirteen states, each of which had a separate constitution and government, and all of which were connected together by articles of confederation. To the purposes of public strength and felicity, that confederacy was totally inadequate. A requisition on the several states terminated its legislative authority: executive or judicial authority it had none. In order, therefore, to form a more perfect union, to establish justice, to insure domestic tranquility, to provide for common defense, and to secure the blessings of liberty, those people, among whom were the people of Georgia, ordained and established the present constitution. By that constitution legislative power is vested, executive power is vested, judicial power is vested." *Id.* at 463.

Chief Justice Jay, also in the majority, appeared to recognize both a national and a federal theory of the revolutionary and Confederation periods, without committing himself to one or the other:

"The revolution, or rather the Declaration of Independence, found the people already united for general purposes, and at the same time, providing for their more domestic concerns, by state conventions, and other temporary arrangements. From the crown of Great Britain, the sovereignty of their country passed to the people of it; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed, not to the people of the colony or states within whose limits they were situated, but

> to the whole people; on whatever principles this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the revolution, combined with local convenience and considerations; the people, nevertheless, continued to consider themselves, in a national point of view, as one people; and they continued, without interruption, to manage their national concerns accordingly; afterwards, in the hurry of war, and in the warmth of mutual confidence, they made a confederation of the states, the basis of a general government. Experience disappointed the expectations they had formed from it; and then the people, in their collective and national capacity, established the present constitution." *Id.* at 470.

The other two justices writing opinions, Blair and Cushing, said nothing relevant to the pre-1789 constitutional situation. Thus in the *Chisholm* case we find three justices expressing relevant opinions: Iredell maintained that the States were fully sovereign prior to 1789 and had not lost that sovereignty in any essential sense; Wilson held that the States were sovereign before 1789 but had yielded the aspect of sovereignty at issue in the case; Jay alone cast any doubt on the pre-1789 sovereignty of the States, but only as a hypothesis, giving equal weight to the opposite hypothesis.

In *Penhallow v. Doane*, 3 U.S. (3 Dall.) 53 (1795), the Court held that the prize appeal court established by Congress in 1778 had possessed jurisdiction to reverse a decision of the admiralty court of New Hampshire. The case necessarily involved an inquiry into the powers of Congress prior to the effective date of the Articles of Confederation. All four justices who wrote opinions—Paterson,

Iredell, Blair and Cushing—relied heavily on the fact that New Hampshire had voted in favor of the act of Congress establishing the prize court, and that having so voted New Hampshire could not withdraw its consent without withdrawing from the Confederation, which all three justices believed it had a perfect right to do. Justice Paterson went on in vivid terms to affirm the *de facto* power of Congress, even prior to the Confederation, over external and military affairs:

> "Much has been said respecting the powers of congress. On this part of the subject, the counsel on both sides displayed great ingenuity and erudition, and that too in a style of eloquence equal to the magnitude of the question. The powers of congress were revolutionary in their nature, arising out of events, adequate to every national emergency, and co-extensive with the object to be attained. Congress was the general, supreme and controlling council of the nation, the centre of union, the centre of force, and the sun of the political system. To determine what their powers were, we must inquire what powers they exercised. Congress raised armies, fitted out a navy, and prescribed rules for their government: congress conducted all military operations both by land and sea; congress emitted bills of credit, received and sent ambassadors, and made treaties: congress commissioned privateers to cruise against the enemy, directed what vessels should be liable to capture, and prescribed rules for the distribution of prizes. These high acts of sovereignty were submitted to, acquiesced in, and approved of, by the people of America. In congress were vested because by congress were exercised, with the approbation of the people, the rights and powers of war and peace. In every

government, whether it consists of many states, or a few, or whether it be of a federal or consolidated nature, there must be a supreme power or will; the rights of war and peace are component parts of this supremacy, and incidental thereto is the question of prize. The question of prize grows out of the nature of the thing. If it be asked, in whom, during our revolution war, was lodged, and by whom was exercised, this supreme authority? No one will hesitate for an answer. It was lodged in, and exercised by, congress; it was there, or nowhere; the states individually did not, and, with safety, could not exercise it. Disastrous would have been the issue of the contest, if the states, separately, had exercised the powers of war. For in such case, there would have been as many supreme wills as there were states, and as many wars as there were wills. Happily, however, for America, this was not the case; there was but one war, and one sovereign will to conduct it. The danger being imminent and common, it became necessary for the people or colonies to coalesce and act in concert, in order to divert or break the violence of the gathering storm; they accordingly grew into union, and formed one great political body, of which congress was the directing principle and soul. As to war and peace, and their necessary incidents, congress, by the unanimous voice of the people, exercised exclusive jurisdiction, and stood, like Jove, amidst the deities of old, paramount and supreme. The truth is, that the states, individually, were not known nor recognized as sovereign, by foreign nations, nor are they now; the states collectively, under congress, as the connecting point or head, were acknowledged by foreign powers as sovereign, particularly in that acceptation of the term, which

is applicable to all great national concerns, and in the exercise of which, other sovereigns would be more immediately interested; such, for instance, as the rights of war and peace, of making treaties, and sending and receiving ambassadors." *Id.* at 80-81.

Paterson was quite clear, however, that the powers of Congress were derived from the delegation and acquiescence of the States:

"Another circumstance worthy of notice, is the conduct of New Hampshire, by her delegate in congress, in the case of the *Sloop Active.* Acts of Congress, 6th March 1779. By this decision, New Hampshire concurred in binding the other states. Did she not also bind herself? Before the articles of confederation were ratified, or even formed, a league of some kind subsisted among the states; and whether that league originated in compact, or a sort of tacit consent, resulting from their situation, the exigencies of the times, and the nature of the warfare, or from all combined, is utterly immaterial. The states, when in congress, stood on the floor of equality; and until otherwise stipulated, the majority of them must control. In such a confederacy, for a state to bind others, and not, in similar cases, be bound herself, is a solecism. Still, however, it is contended, that New Hampshire was not bound, nor congress sovereign as to war and peace, and their incidents, because they resisted this supremacy in the case of the *Susanna.* But I am, notwithstanding, of opinion, that New Hampshire was bound, and congress supreme, for the reasons already assigned, and that she continued to be bound, because she con-

> tinued in the confederacy. As long as she continued to be one of the federal states, it must have been on equal terms. If she would not submit to the exercise of the act of sovereignty contended for by congress, and the other states, she should have withdrawn herself from the confederacy." *Id.* at 81-82.

Justice Iredell, likewise, founded the authority of Congress squarely on the delegation and acquiescence of the States:

> "The powers of congress, at first, were indeed little more than advisory; but in proportion as the danger increased, their powers were gradually enlarged, either by express grant, or by implication arising from a kind of indefinite authority, suited to the unknown exigencies that might arise. That an undefined authority is dangerous, and ought to be intrusted as cautiously as possible, every man must admit, and none could take more pains, than congress, for a long time, did, to get their authority regularly defined by a ratification of the articles of confederation. But that previously thereto they did exercise, with the acquiescence of the states, high powers of what I may, perhaps, with propriety, for distinction, call external sovereignty, is unquestionable. Among numerous instances that might be given of this (and which were recited very minutely at the bar), were the treaties of France in 1778, which no friend to his country at the time questioned in point of authority, nor has been capable of reflecting upon since, without gratitude and satisfaction. Whether among these powers comprehended within their general

authority, was that of instituting courts for the trial of all prize causes, was a great and awful question; a question that demanded deep consideration, and not, perhaps, susceptible of an easy decision. That in point of prudence and propriety it was a power most fit for congress to exercise, I have no doubt. I think, all prize causes whatsoever ought to belong to the national sovereignty." *Id.* at 90.

"If congress, previous to the articles of confederation, possessed any authority, it was an authority, as I have shown, derived from the people of each province, in the first instance. When the obnoxious acts of parliament passed, if the people in each province had chosen to resist separately, they undoubtedly had equal right to do so, as to join in general measures of resistance with the people of the other provinces, however unwise and destructive such a policy might, and undoubtedly would have been. If they had pursued this separate system, and afterwards, the people of each province had resolved that such province should be a free and independent state, the state, from that moment, would have become possessed of all the powers of sovereignty, internal and external (viz., the exclusive right of providing for their own government, and regulating their intercourse with foreign nations), as completely as any one of the ancient kingdoms or republics of the world, which never yet had formed, or thought of forming, any sort of federal union whatever." *Id.* at 92-93.

Justice Blair, likewise, founded the Congressional authority in question on New Hampshire's express delegation of it, and held that New Hampshire could have withdrawn that

delegation by withdrawing from the Confederation. *Id.* at 112.

Cushing likewise regarded Congress' authority as derived solely by delegation of the States:

> "I have no doubt of the sovereignty of the states, saving the powers delegated to congress being such as were 'proper and necessary' to carry on, unitedly, the common defence in the open war, that was waged against this country, and in support of their liberties, to the end of the contest." *Id.* at 117.

In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), the Court held unanimously that a Virginia statute of 1777, confiscating debts owed to British subjects, was superseded by the contrary provision in the Peace of Paris of 1783. Each justice assessed the validity of the Virginia statute under international law, thus recognizing that Virginia at the time was an international person whose act either complied with or violated international law. Only Justice Chase found it necessary to inquire further into the validity of the Virginia statute at the time it was enacted, and his analysis is an emphatic and unequivocal affirmation of State sovereignty:

> "I am of opinion, that the exclusive right of confiscating, during the war, all and every species of British property, within the territorial limits of Virginia, resided only in the legislature of that commonwealth. I shall hereafter consider, whether the law of the 20th of October 1777, operated to confiscate or extinguish British debts, contracted before the war. It is worthy of remembrance, that delegates and representatives were elected by the people of the several counties and corporations of Virginia, to meet in general con-

vention, for the purpose of framing a new government, by the authority of the people only; and that the said convention met on the 6th of May, and continued in session until the 5th of July 1776; and in virtue of their delegated power, established a constitution, or form of government, to regulate and determine by whom, and in what manner, the authority of the people of Virginia was thereafter to be executed. As the people of that country were the genuine source and fountain of all power that could be rightfully exercised within its limits, they had, therefore, an unquestionable right to grant it to whom they pleased, and under what restrictions or limitations they thought proper. The people of Virginia, by their constitution or fundamental law, granted and delegated all their supreme civil power to a legislature, an executive and a judiciary; the first to make; the second to execute; and the last to declare or expound, the laws of the commonwealth. This abolition of the old government, and this establishment of a new one, was the highest act of power that any people can exercise. From the moment the people of Virginia exercised this power, all dependence on, and connection with Great Britain absolutely and forever ceased; and no formal declaration of independence was necessary, although a decent respect for the opinions of mankind required a declaration of the causes which impelled the separation; and was proper, to give notice of the event to the nations of Europe. I hold it as unquestionable, that the legislature of Virginia, established as I have stated, by the authority of the people, was forever thereafter invested with the supreme and sovereign power of the state, and with authority to make any laws in their

discretion, to affect the lives, liberties and property of all the citizens of that commonwealth, with this exception only, that such laws should not be repugnant to the constitution or fundamental law, which could be subject only to the control of the body of the nation, in cases not to be defined, and which will always provide for themselves. The legislative power of every nation can only be restrained by its own constitution: and it is the duty of its courts of justice not to question the validity of any law made in pursuance of the constitution. There is no question but the act of the Virginia legislature (of the 20th of October 1777) was within the authority granted to them by the people of that country; and this being admitted, it is a necessary result, that the law is obligatory on the courts of Virginia, and in my opinion, on the courts of the United States. If Virginia, as a sovereign state, violated the ancient or modern law of nations, in making the law of the 20th of October 1777, she was answerable, in her political capacity, to the British nation, whose subjects have been injured in consequence of that law. Suppose, a general right to confiscate British property, is admitted to be in congress, and congress had confiscated all British property within the United States, including private debts. Would it be permitted, to contend, in any court of the United States, that congress had no power to confiscate such debts, by the modern law of nations? If the right is conceded to be in congress, it necessarily follows, that she is the judge of the exercise of the right, as to the extent, mode and manner. The same reasoning is strictly applicable to Virginia, if considered a sovereign nation; provided, she had not delegated such power to

congress, before the making of the law of October 1777, which I will hereafter consider.

"In June 1776, the convention of Virginia formally declared, that Virginia was a free, sovereign and independent state; and on the 4th of July 1776, following, the United States, in congress assembled, declared the thirteen united colonies free and independent states; and that, as such, they had full power to levy war, conclude peace. &c. I consider this as a declaration, not that the united colonies jointly, in a collective capacity, were independent states, &c., but that each of them was a sovereign and independent state, that is, that each of them had a right to govern itself by its own authority and its own laws, without any control from any other power upon earth.

"Before these solomn acts of separation from the crown of Great Britain, the war between Great Britain and the united colonies, jointly and separately, was a civil war; but instantly, on that great and ever memorable event, the war changed its nature, and became a public war between independent governments; and immediately thereupon, all the rights of public war (and all the other rights of an independent nation) attached to the government of Virginia; and all former political connection between Great Britain and Virginia, and also between their respective subjects, were totally dissolved; and not only the two nations, but all the subjects of each, were in a state of war; precisely as in the present war between Great Britain and France. Vatt, lib. 3, c. 18, § 292-95; lib. 3, c. 5, § 70, 72, 73." *Id.* at 222-24.

Chase held that the 1783 treaty could supersede Virginia's legislation because Virginia had delegated the power to make treaties by entering into the Articles of Confederation:

> "Virginia had a right, as a sovereign and independent nation, to confiscate any British property within its territory, unless she had delegated that power to Congress . . . . [I]f she had before parted with such power, it must be conceded that she once rightfully possessed it.
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> "If the legislature of Virginia could not, by ordinary acts of legislation, do these things, yet, possessing the supreme sovereign power of the state, she certainly could do them, by a treaty of peace; if she had not parted with the power of making such treaty. If Virginia had such power, before she delegated it to congress, it follows, that afterwards, that body possessed it. Whether Virginia parted with the power of making treaties of peace, will be seen by a perusal of the 9th article of the confederation (ratified by all the states, on the first of March 1781), in which it was declared, 'that the United States in congress assembled, shall have the sole and exclusive right and power of determining on peace or war, except in the two cases mentioned in the 6th article; and of entering into treaties and alliances, with a proviso, when made, respecting commerce.' This grant has no restriction, nor is there any limitation on the power in any part of the confederation. A right to make peace, necessarily includes the power of determining on what terms peace shall be made. A power to make treaties must, of necessity, imply a power to decide the

terms on which they shall be made: a war between two nations can only be concluded by treaty." *Id.* at 234, 235-36.

Thus for Chase, as indeed for every justice in these early opinions, Congress possessed what powers it had, both prior to and under the Articles of Confederation, solely by delegation from the States, which therefore possessed all sovereign powers individually prior to that delegation.

In *Sim's Lessee v. Irvine*, 3 U.S. (3 Dall.) 424 (1799), the Court upheld an interest in land created by Virginia in territory subsequently ceded to Pennsylvania pursuant to a compact of 1780 between the two States which contained a provision confirming antecedent property rights. Chief Justice Ellsworth's opinion referred to the laws of Virginia "passed subsequently to her independence." *Id.* at 456. Iredell held that at independence each State separately succeeded both to the property and territorial rights of the crown, subject to any lawful encumbrances thereon. *Id.* at 459. Iredell also expressed his opinion, *id.* at 464, that prior to the Constitution of 1787 the Pennsylvania legislature, being fully sovereign, had the power to ignore an obligation incurred by compact or treaty with another State, and that the courts would have upheld such legislation even though in violation of the compact.

Cooper v. Telfair, 4 U.S. (4 Dall.) 14 (1800), dealt with a Georgia statute of 1782 which confiscated the property of several named persons. The plaintiff, one of the persons named in the act, sued to have the law overturned, arguing that it was a bill of attainder prohibited by the Constitution. The Court unanimously held that in 1782 Georgia was an independent sovereign and therefore had the power to pass such a law unless it was forbidden by its own constitution. Since the constitution of Georgia did not prohibit bills of attainder, the law was valid and the confiscation was upheld.

McIlvaine v. Coxe's Lessee, 8 U.S. (4 Cranch) 209 (1808), concerned a New Jersey law passed during the Revolution confiscating the property of hostile aliens. The Court held that each State became an independent sovereign upon the Declaration of Independence, or before that upon any declaration of independence of its own. At its independence each State acquired all the attributes of sovereignty possessed by any sovereign nation, including the powers of the crown as well as those which had been granted to the colonies by the crown. The Court expressly held that the Treaty of Peace of 1783 was a recognition of the sovereignty of the several States and not a grant of it.

Smith v. Maryland, 10 U.S. (6 Cranch) 286 (1810), involved a Maryland act of 1780 providing for the confiscation of all alien property. The Court construed the Maryland act as effecting a complete confiscation as of the date of its passage with no further steps being required. The Court held that the 1780 act was valid and that, since the confiscation was complete prior to the Treaty of 1783, the treaty did not nullify the confiscation.

Preston v. Browder, 14 U.S. (1 Wheat.) 114 (1816), concerned the validity of a treaty of 1777 between the State of North Carolina and a tribe of Indians. The Court upheld the treaty, noting that after the Declaration of Independence North Carolina was an independent sovereign and that the treaty between North Carolina and an Indian nation to settle hostilities between them was a customary exercise of sovereign power. The Court further held that the boundaries of North Carolina as an independent State were those provided in its colonial charter.

In *United States v. Bevans*, *16* U.S. (3 Wheat.) 336 (1818) (Marshall, C.J.), the Court rejected the argument that the grant of admiralty jurisdiction to the federal courts in the Constitution had divested Massachusetts of territorial sovereignty over the waters of Massachusetts Bay. Marshall declared:

"Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise? This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory, or of general jurisdiction. It is obviously designed for other purposes. It is in the 8th section of the 2d article, we are to look for cessions of territory and of exclusive jurisdiction. Congress has power to exercise exclusive jurisdiction over this district, and over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buldings. It is observable, that the power of exclusive legislation (which is jurisdiction) is united with cession of territory, which is to be the free act of the states. It is difficult to compare the two sections together, without feeling a conviction, not to be strengthened by any commentary on them, that, in describing the judicial power, the framers of our constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction.

"It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction, is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away. The residuary powers of legislation are still in Massachusetts." 3 Wheat. at 389.

It can hardly be doubted that Marshall would have said, had the argument which was successful in the *California* case been presented to him, that the foreign-affairs and defense powers were no more intended to involve a cession of territory than was the admiralty jurisdiction.

In *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), the Court unanimously held that title to land within the United States could not be acquired by purchase from the Indians. Chief Justice Marshall's most interesting opinion dealt with a number of points at issue in the present proceeding. Marshall traced the title to the soil of this country through the royal grants made in the colonial charters, pointing out in particular that the *quo warranto* proceeding at 1624 had not changed the boundaries of Virginia. *Id.* at 578. He noted the recognized principle of international law during the colonial period that title to lands inhabited by savages was acquired by discovery alone, not requiring occupation. *Id.* at 573. He affirmed the continuing legal status of the charters, and the constitutional incapacity of the crown to revoke proprietary charters without cause:

> "These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. A charter intended to convey political power only, would never contain words expressly granting the land, the soil and the waters. Some of them purport to convey the soil alone; and in those cases in which the powers of government, as well as the soil, are conveyed to individuals, the crown has always acknowledged itself to be bound by the grant. Though the power to dismember regal governments was asserted and exercised, the power to dismember proprietary governments was not claimed; and in some instances, even after the

powers of government were revested in the crown, the title of the proprietors to the soil was respected. Charles II. was extremely anxious to acquire the property of Maine, but the grantees sold it to Massachusetts, and he did not venture to contest the right of that colony to the soil. The Carolinas were originally proprietary governments. In 1721, a revolution was effected by the people, who shook off their obedience to the proprietors, and declared their dependence immediately on the crown. The king, however, purchased the title of those who were disposed to sell. One of them, Lord Carteret, surrendered his interest in the government, but retained his title to the soil. That title was respected until the revolution, when it was forfeited by the laws of war." *Id.* at 580-81.

Finally, since the lands in controversy in the litigation lay in the old Northwest territory, he traced the title to that territory of the United States to its cession by Virginia:

"The states, having within their chartered limits different portions of territory covered by Indians, ceded that territory, generally, to the United States, on conditions expressed in their deeds of cession, which demonstrate the opinion, that they ceded the soil as well as jurisdiction, and that in doing so, they granted a productive fund to the government of the Union. The lands in controversy lay within the chartered limits of Virginia, and were ceded with the whole country north-west of the river Ohio. This grant contained reservations and stipulations, which could only be made by the owners of the soil; and concluded with a stipulation, that 'all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of

> the United States as have become, or shall become members of the confederation,' &c., 'according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever.' The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted." *Id.* at 586.

In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Chief Justice Marshall in the most unequivocal terms affirmed the sovereignty and independence of the States separately during the revolutionary and Confederation periods:

> "As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the states appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected." *Id.* at 187.

Harcourt v. Gaillard, 25 U.S. (12 Wheat.) 523 (1827), involved a title dispute to land which one side claimed on the basis of a grant made in 1777 by the British governor of Florida. The land was in the Mississippi territory. Following the Peace of 1783 the area in question had been claimed by the United States, South Carolina and Georgia. While finding it unnecessary to decide between the claims of South Carolina and Georgia, the Court clearly preferred the former on the ground of its colonial charter rights:

> "The original title of South Carolina, under the grant to the lords proprietors, was unquestionable; and she contended, that she had never been legally divested of soil or sovereignty." *Id.* at 525.

> "And although the instrument by which Georgia claimed an extension of her limits to the northern boundary of that territory, was of no more authority or solemnity than that by which it was supposed to have been taken from her, it was otherwise with South Carolina. Her territory had been extended to that limit, by a solemn grant from the crown to the lords proprietors, from whom, in fact, she had wrested it by a revolution, even before the rights of the proprietors had been bought out by the crown." *Id.* at 527.

The Court rejected the claim of the United States in its own right on grounds that are decisive to the issues in this litigation:

> "There are several reasons for putting the claim of the United States out of the question. She has abandoned it, and it is very clear, could never have sustained it. The very ground on which she denied the capacity of Spain to conquer, or take by cession, the territory on the Mississippi, was fatal to the pretensions set up by her against

> Georgia and South Carolina, to wit, that Spain could not acquire, by conquest, a territory within the limits claimed by an ally in the war . . . . *There was no territory within the United States that was claimed in any other right than that of some one of the confederated states; therefore, there could be no acquisition of territory made by the United States, distinct from, or independent of, some one of the states.*" *Id.* at 525-26. (Emphasis added.)

And the Court regarded the Peace of Paris as confirming individual State boundaries and territorial rights:

> "It has never been admitted by the United States, that they acquired anything by way of cession from Great Britain, by that treaty. It has been viewed only as a recognition of pre-existing rights, and on that principle, the soil and sovereignty within their acknowledged limites, were as much theirs, at the declaration of independence, as at this hour. By reference to the treaty, it will be found that it amounts to a simple recognition of the independence and the limits of the United States, without any language purporting a cession, or relinquishment of right, on the part of Great Britain." *Id.* at 527-28.

In *Poole v. Fleeger*, 36 U.S. (11 Pet.) 184 (1837), the Court referred to the holding in *Harcourt v. Gaillard* as "a settled principle," and held that "the prerogative of the king, and the transcendent powers of parliament, devolved on the several states, by the revolution." 11 Pet. at 212a, 212i.

In *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838), the Court held as follows regarding the status of the separate States as successors to the royal prerogative prior to the Constitution of 1787:

> "Those states, in their highest sovereign capacity, in the convention of the people thereof; on whom, by the revolution, the prerogative of the crown, and the transcendent power of parliament devolved, in a plenitude unimpaired by any act, and controllable by no authority (6 Wheat. 651; 8 Ibid. 584, 588); adopted the constitution, by which they respectively made to the United States a grant of judicial power over controversies between two or more states. By the constitution, it was ordained, that this judicial power, in cases where a state was a party, should be exercised by this court as one of original jurisdiction. The states waived their exemption from judicial power (6 Wheat. 378, 380), as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal. By this grant, this court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority; as their agent for executing the judicial power of the United States in the cases specified." *Id.* at 720.

The Court followed established doctrine in regarding every power of the Federal Government as deriving solely by delegation from the separate States:

> "By the first clause of the tenth section of the first article of the constitution, there was a positive prohibition against any state entering into 'any treaty, alliance or confederation;' no power under the government could make such an act valid, nor dispense with the constitutional prohibition. In the next clause, is a prohibition against any state entering 'into any agreement or compact with another state, or with a foreign power, without the

> consent of congress; or engaging in war, unless actually invaded, or in imminent danger, admitting of no delay.' By this surrender of the power, which, before the adoption of the constitution, was vested in every state, of settling these contested boundaries, as in the plentitude of their sovereignty they might; they could settle them neither by war, nor in peace, by treaty, compact or agreement, without the permission of the new legislative power which the states brought into existence by their respective and several grants in conventions of the people. If congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the constitution, when given, left the states as they were before, as held by this court in *Poole v. Fleeger*, 11 Pet. 209; whereby their compacts became of binding force, and finally settled the boundary between them; operating with the same effect as a treaty between sovereign powers." *Id.* at 724-25.

Finally, the Court reaffirmed the established doctrine that in 1783 the United States had no territory other than by virtue of the territorial boundaries of the several States:

> "Hence resulted the principles laid down by this court in *Harcourt v. Gaillard*, 12 Wheat. 526, that the boundaries of the United States were the external boundaries of the several states; and that the United States did not acquire any territory by the treaty of peace, in 1783." *Id.* at 729.

In *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588-92 (1839), the Court held that the States are subject to the same principles of comity in their relations among them-

selves as are prescribed by international law for independent nations. The States "are sovereign States," *id.* at 590. "We think it is well settled that by the law of comity among nations a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this union." *Id.* at 592.

In *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842), the Court reaffirmed all the crucial constitutional doctrines established by the preceding half-century of litigation, and applied them to territorial and proprietary rights in the soil under tide waters. The issue was whether such rights, and specifically the exclusive right to oyster fisheries, had been retained by the proprietors of East Jersey in 1702 or surrendered by them to the crown along with governmental rights. The Court held in favor of surrender. In the course of its exhaustive opinion, the Court confirmed that in the colonial period title to new lands was acquired by discovery alone (*id.* at 409), and held that at independence the States individually succeeded to the sovereign and proprietary rights previously vested in the crown:

> "For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Id.* at 410.
>
> "And when the people of New Jersey took possession of the reins of government, and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the parliament, became immediately and rightfully vested in the state.

"This construction of the surrender is evidently the same with that which it received from all the parties interested at the time it was executed. For it appears by the history of New Jersey, as gathered from the acts, documents, and proceedings of the public authorities, that the crown and the provincial government established by its authority always afterwards in this territory, exercised the same prerogative powers that the king was accustomed to exercise in his English dominions. And, as concerns the particular dominion and propriety now in question, the colonial government from time to time authorized the construction of bridges with abutments on the soil covered by navigable waters; established posts; authorized the erection of wharves; and, as early as 1719, passed a law for the preservation of the oyster fishery in its waters. The public usages, also, in relation to the fisheries continued to be the same. And from 1702, when the surrender was made, until a very recent date the people of New Jersey have exercised and enjoyed the rights of fishery, for shell-fish and floating fish, as a common and undoubted right, without opposition or remonstrance from the proprietors." *Id.* at 416-17.

"Neither is it necessary to examine the many cases which have been cited in the argument on both sides, to show the degree of strictness with which grants of the king are to be construed. The decisions and authorities referred to apply more properly to a grant of some prerogative right to an individual to be held by him as a franchise, and which is intended to become private property in his hands. The dominion and property in navigable waters, and in the lands under them,

being held by the king as a public trust, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted to his care for the common benefit. In such cases, whatever does not pass by the grant, still remains in the crown for the benefit and advantage of the whole community. Grants of that description are therefore construed strictly —and it will not be presumed that he intended to part from any portion of the public domain, unless clear and especial words are used to denote it. But in the case before us, the rivers, bays, and arms of the sea, and all prerogative rights within the limits of the charter undoubtedly passed to the Duke of York, and were intended to pass, except those saved in the letters patent. The words used evidently show this intention; and there is no room, therefore, for the application of the rule above mentioned.

"The questions upon this charter are very different ones. They are: Whether the dominion and propriety in the navigable waters, and in the soils under them, passed as a part of the prerogative rights annexed to the political powers conferred on the duke? Whether in his hands they were intended to be a trust for the common use of the new community about to be established; or private property to be parcelled out and sold to individuals, for his own benefit. And in deciding a question like this, we must not look merely to the strict technical meaning of the words of the letters patent. The laws and institutions of England, the history of the times, the object of the charter, the contemporaneous construction given to it, and the usages under it, for the century and more which has since elapsed, are all entitled to consideration

and weight. It is not a deed conveying private property to be interpreted by the rules applicable to cases of that description[.] It was an instrument upon which was to be founded the institutions of a great political community; and in that light it should be regarded and construed.

"Taking this rule for our guide, we can entertain no doubt as to the true construction of these letters patent. The object in view appears upon the face of them. They were made for the purpose of enabling the Duke of York to establish a colony upon the newly discovered continent, to be governed, as nearly as circumstances would permit, according to the laws and usages of England; and in which the duke, his heirs and assigns, were to stand in the place of the king, and administer the government according to the principles of the British constitution. And the people who were to plant this colony, and to form the political body over which he was to rule, were subjects of Great Britain, accustomed to be governed according to its usages and laws.

"It is said by Hale in his Treatise de Jure Maris, Harg. Law Tracts, 11, when speaking of the navigable waters, and the sea on the coasts within the jurisdiction of the British crown, 'that although the king is the owner of this great waste, and, as a consequence of his propriety, hath the primary right of fishing in the sea and creeks, and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea, or creeks, or arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained of it, unless in such places, creeks, or navigable rivers, where either the king or some

particular subject hath gained a propriety exclusive of that common liberty.'

"The principle here stated by Hale, as to 'the public common of piscary' belonging to the common people of England, is not questioned by any English writer upon that subject. The point upon which different opinions have been expressed, is whether since Magna Charta, 'either the king or any particular subject can gain a propriety exclusive of the common liberty.' For, undoubtedly rights of fishery, exclusive of the common liberty, are at this day held and enjoyed by private individuals under ancient grants. But the existence of a doubt as to the right of the king to make such a grant after Magna Charta, would of itself show how fixed has been the policy of that government on this subject for the last six hundred years; and how carefully it has preserved this common right for the benefit of the public. And there is nothing in the charter before us indicating that a different and opposite line of policy was designed to be adopted in that colony. On the contrary, after enumerating in the clause herein before quoted, some of the prerogative rights annexed to the crown, but not all of them, general words are used, conveying 'all the estate, right, title, interest, benefit, advantages, claim, and demand' of the king in the lands and premises before granted. The estate and rights of the king passed to the duke in the same condition in which they had been held by the crown, and upon the same trusts. Whatever was held by the king as a prerogative right, passed to the duke in the same character. And if the word 'soils' be an appropriate word to pass lands covered with navigable water, as contended for on the part of the defendant in error, it is associated in the letters patent with 'other

> royalties," and conveyed as such. No words are used for the purpose of separating them from the jura regalia, and converting them into private property, to be held and enjoyed by the duke, apart from and independent of the political character with which he was clothed by the same instrument. Upon a different construction, it would have been impossible for him to have complied with the conditions of the grant. For it was expressly enjoined upon him, as a duty in the government he was about to establish, to make it as near as might be agreeable in their new circumstances, to the laws and statutes of England; and how could this be done if in the charter itself, this high prerogative trust was severed from the regal authority? If the shores, and rivers, and bays, and arms of the sea, and the land under them, instead of being held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shell-fish as floating fish, had been converted by the charter itself into private property, to be parcelled out and sold by the duke for his own individual emolument? There is nothing we think in the terms of the letters patent, or in the purposes for which it was granted, that would justify this construction. And in the judgment of the Court, the land under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; and were to be held by him in the same manner, and for the same purposes that the navigable waters of England, and the soils under them, are held by the crown." *Id.* at 411-14.

The cases thus far discussed set forth a historically sound, balanced and, for the most part, consistent ap-

proach. In 1936, Justice Sutherland introduced a bizarre and dangerous eccentricity into constitutional law with his opinion for the Court in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304. Sutherland declared that external sovereignty and power over foreign relations had passed directly from the crown to the Federal Government, and that those federal powers in no way depend on the Constitution but existed prior thereto and independently thereof.

This view—which if consistently applied would, for example, permit a treaty to override the Bill of Rights—has been denounced by virtually every learned commentator who has discussed it as both historically preposterous and constitutionally reprehensible.[66] The theory would have been the ultimate heresy to the revolutionary statesmen, whose first article of faith, as we have seen, was that sovereignty was not "inherent" in *any* governmental body, but in the people of the States, and that sovereign powers

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[66] *See, e.g.*, Goebel, Exhibit 694, p. 768; Berger, "The Presidential Monopoly of Foreign Relations," 71 Mich. L. Rev. 1 (1972); Warmuth, "The Nixon Theory of the War Power: a Critique," 60 Calif. L. Rev. 623 (1972); Berger, "War-Making by the President," 121 U. Pa. L. Rev. 29 (1972); Bickel, "Congress, the President, and the Power to Wage War," 48 Chi-Kent L. Rev. 131 (1971); Bartley, the Tidelands Oil Controversy 30 and *passim* (1953); Kauper, "The Steel Seizure Case," 51 Mich. L. Rev. 141, 144-45 (1952); Levitan, "The Foreign Relations Power: an Analysis of Mr. Justice Sutherland's Theory," 55 Yale L.J. 467 (1946); Patterson, *In re* United States v. Curtiss-Wright Corp.," 22 Tex. L. Rev. 286 (1944); Quarles, "The Federal Government: as to Foreign Affairs. Are Its Powers Inherent as Distinguished from Delegated?," 32 Geo. L.J. 375 (1944); Goebel, "Constitutional History and Constitutional Law," 38 Col. L. Rev. 555 (1938); Lee, "Doctrine of Inherent Power," 3 John Marshall L.J. 293 (1937).

Among the recent manifestations of the theory are undeclared "presidential" wars and the burglary by federal agents of a doctor's office, justified as "well within the President's inherent constitutional powers" to protect national security. Washington Star-News, July 24, 1973, p. 1.

could be exercised only by their agents pursuant to delegation. "To conjure up an 'inherent' executive power in the teeth of this history is both to shut our eyes to the historical record and to abort the plainly manifested intention of the Founders to create a federal government of limited and enumerated powers." Berger, "The Presidential Monopoly of Foreign Relations," 71 Mich. L. Rev. 1, 33 (1972). "It is high time that the mischievous and demonstrably wrong dicta of Justice Sutherland be put to rest." *Id.* at 28. Berger's article contains an exhaustive and unanswerable demolition of Sutherland's theory from an historical point of view.

Even Professor Henkin, writing after he was retained by the United States in the present litigation, could bring himself to accord *Curtiss-Wright* only the most qualified and doubtful approbation:

> "Justice Sutherland's theory has not been unanimously acclaimed. His history, in particular, has been challenged, and surely it is not manifestly all his way: there is disagreement whether the Declaration of Independence declared a single sovereign entity or thirteen independent nation-states; there is evidence that, after independence, at least some of the erstwhile colonies, at least for some time and for some purposes, considered themselves sovereign, independent states; even under the Articles of Confederation it is not wholly clear that 'the United States' was a sovereign entity rather than a band of sovereigns acting together through the agency of the Congress. But Sutherland's view of the locus of sovereignty between 1776 and 1789 has strong support. . . ." Exhibit 700, p. 23.
>
> "That there were to be principal powers of government outside the Constitution is not inti-

> mated in the Constitution itself, in the records of the Convention, or in the Federalist Papers and other contemporary debates. The Sutherland theory, like the earlier cases finding power in sovereignty, carves a broad exception in the historic conception, often reiterated, never questioned and explicitly reaffirmed in the Tenth Amendment, that the federal government is one of enumerated powers only. It means that a panoply of important powers is to be determined from unwritten, uncertain, changing concepts of international law and practice, developed and growing outside the constitutional tradition and our particular heritage." Exhibit 700, pp. 24-25.

Professor Henkin recognized that Sutherland's theory constituted pure dictum, *id.* at 25, and indeed that the Justice strained to import it into a decision to which it was wholly unnecessary in order to give status to a private view which he had held long before he had become a member of the Court and in which he was most interested, *id.* at 288 n.6.

The theory has, moreover, been repudiated by several subsequent decisions of the Court.

In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Solicitor General Perlman relied on *Curtiss-Wright*, for the proposition that the President had "inherent" power to seize the steel mills during the Korean War, for military purposes, as commander in chief. 96 L. Ed. 1163. The Court's opinion did not mention *Curtiss-Wright* but flatly repudiated its theory: "the President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." 343 U.S. at 585. Justice Jackson's concurring opinion dismissed Sutherland's theory in a footnote as dictum. 343 U.S. at 635 n.2.

In *Perez v. Brownell*, 356 U.S. 44, 57 (1958), Justice Frankfurter's opinion for the Court, while relying on the *holding* of *Curtiss-Wright*, repudiated Sutherland's *theory* by carefully and pointedly declaring the wholly different and traditional basis for the federal foreign-affairs power, *i.e.*, that it was delegated to the Federal Government by the States by the provisions of the Constitution of 1787:

> "Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318; *Mackenzie v. Hare*, 239 U.S. 299, 311-312. The States that joined together to form a single Nation and to create, through the Constitution, a Federal Government to conduct the affairs of that Nation must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations." 356 U.S. 57.

In *Zemel v. Rusk*, 381 U.S. 1 (1965), Chief Justice Warren cited the *Curtiss-Wright* case for the proposition that Congress ordinarily gives the Executive more authority over foreign affairs than over domestic matters; but he went on to observe: "this does not mean that simply because a statute deals with foreign relations, it can grant the Executive unrestricted freedom." The Court's rejection of the theory of inherent executive power was in keeping with the position taken earlier in *Reid v. Covert*, 354 U.S. 1 (1956). Responding to the argument that the Constitution had no application to foreign affairs, Justice Black in that case stated emphatically:

> "The United States is entirely a creature of the Constitution. Its powers and authority have no

> other source. It can only act in accordance with all the limitations imposed by the Constitution." 354 U.S. at 5-6.

"In short," one scholar has recently concluded after a review of the pertinent Supreme Court case law, "the dictum in *Curtiss-Wright* has neither paternity nor progeny." Warmuth, "The Nixon Theory of the War Power: a Critique," 60 Calif. L. Rev. 623, 697 (1972).

Finally, it remains only to observe that the *Curtiss-Wright* dictum has nothing whatever to do, either directly or by implication, with the issue in the present litigation. Even had Justice Sutherland been correct, and external sovereignty and the foreign-affairs power had passed directly from the crown to the Federal Government, there is nothing in those concepts which deprives the States of territorial and property rights in the continental shelf. This point will be discussed at pp. 428-43, *infra*.

IX.

THE EXCLUSIVE RIGHTS OF THE STATES TO THE CONTINENTAL SHELF HAVE NOT BEEN ABANDONED OR EXTINGUISHED SINCE 1787.

A. IT WAS WELL UNDERSTOOD THROUGHOUT OUR HISTORY DOWN TO 1947 THAT UNDER THE CONSTITUTION THE STATES RETAINED THEIR RIGHTS IN TIDE WATERS, INCLUDING THE MARGINAL SEA, AND THE BED AND SUBSOIL THEREOF, AND CONGRESS HAS REPUDIATED THE *CALIFORNIA* COURT'S DECISION TO THE CONTRARY.

It was universally recognized and understood throughout our history until the 1930's that the States individually retained their territorial and property rights in the marginal sea, and that the United States as a separate entity had no such rights therein. The United States never made any claim to exclude the States from those rights until 1937, when Secretary Ickes did so, reversing a position he had taken previously. App. 999; Bartley, *The Tidelands Oil Controversy*, 95-101, 128-35 (1953). Little need be said about the universal understanding, since the Court in the *California* case recognized and admitted it, if somewhat grudgingly, with respect to its own past decisions:

> "As previously stated, this Court has followed and reasserted the basic doctrine of the *Pollard* case many times. And in doing so it has used language strong enough to indicate that the Court then believed that states not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not." *United States v. California*, 332 U.S. 19, 36 (1947).

While many of the decided cases dealt with internal waters rather than with the marginal sea, they all relied on and were wholly consistent with the English law of property in land under water, and, as we have seen, that law never made any distinction between property rights in internal tide waters and those in the marginal sea. The *California* Court utterly misunderstood or ignored that English legal background when it said that the statements in prior Supreme Court decisions were "merely paraphrases or offshoots of the *Pollard* inland-water rule, and were used, not as enunciation of a new ocean rule, but in explanation of the old inland-water principle." *Ibid.* The point is that English and American common law had never made any distinction whatever between "inland" and "ocean" waters with respect to property rights. There was no need for a "new" ocean rule; it had been there all along.

Moreover, *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845), enunciated no "inland-water rule"; that decision expressly declared that "the territorial limits of Alabama have extended all her sovereign power into the sea." 3 How. at 230. It is beyond question that for the *Pollard* Court "navigable waters," title to the bed of which was in the States, included the marginal sea as well as inland waters, with no distinction between them, just as had always been the case in English law and practice.

The *California* Court recognized that there were a number of cases which did specifically affirm State rights in the marginal sea, 332 U.S. at 37-38. Its treatment of *Manchester v. Massachusetts*, 139 U.S. 240 (1891), was typical of an approach wholly contrary to both the letter and the spirit of those decisions. The Court observed that in *Manchester* "the illegal fishing charged was in Buzzard's Bay, found to be within Massachusetts territory." *Id.* at 37. While that is true, the *Manchester* Court said nothing about limiting the Massachusetts fisheries statute in

question, which extended to all of Massachusetts' waters, including its territorial sea. To the contrary, the Court held: "the extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and except so far as any right of control has been granted to the United States, this control remains with the States." 139 U.S. at 264. And the Court declared that Massachusetts had a right to territorial waters to a mininum of three miles from the coast. *Id.* at 257.

It is unnecessary to belabor the point, or to discuss other decisions, since as we have seen the *California* Court recognized that it was overruling a long tradition of law and practice which had many times been approved in its own prior decisions.

These decisions, and those of other courts, are adequately treated for our present purposes in the papers in the *California* and subsequent cases, and need not be rehashed here. See especially App. 905-62; U.S. Exhibit 6, pp. 672-73, 678-79, 697-98; U.S. Exhibit 8, 48-49; U.S. Exhibit 11, pp. 7-8, 24-40; U.S. Exhibit 12, pp. 10-16, 23; U.S. Exhibit 17, pp. 208-10. State-court cases are uniformly to the same effect; a few of them are cited at pp. 115-16 and 192, *supra.*

The two principal 19th-century learned authorities on the law of waters likewise had no doubt that the States had preserved their rights under English law and their own charters to all their waters, including the marginal seas. Angell, *Treatise on the Right of Property in Tide Waters, and in the Soil and Shores Thereof* 50 and *passim* (1826); Gould, *A Treatise on the Law of Waters* 75-76 and *passim* (1900). *Accord,* Bartley, *The Tidelands Oil Controversy, passim* (1953); Whittlesey, *Law of the Seashore, Tidewaters and Great Ponds* xxviii-xxxi (1932); Williams (Regional Plan of New York and Its Environs), *Foreshore and Rights in Land Under Navigable Waters in the New York Region*

v. 202-03 (1928); Gerard, *Title of the Corporation and Others to the Streets, Wharves, Piers, Parks, Ferries and Other Land and Franchises in the City of New York* 1-17 (1872); Embrey (Virginia State Commission on Conservation and Development), *Waters of the State* 128-62, 198-211 (1931); Mershon, *The Major and the Queen* 65-66; Mershon, *English Crown Grants* 104-16; 1 Farnham, *The Law of Water and Water Rights* 48-52, 74-76 (1904).

There was likewise, throughout the period 1783-1947, a very considerable body of State legislative and administrative assertion and exercise of territorial and property rights in the marginal sea. Again we shall not deal with this in any detail, since we do not expect that the assertion will be contested. A large body of material on these points is found in U.S. Exhibits 1 through 17; that material has been supplemented to some extent by exhibits introduced by the Common Counsel States in this proceeding. The State powers in question are documented, and examples given, in Gould, *op. cit.* at 72-95.

We assume, for example, that it will not be contested that State statutes repeatedly regulated surface fishing and other marginal-sea activity. *E.g.*, New Jersey: App. 992-93; Massachusetts: U.S. Exhibit 9, pp. 90-91; Exhibits 519, 521, 522, 526, 544, 545, 552; see *Manchester v. Massachusetts, supra.* In *Louisiana v. Mississippi*, 202 U.S. 1, 52 (1906), the Court declared that "the maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea."

The States frequently enacted statutes regulating and in some instances leasing sedentary fisheries in the marginal sea. New Jersey: App. 991-93; Rhode Island: App. 991-92; Virginia: App. 992; *Commonwealth v. Newport News*, 158

Va. 521, 164 S.E. 689, 698 & n. 6 (1932); Georgia: App. 992; U.S. Exhibit 6, pp. 648-50; North Carolina: U.S. Exhibit 6, pp. 660-61; Massachusetts: U.S. Exhibit 9, p. 90; Exhibits 513, 514, 515, 516, 519, 520, 521, 544, 550, 551, 552. Such State jurisdiction was held to exclude federal jurisdiction within the State's territorial limits in *The Abby Dodge*, 223 U.S. 166 (1912).

As Professor Henkin conceded (Tr. 2662), the States habitually executed deeds of portions of the seabed of the marginal sea to the United States, which the United States requested and accepted, usually on the basis of a formal opinion by both federal and State counsel confirming the State's title. South Carolina: App. 997; Florida; App. 997-98; New Jersey: Exhibits 486, 487, 489; Delaware: App. 998; New York: Exhibits 488, 547, 548, 549; Virginia: App. 998. See also Bartley, *The Tidelands Oil Controversy* 122-28 (1953). The States also enacted statutes controlling the construction of wharves, etc., or transferring the title of the seabed, in the marginal seas. New Jersey: App. 994; New York: App. 995; U.S. Exhibit 12, pp. 7-9.

Several of the States during the 19th and early 20th centuries enacted statutes setting the limit of their full territorial sovereignty in the marginal sea as three miles from the coast. U.S. Exhibit 6, pp. 703, 706-07; U.S. Exhibit 11, pp. 47-48; see also Exhibit 494. At pp. 389-427, *infra*, we demonstrate that the three-mile limit for purposes of full territorial sovereignty was never regarded as incompatible with assertions of more limited rights of jurisdiction and property beyond that limit. The point here is that the three-mile statutes represent solid examples of the universal understanding that the States individually possessed whatever rights the nation as a whole possessed in the marginal sea, and thus are flatly contrary to the *California* decision. Territorial boundaries were, of course, regarded as carrying ownership in property with them.

Finally, when exploitable mineral resources of oil and gas began to be discovered, in the late 19th century and the early years of this century, in the seabed of the marginal seas of certain of the States, it was assumed as a matter of course for many years that it was the State government, not the federal, which had the exclusive right to explore and to exploit them. Bartley, *The Tidelands Oil Controversy, passim* (1953); Hearings on Submerged Oil Lands Before Subcommittee No. 4, House Committee on the Judiciary 76th Cong., 1st Sess., p. 110 (1939); *Boone v. Kingsbury*, 206 Cal. 148, 273 Pac. 797 (1928);[67] Calif. Stats. 1921, c. 303, p. 404; Calif. Stats. 1923, p. 593; Ireland, "Marginal Seas Around the States," 2 La. L. Rev. 252 (1940); U.S. Exhibit 7, pp. 70-71 n.10.

Bartley aptly described the reaction to the *California* line of cases, in the light of the universal understanding prior thereto, as follows:

> "It came as a considerable shock to the officials of coastal states to find that they did not have the authority over the area from low-water mark to the three-mile limit which they had assumed. The coastal states for nearly 150 years had utilized and controlled the marginal sea area as though they owned it—which in fact they thought they did. They had regulated the fisheries in the area, applying state laws to vessels licensed under national statutes and operated by out-of-state persons. They had prescribed the size of fish that might be taken, had directed the manner in which fish might be caught, and had even exercised suc-

[67] That decision held that California owned the soil of its marginal sea and had the right to license the exploitation of the mineral resources thereof. Review was sought in the Supreme Court of the United States, which denied certiorari and dismissed the appeal for want of a substantial federal question. Workman v. Boone, 280 U.S. 517 (1929).

> cessful though indirect control over the activities of floating canneries operating outside the three-mile limit. Oysters, shrimp, and sponges had been subjected to similar controls. The states had granted or leased areas in the marginal sea to private persons and corporations and to the national government itself. The purposes of these state grants were many and varied. Long before any person dreamed of black gold, the process of land reclamation and harbor development, on land granted or leased by the states, had begun. Breakwaters had been built and harbors dredged from below low-water mark and converted to useful commercial purposes. Later, with visions of wealth from petroleum royalties spurring them to action, the states of California, Texas, Louisiana, and, to a lesser extent, others, had leased the offshore lands for oil production. Immensely valuable property rights had been established in the marginal-sea areas, rights dependent upon grant or lease by a state made upon the unchallenged assumption that the state 'owned' the area it purported to grant or lease." *Op. cit.* at 5; see also *id.* at 27-42.

In *United States v. Louisiana*, 363 U.S. 1, 17-19 (1960), the Supreme Court frankly recognized the overwhelming opposition to its *California* decision, and set forth conclusive evidence showing that Congress disagreed with the decision and had acted to repudiate it:

> "It was strongly urged, both before and after the *California* decision that because the States had for many years relied on the applicability of the *Pollard* rule to the marginal sea, it was just and equitable that they be definitively given the rights which follow from such an application of the rule,

and the *California*, *Louisiana*, and *Texas* cases were severely criticized for not having so applied it.[17]

"[17] H.R. Rep. No. 1778, 80th Cong., 2d Sess., to accompany H.R. 5992, at 1, 2, 3, 16 (Apr. 21, 1948): 'H.R. 5992 is, in substance, the same as numerous bills introduced in the House . . . . [T]he aforementioned bills [were] introduced in the Congress to preserve the status quo as it was thought to be prior to the California decision . . . to confirm and establish the rights and claims of the 48 States, long asserted and enjoyed with the approval of the Federal Government, to the lands and resources beneath navigable waters within their boundaries . . . . The repeated assertions by our highest Court for a period of more than a century of the doctrine of State ownership of all navigable waters, whether inland or not, and the universal belief that such was the settled law, have for all practical purposes established a principle which the committee believes should as a matter of policy be recognized and confirmed by Congress as a rule of property law.'

"S. Rep. No. 1592, 80th Cong., 2d Sess., to accompany S. 1988, at 17-18 (June 10, 1948), after noting that the legal profession had long believed that the States owned the lands under navigable waters within their territorial jurisdiction, went on to comment:

" 'The evidence is conclusive that not only did our most eminent jurists so believe the law to be, but such was the belief of lower Federal court

jurists and State supreme court jurists as reflected by more than 200 opinions. The pronouncements were accepted as the settled law by lawyers and authors of leading legal treatises.

" 'The present Court in the California decision did not expressly overrule these prior Supreme Court opinions but, in effect, said that all the eminent authorities were in error in their belief.

" 'For the first time in history the Court drew a distinction between the legal principles applicable to bays, harbors, sounds, and other inland waters on the one hand, and to submerged lands lying seaward of the low-water mark on the other, although it appears the Court had ample opportunity to do so in many previous cases, but failed or refused to draw such distinction. In the California decision the Court refused to apply what it termed 'the old inland water rule' to the submerged coastal lands; however, historically speaking, it seems clear that the rule of State ownership of inland waters is, in fact, an offshoot of the marginal sea rule established much earlier.'

"H.R. Rep. No. 695, 82d Cong., 1st Sess., to accompany H.R. 4484, at 5 (July 12, 1951):

" 'Title II merely fixes as the law of the land that which, throughout our history prior to the Supreme Court decision in the California case in 1947, was generally believed and accepted to be the law of the land; namely, that the respective States are the sovereign owners of the land beneath navigable waters within their boundaries and of the natural resources within such lands and waters. Therefore, title II recognizes, confirms, vests, and establishes in the States the title

to the submerged lands, which they have long claimed, over which they have always exercised all the rights and attributes of ownership.'

"S. Rep. No. 133, 83d Cong., 1st Sess., to accompany S.J. Res. 13, at 7-8 (Mar. 27, 1953):

" 'All of these areas of submerged lands have been treated alike in this legislation because they have been possessed, used, and claimed by the States under the same rule of law, to wit: That the States own all lands beneath navigable waters within their respective boundaries. Prior to the California decision, no distinction had been made between lands beneath inland waters and lands beneath seaward waters so long as they were within State boundaries.

" 'The rule was stated by the Supreme Court in the early case of *Pollard v. Hagan* . . . .

* * *

" 'The purpose of this legislation is to write the law for the future as the Supreme Court believed it to be in the past—that the States shall own and have proprietary use of all lands under navigable waters within their territorial jurisdiction, whether inland or seaward, subject only to the governmental powers delegated to the United States by the Constitution.' "

In his separate opinion Justice Black, author of the *California* decision, likewise fully recognized Congress' conclusions and the facts on which they were based:

"[W]e must look to the claims, understandings, expectations and uses of the States throughout their history. This is because of the congressional expressions, stated time and time again that the

Act's purpose was to restore to the States what Congress deemed to have been their historical rights and powers. Nor can I accept the Government's argument that these States' interests in the marginal seas must be determined in accord with the national policy of foreign relations. Everything in the very extended congressional hearings and reports refutes any such idea. Instead, these sources indicate that Congress passed the Act to apply broad principles of equity—not as we see it but as Congress saw it.[8]

"[8]Under the heading, 'Equity best served by establishing State ownership,' the earlier Senate Report incorporated in the Report on the 1953 Act summarizes the equitable features involved:

" 'The repeated assertions by our highest Court for a period of more than a century of the doctrine of State ownership of all navigable waters, whether inland or not, and the universal belief that such was the settled law, have for all practical purposes established a principle which the committee believes should as a matter of policy be recognized and confirmed by Congress as a rule of property law.

" 'The evidence shows that the States have in good faith always treated these lands as their property in their sovereign capacities; that the States and their grantees have invested large sums of money in such lands; that the States have received, and anticipate receiving large income from the use thereof, and from taxes thereon; that the bonded indebtedness, school funds, and tax structures of several States are largely dependent upon State ownership of these lands; and that the legislative, executive, and judicial branches of the

Federal Government have always considered and acted upon the belief that these lands were the properties of the sovereign States.

" 'If these same facts were involved in a dispute between private individuals, an equitable title to the lands would result in favor of the person in possession . . . . ' S. Rep. No. 133, 83d Cong., 1st Sess. 67, reprinting S. Rep. No. 1592, 80th Cong., 2d Sess.

"To the same effect is the conclusion of the 1953 Report: 'By this joint resolution the Federal Government is itself doing the equity it expects of its citizens.' *Id.* at 24."

* * *

". . . The very last paragraph of the report on the bill referred to it as 'an act of simple justice to each of the 48 States in that it reestablishes in them as a matter of law that possession and control of the lands beneath navigable waters inside their boundaries which have existed in fact since the beginning of our Nation. It is not a gift; it is a restitution.' "[13]

"[13] *Id.*, at 24."

* * *

"It is admitted that prior to 1937 the United States never claimed any title to, or exercised any possession over, any part of these marginal lands, either within or without three-mile limits, except under grants from the States. On the other hand, each of the Gulf States began to exercise acts of possession, ownership, dominion and sovereignty over the marginal belt from the time of admission into the Union, without regard to any three-mile

limit. The hearings of Congressional Committees show and their reports assert that very large sums of money have been spent by the States and their public agencies and grantees in the development and improvement of the marginal submerged lands adjacent to the States' borders. Not only have the States' possession, dominion and sovereignty over these marginal belts been open and notorious, but that is coupled with the fact that for much more than a century federal departments and agencies not only acquiesced in but unequivocally recognized the States' rightful claims to these belts. It is conceded that in many instances the Government itself has deemed it necessary to acquire title from these States before attempting to exercise any power of its own. There is nothing to indicate that the claims or uses of the marginal lands were ever limited to three miles." 363 U.S. at 90-91, 92, 94-95.

See also Exhibit 813, pp. 22-24, 32, 40-44 for still further proof that Congress repudiated the *California* line of decisions as incorrect.

The decisions have also been rejected by the vast preponderance of scholarly comment as unsound (p. 433, *infra*), and their rationale that federal ownership of submerged lands was required by the foreign-affairs and defense powers has been repudiated by the State Department, Congress and subsequent decisions of the Court; see pp. 433-39, *infra*. In view of all this, there is no merit in plaintiff's contention (Pl. Br. 25-29) that because of the *California* line of decisions the defendant States bear "a heavy burden" in order to prevail in this proceeding. If any one bears a heavy burden, it is surely the plaintiff.

B. THE UNITED STATES DID NOT ABANDON OR RELINQUISH THE RIGHTS OF THE STATES BY ADOPTING THE THREE-MILE LIMIT.

Plaintiff contends that any rights of the States in the continental shelf beyond three miles which existed in 1789 have since been extinguished through renunciation or abandonment by the United States. The United States makes no claim that there was ever any express or explicit abandonment of such rights; the argument is solely that such abandonment necessarily followed from the United States' adoption of and adherence to the three-mile limit of territorial waters. Tr. 2647-48.

The short answer to plaintiff's argument is that, even if it were the fact that the United States had at any time acted as though rights in the continental shelf had been abandoned by implication (to repeat: no express abandonment has been or could be alleged), the United States has long since changed that position and has, since 1945 by plaintiff's admission, been a vigorous advocate of exclusive continental-shelf rights, while continuing to adhere to the three-mile limit with respect to full territorial sovereignty. The legitimacy of the States' title should be judged in the light of the United States' present expressly asserted title against foreign nations, rather than in the light of an alleged implied position in past years inconsistent with that title. In a court of equity, certainly, it would be unconscionable to presume that the United States had extinguished State property rights through a course of conduct alleged to be inconsistent therewith, and that thereafter the United States by reversing that course of conduct had asserted and perfected those very same rights, not on behalf of the States but on behalf of itself. From an equitable point of view such a sorry argument is little better than a defense of larceny after trust. Equity aside, there is no reason in law why the States' claims as of today should not be weighed against the United States' present in-

ternational posture, rather than against some alleged prior inconsistent position of the United States which by plaintiff's admission was repudiated many years ago.

We think the foregoing answer to plaintiff's contention is conclusive. Nonetheless, we shall proceed to demonstrate that the United States' adherence to the three-mile limit was never understood to entail the renunciation of all rights of every kind out beyond three miles, and particularly was never understood as a renunciation of the right involved herein: the right of exclusive exploitation of the resources of the continental shelf. To the contrary, history and the record show that the three-mile limit was never absolute, and was well understood not to preclude the assertion of rights for certain purposes to greater distances. The three-mile limit was never applied by the United States to the seabed and subsoil of the continental shelf; it was regarded as applicable only to the surface of the marginal seas. This was in line with the purpose of the three-mile limit, which was to assure the greatest possible freedom of the seas for navigation, for naval operations and to some extent for surface fishing. Since the purposes of the rule had no application to the seabed, the rule did not apply there either.

Judge Jessup is the leading living scholar in this country, and probably in the world, on the history and nature of territorial waters and of the three-mile limit. Judge Jessup testified that the United States has never abandoned or renounced the property rights of the States in the continental shelf, and specifically that no such renunciation can be deduced from the United States' adoption of and adherence to the three-mile limit. App. 502-03, 524. Judge Jessup's entire testimony stands for, and demonstrates, the proposition that there is no inconsistency between the three-mile limit and its purposes, on the one hand, and, on the other, exclusive rights to the exploitation of continental-shelf resources to a much greater distance.

1. NO RENUNCIATION CAN BE INFERRED FROM MERE SILENCE.

It can hardly be supposed that a renunciation by the United States of vested State territorial and property rights would have occurred casually or implicitly, without discussion or protest. In the period when the renunciation allegedly occurred, it would almost certainly have been regarded as beyond the constitutional power of the Federal Government to accomplish without the consent of the affected States. Professor Henkin was at pains to argue that it might be held today that the United States does have the power to alter State boundaries or to renounce State territorial rights without such consent. Tr. 1914-15. But Professor Henkin conspicuously refrained from arguing that it would have been so held before recent times; and he conceded the existence of what he called "aging dicta that the United States cannot cede territory of a State without its consent." Tr. 1914. In fact it is easy to demonstrate that in the 19th century State consent to such a cession was regarded as essential.

That question arose in acute fashion in the dispute between the United States and Great Britain regarding the border between Maine and New Brunswick. At one time the dispute was arbitrated, but the United States rejected the arbitral award in 1831 because of objections by Maine and Massachusetts. The United States then negotiated an agreement with Maine to gain a free hand in negotiations with Great Britain (Exec. Doc. 431, 25th Cong., 2d Sess.), but it was never ratified. Subsequently Secretary of State Webster, in preparation for further negotiations, obtained the appointment by Massachusetts and Maine of representatives to participate in the negotiations. Maine's instructions to its delegates required compensation for any Maine lands given up in a negotiated treaty. Consequently, as part of the Webster-Ashburton Treaty of 1842, the United States obligated itself to pay Maine and

Massachusetts each $150,000 in return for the renunciation of claims to disputed land awarded to Great Britain as part of the agreement. See generally 1 Moore, *Arbitration Digest* 90-153 (1898); 22 *British and Foreign State Papers* 818-32 (1847); 7 Winsor, *Narrative and Critical History of America* 177-80 (1888). In 1833 the United States officially explained to the British that the Federal Government had no constitutional power to cede any territory of a State. 22 *British and Foreign State Papers* at 819. In view of this history, it is impossible to maintain that the rights of the Atlantic States in the continental shelf could have been renounced by the United States in the 18th or 19th century, not only without the consent of the affected States but without even any formal act or instrument to accomplish the alleged renunciation.

Nor may it be soundly contended that the rights of the States were lost through mere inaction or lack of assertion or exploitation. The fact is that from the foundation of the Union until very recent times there was no discovery or indication of any exploitable resources in the Atlantic continental shelf more than three miles from the coasts of the defendant States. There was therefore no occasion for the continued reiteration of the rights of the States; the problem simply did not arise. But this does not in any way imply that, if exploitable resources *had* been discovered in the continental shelf, the United States vis-a-vis foreign powers, and the States individually, would have refrained from asserting the exclusive right to their exploitation—a right which they did, of course, assert once exploitable resources were found or even suspected.[68] Obviously, if exploitable resources had been found during the 19th century

[68] It bears mentioning that under English law the right to an exclusive fishery is not abandoned by non-use, even over a long period of time. App. 862. Title to land, of course, is never lost by lack of occupation, exploitation or use, but only by the establishment of adverse possession by a new owner.

and the States had remained silent, allowing individual citizens and foreigners to reap the benefits thereof, a case for abandonment or renunciation of their exclusive rights could be made out. But no such case can be made out from the mere lack of constant reiteration of those rights when no occasion for their reiteration existed or arose.

2. The United States' Adherence to the Three-Mile Limit Has Not Been Consistent or Unqualified.

In view of plaintiff's heavy reliance on the three-mile limit, it is necessary to examine the circumstances of the United States' adoption of and adherence to that limit. Professor Henkin's position seems to be that the three-mile limit was established law even prior to the American Revolution and that the United States merely followed standard practice in adhering to it. Tr. 1899. This of course is the opposite position from that of the *California* decision, which was apparently written under the impression that international law permitted no territorial waters when the United States became independent and that the right to such waters arose only thereafter, largely through the acts of the United States. 332 U.S. at 32-33. The truth is that neither of these bizarre views is accurate, but rather, as we have already shown, that international law was perfectly clear in the late 18th century that every coastal state was entitled to territorial waters, that there was no general agreement on the extent of those waters, and that three miles was the least that any one had ever proposed for the extent of territorial waters and less than any nation had embraced up to that time.

Assertions of jurisdiction in the marginal sea must, of course, be carefully distinguished with respect to the type and purpose of the jurisdiction being asserted. The type of jurisdiction first asserted by the United States in the sea to

a specific distance[69] was the right of visitation and search of foreign vessels for customs and smuggling purposes. The extent of that right was established by statute in 1790 as four leagues (approximately 12 miles), and that jurisdiction has remained unimpaired from that day until this. Masterson, *Jurisdiction in Marginal Seas* 184-90 (1929); Swarztrauber, *The Three-Mile Limit of Territorial Seas* 93-94 (1972); Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* 637-39 (1919). In *Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 234-35 (1804) (Marshall, C.J.), the Court held that international law did not limit the smuggling jurisdiction of coastal nations to the cannon-shot line (the three-mile limit was not even discussed), but that the jurisdiction is not "limited within any certain marked boundaries," and could well be broader on an open coast than in, for example, the English Channel.

The question of maritime jurisdiction next arose in the context of neutrality. The question was precipitated in 1793 by French seizures of British ships near the coasts of the United States. The United States government was forced, very much against its will, to commit itself as to the distance off its coasts to which it would enforce the right of neutrality. In the course of 1793, several views were advanced. Alexander Hamilton declared:

> "According to the general laws and usage of nations, the jurisdiction of every country extends a certain distance into the sea along the whole ex-

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[69] Judge Jessup described a number of early American treaties, beginning with the treaty of 1778 with France, which contain provisions "which reveal an appreciation of the fact that states had rights and interests in sea areas off their shores. . . . I cannot define the exact milage which may have been in mind when the treaty terms were employed, but I submit that the drafters had in mind something less than the earlier claims to vast oceans but something definitely more than inland waters and, it is reasonable to assume, more than territorial waters *stricto sensu*." App. 127.

tent of its coast. What this distance is remains a matter of some uncertainty, though it is an agreed principle that it at least extends to the utmost range of cannon shot, that is, not less than four miles. But most nations claim and exercise jurisdiction to a greater extent. Three leagues, or nine miles, seem to accord with the most approved rule, and would appear from Martin, a French author, to be that adopted by France, though Valin, another French author, states it at only two leagues, or six miles." Exhibit 697, pp. 27-28.

In the same year, Attorney General Randolph issued an opinion claiming all of Delaware Bay as territorial waters of the United States. Randolph's opinion contained the most interesting observation that "the necessary or natural law of nations (unchanged as it is, in this instance, by any compact or other obligation of the United States) will, perhaps, when combined with the Treaty of Paris in 1783, justify us in attaching to our coasts an extent into the sea beyond the range of cannon shot." Crocker, *op. cit* at 633. The reference to the Peace of Paris can only be to the provision giving the United States all islands within 20 leagues of the coast, since the treaty contains no other provision which Randolph could have had in mind. His opinion was confirmed and adopted by Jefferson. 1 *American State Papers (Foreign Relations)* 71, 72 (1819).

In June and August of 1793, Jefferson believed that captures made five miles off the coast of the United States violated the neutrality jurisdiction of this country. *Id.* at 119-22, 145.

Jefferson's letter of November 8, 1793, to the British minister fixed "provisionally" a three-mile belt for purposes of neutrality only. Swarztrauber, *op. cit.* at 57; Tr. 2427-28. Jefferson's note emphasized four times in one

paragraph that his decision was temporary only and did not preclude eventual determination on a broader distance. He said that "respectable assent among nations" had been given to neutrality belts of more than 20 miles, and that three miles was "the smallest distance . . . claimed by any nation whatever." He further pointed out that "the character of our coast . . . would entitle us, in reason, to as broad a margin of protective navigation as any nation whatever." Jefferson later explained to John Quincy Adams that he had carefully left the door open to claiming neutral waters out to the Gulf Stream. Swarztrauber, *op. cit.* at 58. Secretary of State Pickering likewise emphasized the provisional nature of the determination. Crocker, *op. cit.* at 637; see also Exhibit 813, pp. 107-19, 210-18.

The treaty of 1794 with Great Britain adopted cannon shot, not the three-mile limit, as the measure of neutral waters. App. 129; Crocker, *op. cit.* at 637. A treaty of 1795 with Spain committed both parties to enforcing neutral rights for vessels "which shall be within the extent of their jurisdiction by sea or by land," without stating any specific distance. App. 130. The cannon-shot rule, with no mention of three miles, was still applied in treaties of the United States as late as 1836. Exhibit 813, p. 115 n. 61.

In 1805 Jefferson told John Quincy Adams of his conviction that American neutral waters should extend to the Gulf Stream and indicated that he intended to claim that limit in the future. Crocker, *op. cit.* at 641-42. In 1806 Jefferson indicated to Monroe that the Gulf Stream proposal was already in effect for diplomatic though not yet for military purposes: hostilities within the Gulf-Stream line "are to be frowned on for the present, and prohibited so soon as either consent or force will permit us." Exhibit 702, p. 450. The edge of the Gulf Stream is the point where the continental shelf ends and a natural escarpment occurs.

In 1806 Secretary of State Madison proposed four leagues, or preferably the Gulf Stream, as the width of American neutral waters, and instructed Monroe and Pinckney to attempt to obtain that measure in a treaty with Great Britain. Crocker, *op. cit.* at 639-40. In the unratified treaty of 1806, the American negotiators, having ardently but unsuccessfully attempted to gain more, agreed that the limit of neutral waters should be five miles. Swarztrauber, *op. cit.* at 94; Crocker, *op. cit.* at 642; Masterson, *op. cit.* at 254-56; 3 *American State Papers (Foreign Relations)* 149 (1832).

Professor Morris contended (Tr. 1829-30) that because the boarding of the Chesapeake by the Leopard occurred three leagues off the American coast, it is clear that Great Britain did not regard that area as part of United States waters despite the 20-league provision of the treaty of 1783. What the professor overlooks is that in that period the British were claiming and exercising the right of impressment in American waters right up to the shoreline, and even within ports and harbors, without regard to any definition of territorial waters. Tr. 2423-26; 3 *American State Papers (Foreign Relations)* 83 (1832); 4 Brant, *James Madison* 254-56; 10 Ford (ed.), *Works of Thomas Jefferson* 439 (1905).

Some years later, Chancellor Kent regarded the three-mile limit as far too modest, and believed that American neutral waters should extend to at least four leagues from the coast and also should embrace waters within "lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi." Crocker, *op cit.* at 181. (Those are "quite distant" headlands indeed.) Most interestingly, Kent was fully aware that jurisdictional limits in the sea were proper

to different distances for different purposes, and specifically that sedentary fisheries and similar seabed resources were legitimate objects of property. *Id.* at 180. Kent concluded that "the dominion of the sovereign of the shore over the contiguous sea extends as far as is requisite for his safety, and for some lawful end." *Id.* at 181. Plainly, if a valuable and exploitable mineral resource had been discovered in Chancellor Kent's time four or ten or thirty miles off the American coast, he would have believed it wholly clear that the adjacent State had a right of exclusive exploitation thereof.

By the Treaty of Guadalupe Hidalgo between Mexico and the United States in 1848, the boundary between the territorial waters of the two countries was defined as extending three leagues from land. Swarztrauber, *op. cit.* at 91-92. This three-league territorial sea, which was confirmed by another treaty in 1853, and which was recognized and asserted by the United States on many occasions (Exhibit 812, pp. 92-107), formed the basis for Texas' claim to territorial waters of three leagues, which was accepted by the Supreme Court in the second Gulf States litigation as having been recognized and confirmed by the United States. *United States v. Louisiana*, 363 U.S. 1 (1960). In that case the United States vigorously argued, as it does here, that any State boundaries beyond three miles had been repudiated by the Federal Government's adherence to the three-mile limit. The Court squarely rejected this contention, holding that boundaries in the sea may exist for various limited purposes and that such boundaries for the purpose of continental-shelf ownership were in no way inconsistent with the national three-mile limit of full territorial sovereignty.

> "We think that the Government's contentions on this score rest on an oversimplification of the problem.

"A land boundary between two States is an easily understood concept. It marks the place where the full sovereignty of one State ends and that of the other begins. The concept of a boundary in the sea, however, is a more elusive one. The high seas, as distinguished from inland waters, are generally conceded by modern nations to be subject to the exclusive sovereignty of no single nation. It is recognized, however, that a nation may extend its national authority into the adjacent sea to a limited distance for various purposes. For hundreds of years, nations have asserted the right to fish, to control smuggling, and to enforce sanitary measures within varying distances from their seacoasts . . . . [A]ssertions of jurisdiction to different distances may be recognized for different purposes. In a manner of speaking, a nation which purports to exercise any rights to a given distance in the sea may be said to have a maritime boundary at that distance. But such a boundary, even if it delimits territorial waters, confers rights more limited than a land boundary. It is only in a very special sense, therefore, that the foreign policy of this country respecting the limit of territorial waters results in the establishment of a 'national boundary.' " 363 U.S. at 33-34.

See also Exhibit 668; Exhibit 814, pp. 208-10.

Similarly, the Florida constitution of 1868, which was accepted by Congress in readmitting Florida to the Union, provided for territorial waters of three leagues off the Gulf coast and out to the Gulf Stream in the Atlantic. In 1935 a United States court held that provision sufficient to give Florida the right to regulate sponge fisheries beyond the three-mile limit. *Pope v. Blanton*, 10 F. Supp. 18 (N.D. Fla.

1935). In *Skiriotes v. Florida*, 313 U.S. 69 (1941), the Supreme Court held such regulation by Florida valid as to citizens and found it unnecessary to reach the question whether foreigners could be subjected to it. More recently, of course, the Supreme Court has accepted Florida's three-league Gulf boundary as giving it the right to the continental-shelf resources within those limits. *United States v. Florida*, 363 U.S. 121 (1960).

In 1863 the United States took the position that international law, "since the invention of Armstrong rifled cannon," fixed a neutrality belt of six miles. Exhibit 813, pp. 125-26. In 1874 the United States joined six other nations in a declaration advocating a territorial sea of three leagues. Crocker, *op. cit.* at 485; Swarztrauber, *op. cit.* at 104. As late as 1896, the United States favored territorial waters and a neutrality zone of six miles. *Op cit.* at 94.

The United States thus has hardly been a consistent and unqualified adherent of the three-mile limit as plaintiff now asserts.

That the three-mile limit was never regarded as an abdication of all rights or claims outside that limit is proved by the long history of the United States' jurisdiction over customs and smuggling extending four leagues from shore. As we have seen (p. 394, *supra*), that jurisdiction antedates the three-mile limit itself, and applies to foreign as well as to American ships. The jurisdiction has been repeatedly upheld by the Supreme Court; while at times other nations have questioned it, the United States has insisted upon it in the face of all opposition, and eventually succeeded in obtaining general acquiescence thereto. Enforcement of this twelve-mile jurisdiction was particularly active and important in the relatively recent period of the 1920's, because of the customs and smuggling problems caused by the prohibition of liquor in this country during that period. See generally, Masterson, *op. cit.* at 184-252, 304-74; 1 Hack-

worth, *Digest of International Law* 664-90 (1940). Doubtless because of the existence of this American jurisdiction, the United States did not protest when in 1910 Russia declared a twelve-mile belt as "the marine customs area, within the limits of which every vessel, whether Russian or foreign, is subject to supervision by those Russian authorities in whose charge is the guarding of the frontiers of the empire." Masterson, *op. cit.* at 286.

The United States will contend, of course, that the smuggling jurisdiction is an exception to the three-mile limit, and that the existence of one exception does not imply the existence of another. As we have seen, and shall see further below, it was by no means the only exception. But the point is that the three-mile limit was never regarded as precluding the existence of various rights beyond it—even rights which, like the smuggling jurisdiction, operated on the surface of the sea and most definitely interfered with free navigation, let alone rights to the mineral resources of the seabed, which have nothing to do with the freedom of the seas. The fact that there was no need to assert the latter exception, because the problem did not arise, in no way suggests that the assertion would not have been made had the occasion arisen.

3. The Three-Mile Limit Was Not Applied by the United States to the Seabed and Subsoil.

While the three-mile limit as originally declared by Jefferson, and as understood for some years thereafter, related purely to neutrality jurisdiction,[70] the three-mile belt later

[70] In 1800 France and the United States agreed by treaty that "neither party will intermeddle in the fisheries of the other on its coasts." Exhibit 742, p. 202; App. 130. The three-mile limit was not mentioned, and the extent of the exclusive right to coastal fisheries was left unspecified.

became considered as that maritime area over which the United States possessed full territorial sovereignty. However, that never meant, and was never said to mean, that the United States possessed no rights in the sea or seabed beyond three miles. Official United States articulation of the doctrine and the reasons therefor habitually based it on the principle of freedom of the seas for navigation. See, *e.g.*, Crocker, *op. cit.* at 653-56; innumerable similar statements could be mentioned. In the 19th and early 20th centuries the three-mile limit was the favored doctrine of the principal maritime powers, especially Britain and the United States, their motive admittedly being to maximize those maritime areas which were regarded as free for navigation and naval operations.

None of this has any bearing on the seabed, since there is no inconsistency between freedom of navigation and the exclusive right to exploit continental-shelf resources. While no such resources were discovered on the American continental shelf until this century, it can hardly be doubted that if that had occurred exclusive American rights would have been asserted and would not have been regarded as inconsistent with the three-mile limit or the principle of freedom of the seas. When the United States occupied the Philippines, it promptly prohibited unlicensed pearl fishing within three leagues of land. App. 193; Exhibit 345, pp. 213-17. Significantly, the United States, while often protesting against claimed extensions of surface territorial waters beyond three miles, never protested against the many claims by other coastal states to exclusive rights to continental-shelf resources in areas where such resources were discovered and exploitable.

The sole piece of evidence which plaintiff has been able to produce from all of American history, which it puts forward as indicating an abandonment or renunciation of exclusive continental-shelf rights, is a State Department letter

to private persons in 1918 to the effect that "the United States had no jurisdiction over the ocean bottom of the Gulf of Mexico beyond the territorial waters adjacent to the coast." Tr. 1921. The letter takes no position as to whether the adjacent coastal State has such jurisdiction; the letter is fully consistent with the position of the Common Counsel States in this proceeding. Even if the letter could be interpreted as denying State as well as federal jurisdiction, a single such letter by a State Department official to private persons, relating to the Gulf of Mexico, could hardly be regarded as a lawful or effective renunciation of the rights of the Atlantic coastal States to their continental-shelf resources.

The position taken by the United States in the Bering Sea fisheries dispute demonstrates that the United States has not construed the three-mile limit as precluding exclusive claims even to surface fisheries in some instances, let alone to seabed and subsoil resources.[71]

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[71] In the 1930's the United States took a similar position with respect to the Bering Sea salmon fisheries.

> "The American Government must also view with distinct concern the depletion of the salmon resources of Alaska. These resources have been developed and preserved primarily by steps taken by the American Government in co-operation with private interests to promote propagation and permanency of supply. But for the efforts, carried on over a period of years, and but for consistent adherence to a policy of conservation, the Alaska salmon fisheries unquestionably would not have reached anything like their present state of development . . . . [T]he American Government believes that the safeguarding of these resources involves important principles of equity and justice. It must be taken as a sound principle of justice that an industry such as described which has been built up by the nationals of one country cannot in fairness be left to be destroyed by the nationals of other countries. . . ."

By legislation of 1869 Congress prohibited the killing of fur-bearing animals "within the limits of Alaska Territory, or in the waters thereof." Rev. Stat. § 1956. The Treasury Department interpreted that legislation as applying to all waters of the Bering Sea east of the maritime boundary established by the treaty of 1867 with Russia which ceded Alaska to the United States. Between 1886 and 1890, the Coast Guard seized British vessels fishing for fur seal in the Bering Sea at distances ranging from 15 to 115 miles from land. Exhibit 813, pp. 126-28; Swarztrauber, *op. cit.* at 87.

In 1889 the statute was amended to incorporate a declaration that it applied "to all the dominion of the United States in the waters of Bering Sea." 25 Stat. 1009.

In admiralty proceedings for the condemnation of the seized British fishing boats, and punishment of their officers, the juries were instructed that the territorial waters of Alaska included all the Bering Sea east of the treaty boundary, and the prisoners were found guilty and their vessels and cargoes confiscated. Crocker, *op. cit.* at 286. The Supreme Court declined to set aside the convictions in spite of vigorous arguments on behalf of the British that they violated international law and the three-mile limit. *In re Cooper*, 143 U.S. 472 (1892). The Court expressly held that in 1889 Congress had asserted dominion over the entire Bering Sea east of the treaty boundary and that the executive branch of the Federal Government had formally and officially taken that position. 143 U.S. at 498-99.

The federal admiralty courts, in decisions forfeiting both British and American ships for seal fishing far beyond the

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"The Alaska Salmon-Fishery Situation," 18 U.S. Dept. of State Press Releases (Jan. -June 1938) 412, 414, 416. By a proclamation of September 28, 1945, President Truman formally asserted exclusive United States control over these salmon fisheries. Borchard, "Resources of the Continental Shelf," 40 Am. J. Int'l L. 53, 54-55 (1946).

three-mile limit, held that international law did not prohibit the asserted jurisdiction and that, in any event, the courts could not question it. It was declared that "a nation having the power to do so may extend its dominion over the sea beyond the limits heretofore admitted by the powers of the earth to be lawful"; that probably territorial waters should be deemed extended because of the increased range of artillery; but that in any event the courts had no power to question on international-law grounds the acts of their government in asserting maritime sovereignty, dominion and jurisdiction. *United States v. The James G. Swan*, 50 F. 108, 110-11 (D. Wash. 1892). "[N]ations may prevent the violation of their laws by seizures on the high seas, in the neighborhood of their own coast, and . . . there is no fixed rule prescribing the distance from the coast within which such seizures may be made." *United States v. The Kodiak*, 53 F. 126, 128 (D. Alaska 1892), citing *Church v. Hubbart*, *supra*. *Accord*, *The Alexander*, 60 F. 914 (D. Alaska 1894).

The position taken by the United States in the subsequent arbitral proceeding with Great Britain is fully described in Judge Jessup's testimony. App. 215-27. While not claiming that the waters in question were within the territorial sea of the United States for all purposes, the United States vigorously asserted the right to regulate the seal fishery in those waters and to exclude foreigners therefrom. As Judge Jessup pointed out (App. 217), "the United States rested on the established doctrine that seabed resources could be the subject of ownership by the adjacent state—which was not disputed—and unsuccessfully attempted to reason from that fact to a sovereign right over surface fisheries." The United States thus attempted to extend to surface fisheries precisely the doctrine of proprietary rights over resources which had uniformly been recognized as to seabed and subsoil resources whenever they were capable of exploitation:

"'These regulations are found in the cases of oyster beds, coral beds, beds where the pearl fishery is carried on, beds which are found in a certain proximity to the coast of a country, and which can be worked more conveniently by the citizens of that country than any other.'" App. 221.

"'It is where there is a natural advantage, within a certain proximity to the coast of a particular nation, which it can turn to account better than the citizens of any other nation, and in respect to which it enjoys peculiar advantages growing out of its proximity, and where, if it is permitted to establish and carry out a system of national regulation, it may furnish a regular, constant supply of a certain product of the seas, for the uses of mankind; which product, if it were thrown open to the whole world, would be destroyed.'" App. 221.

While the United States nominally lost the case, on the ground that its interference with surface navigation and fishery was not justified in view of the adherence of both parties to the three-mile limit, the arbitral tribunal prescribed regulations for the fishery, and these were later extended and expanded by negotiation and treaty. 1 Hackworth, *Digest of International Law* 792-98 (1940). Fulton described the results as follows:

"Then the Tribunal, in terms of the treaty appointing them, prescribed the regulations above referred to, leaving to Great Britain the honours of the contest, and to the United States the advantage. The true lesson to be derived from this chapter of international diplomacy, is not that the high tribunal reaffirmed the three-mile limit as the legal boundary of the territorial sea, which they did not do (see letter from Baron de Courcel,

> the President, p. 661), but that that limit may be set aside and a much wider boundary fixed (in this instance 60 miles) if the protection and preservation of a marine fishery require it." *Op. cit.* at 696, n. 3.

The identify of the 60-mile line fixed by the tribunal and the 20-league boundary established by the Peace of Paris of 1783 in the Atlantic is notable.

In the Bering Sea arbitration we find both parties—Great Britain and the United States—recognizing that the three-mile limit did not prevent the establishment of exclusive rights to exploit the resources of the seabed beyond three miles. And we find the United States seeking to extend that accepted doctrine to surface fisheries as well, and succeeding to a substantial degree. Given this history, it is hard to understand how the United States in the present litigation can seriously maintain that its adherence to the three-mile limit was or is inconsistent with the rights asserted by the Common Counsel States herein.

C. THE STATES' CONTINENTAL-SHELF RIGHTS WERE NOT EXTINGUISHED BY ANY OBLIGATORY RULE OF INTERNATIONAL LAW IN THE PERIOD 1783-1945.

Plaintiff apparently concedes, as it must, that the continental-shelf rights claimed by the States in this proceeding have been fully consistent with, and affirmatively sanctioned by, international law since 1945 or thereabouts. Plaintiff contends, however, that the States' claims were inconsistent with principles of international law during the century and a half prior to 1945, and specifically with an obligatory rule thereof nullifying all territorial and proprietary seabed claims outside the three-mile limit except in a few special cases based on ancient use or prescription.

1. Even If Plaintiff Were Otherwise Correct, the International Law Against Which the States' Claims Should Be Judged Is Present Law, Not Past Law.

Even if plaintiff's contentions about international law were correct, they should not be held to wipe out the States' claims if, as is plainly the case, the States never renounced or surrendered those claims. Even if for some period of years the State claims were repugnant to international law, in the end it was international law which gave way. On plaintiff's theory, international law changed in or about 1945 and since then has sanctioned precisely the rights in the continental shelf which the States were granted in their charters, claimed in earlier centuries and continue to claim. Today, therefore, there is concededly no conflict between the State claims and international law. Even if, during the heyday of the three-mile limit, a court might have held that State claims were overridden thereby, that furnishes no reason for any infirmity in the States' claims once the international law has changed. No court has ever held, or would hold, territorial or property claims unlawful by applying, not contemporaneous international law, but rather the superseded international law of some earlier period. In the second Gulf States litigation, the Court measured the claims of the States against international law as it then existed. *United States v. Louisiana*, 363 U.S. 1, 33-34 (1960).

If the lawfulness of the United States' asserted exclusive rights in the continental shelf, as against other nations, were today to come before a tribunal applying international law, it would not concern itself with the international law of the 19th or early 20th centuries, but solely with the law of today.[72] There is no reason why any different treatment

[72] The United States surely will accept this proposition; otherwise it will find itself arguing that its own claims are unlawful.

should be accorded to the claims of the States. If they can establish title under domestic law, no useful purpose or need is served by measuring that title against alleged international-law inhibitions of prior ages, when it is admitted that the international law of today presents no impediment to them.

Thus the Common Counsel States contend that it is unnecessary to examine the international law of the period 1783-1945. However, if that law is deemed relevant we submit that it furnishes no basis for rejecting the States' claims.

2. The Three-Mile Limit Never Became an Obligatory Rule of International Law.

Volumes have been written on the question of whether the three-mile limit, as applied to the surface of waters, ever became an obligatory rule of customary international law, binding even on those nations which declined to accept it. Judge Jessup, writing in 1927, believed that it had become such a rule, though he regarded the question as a most difficult one and was careful to point out that the three-mile limit was obligatory only as fixing a limit on full territorial sovereignty, not precluding exclusive rights in other portions of the sea for more limited purposes. App. 113-20. For an exhaustive argument that the three-mile limit never became an obligatory rule even in that limited sense, see Exhibit 813, pp. 82-83, 147-240; see also Exhibit 668; U.S. Exhibit 7, pp. 31-58; U.S. Exhibit 17, 3d vol., second pagination, pp. 14-15 (Memorandum of Charles Cheney Hyde). *Accord, e.g.*, Fulton, *op. cit.* at 663-64; Bartley, *The Tidelands Oil Controversy* 19-21 (1953).

A view frequently stated was that international law had crystallized to the extent of making it clear that claims of full sovereignty out to three miles were lawful, but had not crystallized on the question of whether more extensive

claims were lawful. See, *e.g.*, U.S. Exhibit 7, p. 34. The two nations most active in contending for the three-mile limit were Great Britain and the United States; however, even they were by no means consistent or uniform in their positions to that effect.

American courts in the late 19th century were far from certain that a three-mile maximum limit as applied to the surface of waters was an obligatory rule of international law:

> "The extent of these rights, that is to say, how much of the sea they cover, has been uncertain. Some nations claim a marine league; others more, even up to thirty leagues. Perhaps the best way of stating it is that every nation has the right to control so much of the seas adjacent to its shores as is necessary for all purposes of revenue or of defence." *The Hungaria*, 41 F. 109, 110 (D.S.C. 1889).

> "It has often been a matter of controversy how far a nation has a right to control the fisheries on its sea-coast, and in the bays and arms of the sea within its territory; but the limits of this right have never been placed at less than a marine league from the coast on the open sea; . . . . More extensive rights in these respects have been and are now claimed by some nations; but, so far as we are aware, all nations concede to each other the right to control the fisheries within a marine league of the coast, ... " *Commonwealth v. Manchester*, 152 Mass. 230, 236, 25 N.E. 113, 114 (1890).

> "We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast; . . . . "

Manchester v. Massachusetts, 139 U.S. 240, 258 (1891).

"Appellant's contention is based upon the old rule which limited jurisdiction over the waters of the ocean to a strip extending one marine league from shore, and considered inland waters a part of the main sea, when inclosed by headlands more than two marine leagues across. These arbitrary distances were fixed upon at a period when it was assumed that a marine league was the effective range of a heavy gun, and it may well be doubted whether they will not be extended by the courts to conform to changed conditions. Certainly it may be expected that every maritime nation will insist upon the control of its own coast waters to the extent to which it is able to dominate them from the shore." *Middleton v. Compagnie Générale Transatlantique,* 100 F. 866, 867 (2d Cir. 1900).

See also the cases discussed at pp. 404-05, *supra.*

The heyday of the three-mile limit was brief. As we have seen, it was virtually unheard of until 1793, and then and for some years thereafter it was generally applied to neutrality only. As the 19th century advanced, the doctrine was extended to other aspects of jurisdiction over surface waters, including fisheries; but many nations never acquiesced in it, and other limits, such as cannon shot, six miles and three leagues, remained very much in vogue. Swarztrauber, *op. cit., passim.* As late as 1890-1910, Britain and the United States were both ignoring, or carving large exceptions out of, the three-mile limit whenever it suited their interests to do so. Fulton, writing in 1911, believed that the cannon-shot rule, but not the three-mile limit, had achieved obligatory status, and that the measure of cannon shot was not fixed but should increase as the range of artillery increased. Fulton, *op. cit.* at 573-603.

Many other writers took the same view; see Jessup, *The Law of Territorial Waters* 65 (1927). The eminent publicist Charles de Visscher, reviewing the evidence in 1968, concluded that "the three-mile measure, as outside limit of jurisdiction, doubtless never acquired universal authority," and "represents only the minimum that the riparian state can claim." De Visscher, *Theory and Reality in Public International Law* 220, 221 (1968).

Fulton regarded three miles as wholly inadequate for the purpose of exclusive fisheries, *op. cit.* at 604-49, and Jessup agreed, *op. cit.* at 462. "In all the history of fishing disputes there is no case where a state has permitted damaging fresh foreign invasion of its coastal fisheries even outside the three-mile limit in simple voluntary recognition of a foreign claim of international-law right." Bingham, *Report on the International Law of Pacific Coastal Fisheries* 6 (1938). It has long been recognized that even surface fisheries require much greater protection if these valuable resources are not to be wholly extinguished. *Id.* at 8. Raestad, an eminent publicist, believed it clear that exclusive-fishery claims which antedated the three-mile rule were not impaired by it. *La Mer Territoriale* 180-81 (1913). Many writers who adhered to the three-mile rule for other surface purposes rejected it as a limitation on exclusive fisheries.

By the 1920's acceptance of the three-mile rule had already passed its peak and a process of swift decline had set in. Swarztrauber, *op. cit.* at 131 *et seq.* An attempt to achieve recognition of the rule at the Hague Codification Conference in 1930 failed dismally; no rule limiting territorial waters could command a consensus. Bingham, *op. cit.* at 6; Riesenfeld, *Protection of Coastal Fisheries Under International Law* 120-24 (1942). In recent decades, of course, the three-mile limit has been virtually abandoned and no longer has any pretension to the status of any obligatory rule of customary international law.

"To an unprejudiced student of history and of present world affairs, it is abundantly apparent (a) that there never has been and is not today [1938] any general agreement on the extent of territorial waters; (b) that no state ever has applied consistently a uniform limit for all purposes to the zone of its coastal sea jurisdiction, (c) that it always has been the opinion of realistic experts that if definite limits are set to marginal seas jurisdiction those limits should be different for different purposes, and (d) that there is no common or nearly common agreement on the matter of legality of control over coastal fisheries beyond a three-mile zone of marginal sea or other conceded territorial area." Bingham, *op. cit.* at 9.

During the period when the three-mile limit enjoyed its greatest vogue, its status as an obligatory rule was denied by the following respected publicists, among many others: Ullmann, *Völkerrecht* 181-82 (1898); Westlake, *International Law* 185 (1904); Cavarretta, *Diritto Interstatuale* 110 (1914); Hall, *Outline of International Law* 35 (1915); Anzilotti, *Rivista di Diritto Internazionale* 161 *ff.* (1917); Suarez, *Diplomacia Universitaria Americana* 155-75 (Suarez held that the limit of territorial waters was the edge of the continental shelf); Strupp, *Grundzuge des Positiven Völkerrechts* 70 (1921); Catellani, *Lezioni di Diritto Internazionale* 133 (1921); Hatschek, *Völkerrecht* 192 (1923); Bjorksten, *Das Wassergebiet Finnlands in Volkerrechtlichter Hinsicht* 68 (1925); 1 Fauchille, *Traite de Droit International Public* 180 (1925); Cavaglieri, *Corso di Diritto Internazionale* 314 (3d ed. 1934); Grey, "Des Eaux Territoriales," Revue de Droit International et de Legislation Comparée 123 (1927); Brierly, *The Law of Nations* 102 (1928); Masterson, *Jurisdiction in the Marginal Seas* xiii (1929); Sanchez de Bustamante y Sir-

ven, *The Territorial Sea* 106 *ff.* (1930); Longo, *Diritto Internazionale Pubblico e Privato* 118-19 (1930); Jaureguiberry, *La Mer Territoriale* (1932); 2 Hold-Ferneck, *Lehrbuch des Völkerrechts* 68 (1932); 3 Gidel, *Le Droit International Public de la Mer* 151 (1934); Baldoni, *Il Mare Territoriale nel Diritto Internazionale Comune* 77 (1934); Meyer, *The Extent of Jurisdiction in Coastal Waters* 520 (1937); Bingham, *Report on the International Law of Pacific Coastal Fisheries* 5-6 (1938); Riesenfeld, *Protection of Coastal Fisheries Under International Law* 278-82 (1942). Riesenfeld made an exhaustive survey of the literature, and found 114 writers who had dealt with the question between 1900 and 1942, of whom 41 believed the three-mile rule was obligatory, 21 favored different rules, and 52 believed that no limitation had achieved the status of a binding customary rule. *Id.* at 280. A thorough survey of state practice likewise led Riesenfeld to conclude that no binding limitation was in force. *Id.* at 127-263, 280-281.

3. No Obligatory Rule of International Law Prior to 1945 Barred the States' Seabed and Subsoil Claims.

The three-mile limit did not preclude territorial and property rights to the seabed and subsoil extending much farther than three miles. As already discussed at pp. 278-81, *supra*, the basic reason for the "narrow limit" rules of territorial waters, culminating in the three-mile limit, was the insistence by the maritime powers on the right of free navigation, including belligerent navigation not protected by the doctrine of innocent passage, to the maximum possible extent in the seas. It was also believed by some (quite erroneously, as others pointed out) that surface fisheries were inexhaustible and thus that no nation could reasonably claim an exclusive right to them. None of this had any application to seabed and subsoil resources, and the three-mile limit did not apply to them.

We have little to add to Judge Jessup's testimony on this point, and for this portion of our brief we incorporate his testimony at App. 111-13, 131-230, 490-527. See also Swarztrauber, *op. cit.* at 95-99. Much additional support could be adduced if necessary. Most writers have recognized that sedentary fisheries, as well as the mineral resources of the subsoil, were not subject to the narrow-limit rules applicable to surface waters or to the reasons therefor, but rather "require special treatment." Fulton, *op. cit.* at 612. Such resources "have always been considered as on a different footing from fisheries for floating fish. They may be very valuable, are generally restricted in extent, and are admittedly capable of being exhausted or destroyed; and they are looked upon rather as belonging to the soil or bed of the sea than to the sea itself." *Id.* at 697. *Accord*, the British Under-Secretary of State for Foreign Affairs, speaking in Parliament in 1923. *Parliamentary Debates*, May 30, 1923, cols. 1265-66. This has fairly consistently been the British view, as pointed out by Jessup in 1927. *Op. cit.* at 13-17.

In 1803 the continental-shelf doctrine was foreshadowed by Gérard de Rayneval:

> "The sea which washes the coasts of a state is considered to form part thereof. Its security and tranquility render this property necessary. The sea must take the place of a rampart for it. We may add that the seabed along the coasts can be considered as having formed part of the continent and for that reason is considered as still forming part thereof." Rayneval, *Institutions de Droit de la Nature et des Gens* 161 (1803).

Rayneval rejected the cannon-shot doctrine and denied that it had the force of an obligatory rule. *Ibid.* Many other 19th-century writers regarded the seabed of the continental shelf as a natural prolongation or appurtenance of the continent, and therefore as the property of the coastal state. 1 Nizze,

Das Allgemeine Seerecht des Civilisirten Nationen 31 (1857); 1 Cussy, *Phases et Causes Célèbres du Droit Maritime des Nations* 91 (1856); 1 Masse, *Le Droit Commercial dans les Rapports avec le Droit des Gens et le Droit Civil* 113; 1 Cauchy, *Le Droit Maritime International Considéré dans Ses Origines* 39 (1862).

It is quite true that, as Professor Henkin has pointed out and as plaintiff's brief emphasizes, some writers have considered the three-mile limit as applicable to the seabed and subsoil, and have regarded the many cases of exclusive rights to sedentary fisheries claimed and exercised, usually without objection, by coastal states as exceptional in nature and based upon, in one sense or another, prescription or occupation. It is impossible, on the basis of these text writers alone, to derive a rule of customary law which ever had the required degree of acceptance and acquiescence by the international community to make it a binding and obligatory rule. In any event, plaintiff misconstrues the views of most of these writers.

The doctrine of occupation, properly understood, meant that, on the discovery of a new resource in the continental shelf, the coastal state must take steps to occupy or to exploit it; if it failed to do so, others could come in. But the doctrine of occupation, as applied in state practice, never meant that exclusive rights could exist only in those resources which had been known and exploited for centuries, and that on the discovery of a new resource an attempt by the coastal state to "occupy" it could be defeated by protests on the part of other nations that no *ancient* occupation, prior to the discovery, had been made of that portion of the seabed.

Edwin Borchard, an eminent international-law authority, writing in 1941 in defense of Florida's regulation of sponge fisheries beyond three miles, was far from regarding occupation as the sole criterion:

"But there is another type of claim—riparian exploitation or licensing of the sedentary fisheries or subsoil mines or petroleum reserves close to the shore but outside the three-mile limit. Here other considerations enter the problem. Could a country tolerate a permanent foreign occupation or stationary works at its front door, especially if the operations occur on a shallow bank or shelf? Practical considerations would seem to dictate a negative answer. In English history the Crown laid claim to minerals won from mines and workings below the low-water mark under the open sea adjacent to the coast but outside the three-mile limit. So, the pearl fisheries of Bahrein and Ceylon, extending many miles from shore, have for centuries been regulated by local ordinances of the riparian States, and Vattel seems to have supported the ancient claim of monopoly in these sedentary fisheries. The claim may be said to rest on several theories—the extension of the land to the shallow banks, the long historical use and presumption of acquiescence, the physical occupation, and the special fact that Palk's Bay, if not the Gulf of Manaar, which divides India from Ceylon, may be deemed a constituent portion of the British dominions. Even so, there would be no right to interfere with navigation and surface fishing beyond the three-mile limit."

* * *

"The Florida claim to control the manner of taking sponges at a distance up to nine miles from the shore could therefore be justified on the theories of historical assertion of jurisdiction and acquiescence therein, protective jurisdiction for the preservation of a natural resource, and

possibly occupation. The Florida statute escapes the more debatable but not necessarily unsustainable claims of licensing a national monopoly in the nine-mile zone or effective occupation of the bed of the sea. In any event, the Florida statute seems invulnerable to attack even if State sovereignty over the bed of the sea beyond three miles be denied." Borchard, "Jurisdiction over the Littoral Bed of the Sea," 35 Am. J. Int'l L. 515, 518-19 (1941).

If, contrary to our submission, superseded international law rather than present law should be used as a measure of the States' claims, the proper form in which to state the issue is: if in 1840 or 1920 an exploitable resource had been discovered in the continental shelf of one of the Common Counsel States more than three miles from the coast, and if the State had promptly asserted the exclusive right of exploitation (as it clearly would have done), and if no other nation had objected (and almost certainly no other nation *would* have objected), would a title valid in international law have been made out? We think the answer is plainly in the affirmative.

We think Judge Jessup's testimony has thoroughly exploded the notion that continental-shelf rights ever depended solely on occupation or prescription in the sense apparently urged by plaintiffs; that is, that only an anciently exploited resource, not a newly discovered resource, could validly be claimed by the coastal state. The fact is what *whenever* such a new resource has been discovered, it has been the coastal state which has successfully asserted the exclusive right to explore and to exploit. Professor Henkin conceded this:

"Q . . . . Can you give me a single example from anywhere in the world within, say, the last 300 years where a valuable resource has been discovered on the seabed within, say, 60 miles of the coast of one state and no closer to the coast of any state, when the coastal state has not claimed and exercised the exclusive right to exploit it?

"A. I don't know of any such examples." App. 541.

The body of state practice thus admitted is conclusive. As Judge Jessup has observed, no one would take the trouble to occupy a portion of the continental shelf *until* a valuable and exploitable resource was discovered there. App. 498-99. The question of occupation arises only on the discovery of the resource, and the requirement of occupation is met when the coastal state asserts and exercises its right promptly after the discovery. Never at any time has the doctrine of occupation or prescription as creating an exclusive right been applied in favor of any state other than the coastal state. It has always been that state alone which has been regarded as the state having the exclusive right to make, or to proclaim, an occupation of a newly discovered resource in its continental shelf. Any attempt by a state other than the coastal state to make an exclusive occupation would have met with immediate challenge and resistance by the coastal state; and no such attempt was ever made. And, as Professor Henkin conceded, the coastal state has never been willing to leave the resource to promiscuous exploitation by the world at large; it has always claimed an exclusive right for itself, and that right has been acquiesced in and thus vindicated by the international community.

Borchard summarized the law, after a review of the state practice on which it was based, as follows:

"As is apparent, foreign countries near whose coasts were located natural valuable resources, found no difficulty, whatever their views as to the marginal sea, and met with no foreign objection, in putting to their own use these resources . . . . The soil and subsoil wealth within reach of the shore was uniformly claimed by the riparian state and where resources were discovered, the rights of ownership exercised . . . .

"But as to contiguous subsoil minerals under the sea and as to the sedentary resources attached to the bottom of the sea both statute and decision have claimed and foreign countries have recognized the propriety of riparian control, if not ownership. The *Columbia Law Review*, in a study on the subject, lists judicial and legislative instances which have supported the littoral states' jurisdiction or control of submarine petroleum, gold, and coal and such sedentary fisheries as oysters, pearls, and chanks. Whether this jurisdiction or control be claimed as public property, under the sovereign right over the marginal sea in international law and the common law, or because the continental shelf is a continuation of the littoral state, or as a property right in the controllable soil and subsoil without any claim to surface waters, or that foreign rights in the subsoil beyond the three-mile limit would give rise to trouble, the fact is that the local claim has often been asserted and acquiesced in, especially where a specific resource was in question. Property by prescription would alone have sustained the right to a resource already exploited. Assertion of jurisdiction and acquiescence therein—without

> entering upon the abstruse question of title --must explain the coastal states' jurisdiction over unexploited resources in the continental shelf." Borchard, "Resources of the Continental Shelf", 40 Am. J. Int'l L. 53, 59-60 (1946).

While the Truman Proclamation was indeed an important step in the formulation of a general doctrine which clarified and made much more explicit and uniform the rights of coastal states in their continental shelves, it was no sharp reversal of prior law, but was rather the natural outgrowth, in the light of vastly expanded potential uses of continental-shelf resources, of the substantial body of state practice and customary law which had been applied for centuries to those resources whenever and wherever they had assumed practical importance. It is wholly unsound to say that customary international law ever at any time contained an obligatory rule which made it unlawful for a coastal state to claim and to exercise exclusive rights over a newly discovered, exploitable shelf resource. The exclusive right had always existed and was uniformly asserted whenever the occasion arose. The fact that such occasions became much more frequent in our century quite naturally gave rise to a legal principle stated in general terms where previously there had been some degree of doctrinal confusion. But we believe it clear that never at any time did international law prohibit claims of the type which the defendant States are asserting here. (Even if, contrary to our submission, it did contain such a rule at one time, that is no bar to recognition of the States' claims now that international law so clearly and conclusively sanctions them.)

If plaintiff's present position is correct, then President Truman and this country committed an internationally unlawful act by promulgating the Proclamation of 1945. See App. 524-25. That proclamation, asserting the exclusive right to explore and to exploit all the resources of the con-

tinental shelf of the United States, was not a mere proposal offered for comment, acquiescence or objection by other countries. To the contrary, it was self-executing and took effect immediately; hence it was unlawful if not countenanced by the international law then in effect. Contrary to the position now taken by the United States, we do not believe President Truman acted unlawfully at all; at most he was merely making more articulate, more systematic and more comprehensive what had always been the rights of coastal states.

To the extent that the law changed because of the Truman Proclamation and its aftermath, the principal change was that thenceforth shelf resources were recognized to be under the sole jurisdiction of the coastal state *even if* it took no steps to "occupy" and to exploit them, or even to claim them. This was a rather academic change, since as we have seen coastal states invariably *have* acted when an exploitable resource is discovered.

Lauterpacht's analysis quoted at Pl. Br. 249-51 expressly repudiates any requirement of "prescription" (Pl. Br. 249), and defends the lawfulness of the Truman Proclamation as fully consistent with principles of traditional international law (Pl. Br. 250-51). Lauterpacht regarded the alleged requirement of effective occupation as a requirement "to be applied only in a general and substantially figurative manner—as, indeed, it has been applied in the past . . ." (Pl. Br. 251). A fair reading of the quotations from Lauterpacht selected and relied on by plaintiff itself makes it clear, in our submission, that he believed that the Truman Proclamation was not inconsistent with traditional international law. That was also the thesis of Lauterpacht's earlier article quoted by Judge Jessup at App. 155-67. The "occupation" required by Lauterpacht, and by the other authorities quoted at App. 163-73, is "figurative" indeed, and is satisfied by the States' historic title deriving from their

charters and the other evidence set forth herein. Indeed, in marine areas not claimed by any other state, a valid title is made out by "the bare existence of a claim." App. 158.

None of the members of the International Law Commission quoted at Pl. Br. 253-56 regarded the Truman Proclamation as a reversal or sharp break with prior law; they regarded it rather as a natural clarification or adaptation of prior law, as plaintiff's own quotations show.

Plaintiff claims (Pl. Br. 257) that the United States delegate to the 1958 Conference on the Law of the Sea "brought to the attention" of the Conference "the nature" of the "departure" of the new doctrine "from the principles of international law which governed the seabed and subsoil beyond territorial waters prior to 1945." What the delegate actually said was that "prior to very recent years, the legal status of the continental shelf, outside the recognized territorial seas was, in considerable measure, undefined." *Ibid.* That is, a principle or definition had become recognized where before there was none. This view, which has been shared by many others, is radically different from a belief that a new principle represents a "departure" from, or contradiction of, an old one. And if prior to 1945, as this view asserts, international law was simply silent on the validity of continental-shelf claims, then it contained no rule which could make the States' claims defective. The first principle of international law is, of course, that a state may do anything it likes unless an obligatory rule prohibits it. App. 109-11; see p. 263, *supra*.

The opinion for the Court in the *North Sea Continental Shelf Cases* likewise regarded the Truman Proclamation as "the starting point of the positive law on the subject," where before there had been only "various theories." Pl. Br. 261. "Various theories" are, of course, the exact opposite of a customary rule enjoying the overwhelming consensus necessary to give it binding force. Thus plaintiff's assertion

that the Court regarded the continental-shelf doctrine as a "departure from previous law," in the sense that previously there had existed a different or inconsistent obligatory rule limiting the freedom of action of states, is wholly unsound. Nor can plaintiff derive any comfort from the Court's reference to "maritime expanses which, during the greater part of history, appertained to no-one." Pl. Br. 261. Those "expanses" had indeed belonged to no one if the coastal state had never claimed them; now they belong to the coastal state even in the absence of a claim. The Court's language had no application to those seabed areas which *had* been previously brought under the sovereignty and dominion of the coastal state. For Judge Jessup's comments on the Court's language, see App. 145-46, 499-500.

With the possible exception of Judge Ammoun's description of manifestations of the continental-shelf doctrine as "derogations" from the "freedom" of "the high seas," Pl. Br. 265, none of the language in the separate opinions quoted at Pl. Br. 263-67 states or implies that the continental-shelf doctrine reversed a prior inconsistent rule of positive law. Even Judge Ammoun, by plaintiff's own characterization, regarded the doctrine as a "progressive development of the law" rather than a break with prior inconsistent law. Pl. Br. 266.

The farthest one could possibly go in deprecating the States' title on international-law grounds would be to say that prior to the Truman Proclamation the States' title (fully perfected in domestic law) was inchoate and potential, and would have been perfected only upon the discovery of an exploitable resource and the steps the State would immediately have taken to establish control over it. That potential title was exclusive, since no one other than the coastal State could have perfected such a title. The effect of the Truman Proclamation, in these terms, was to perfect the States' title *in advance of* the discovery of exploitable

resources and establishment of control thereover which, even without the Truman Proclamation, would have perfected them sooner or later. As Judge Jessup testified, however, Lauterpacht believed that to call titles of this sort "inchoate" is useful only with drastic qualifications; he regarded the coastal state as having an inchoate, perfectible title *in the absence of any claim*, and as having a perfected title *once a claim had been made.* App. 164-66.

Professor Henkin contends (Tr. 1920, 1923-24) that no one besides Judge Jessup has ever founded the right to a portion of the continental shelf on a survival of the seabed and subsoil portions of earlier expansive claims to wide territorial seas. That contention was refuted in 1923 by Sir Cecil Hurst, who declared that, so far as Great Britain was concerned, rights of ownership in the seabed are "the survival of more extensive claims to the ownership of and sovereignty over the bed of the sea," and that by virtue of those older claims, which have been eroded only so far as the principle of freedom of the seas required it, British property rights in the seabed beyond the three-mile limit may be "valid and subsisting." Hurst, "Whose Is the Bed of the Sea?", 4 *British Yearbook of International Law* 34, 43 (1923)[73] Oppenheim flatly declared that the reasons for "the abandonment of the former claims to occupy the waters of the open sea . . . do not apply to the sea-bed. . . ." 1 Oppenheim, *International Law* 575 (6th ed. 1947).

Exactly the same contention was made by the Gulf Coast States of this country, based on their historic boundaries in the sea; and while rejected by the Supreme Court those claims were upheld by Congress, to which the Court then deferred. Those claims were advocated and defended in a

[73] There is likewise, of course, a continuity as to sovereignty of surface waters: "the sovereignty allowed by international law over portions of the sea is in fact a decayed and contracted remnant of the authority once allowed to particular states over a great part of the known sea and ocean." Maine, International Law 78 (1888).

joint memorandum in support of rehearing in *United States v. Texas*, App. 749-66, by ten of the most eminent international lawyers of that time: Joseph Walter Bingham, C. John Colombos, Gilbert Gidel, Manley O. Hudson, Charles Cheney Hyde, Hans Kelsen, William E. Masterson, Roscoe Pound, Stefan A. Riesenfeld and Felipe Sanchez Roman, and concurred in by another, William W. Bishop, Jr., who had been principally responsible for drafting the Truman Proclamation. App. 511. The qualifications of these scholars are set forth in summar form at App. 749-51; see also Bartley, *The Tidelands Oil Controversy* 208-10 (1953). It is beyond dispute, Professor Henkin to the contrary, that Judge Jessup's views have been shared by many others. We submit that those views are wholly sound.

The present international-law situation, after the Truman Proclamation, the Continental Shelf Convention of 1958, and the decision of the International Court of Justice in 1969 in the *North Sea Continental Shelf Cases*, is that the exclusive right of a coastal state to its continental-shelf resources is fully recognized out to the 200-meter depth mark as a minimum, and may extend considerably beyond that mark if the resources in question are exploitable and are determined to be "adjacent" to the coast. The exact outer limit of exclusive rights in the continental shelf is presently the subject of discussion and negotiation. For a recent survey, see Krueger, "An Evaluation of United States Oceans Policy," 17 McGill L.J. 603 (1971).

As it happens, on the Atlantic coast of the United States the 200-meter depth mark corresponds rather closely in most areas to the 100-mile limit which is generally the measure of the historic claims of the Common Counsel States. U.S. Exhibit 7, p. 80 n. 195; U.S. Dept. of the Interior, *Atlantic Continental Shelf and Slope of the United States*, Geological Survey Professional Paper 529-J (1972). No problem or question under international law can arise as to those portions of the shelf which the States claim. The

States freely recognize the authority of the Federal Government to determine, by treaty or otherwise, the extent of the continental shelf within which national rights are claimed.

As to portions of the shelf within both the 200-meter depth mark and the States' historic 100-mile boundaries, the States' claim rests on their historic title. As to portions of the shelf within the 100-mile boundaries but beyond the 200-meter depth mark, the States claim them conditionally on their eventually being determined by the Federal Government to be subject to national exclusive rights as a matter of international law and policy; if the Federal Government finally determines not to claim such areas as against other nations, the States' title will lapse. As to portions of the shelf within the 200-meter depth mark (or within such broader limit as the Federal Government may eventually adopt) but outside the 100-mile boundaries, the States claim them on the ground that the 100-mile limit was not regarded as precluding wider exclusive rights if exploitable resources were found outside it but still adjacent to the coast, and on the ground that, as to any portion of the shelf which becomes recognized as subject to national exclusive rights, it is the States rather than the Federal Government which have the better claim, as owners of their public lands and as residual sovereigns over the coast to which the shelf is an inherent appurtenance. See pp. 502-08, *infra*.

X.

THE FEDERAL FOREIGN-AFFAIRS AND DEFENSE POWERS DO NOT REQUIRE FEDERAL OWNERSHIP OF THE EXCLUSIVE RIGHT TO EXPLOIT THE RESOURCES OF THE CONTINENTAL SHELF, BUT MERELY THE SAME PARAMOUNTCY WHICH THE FEDERAL GOVERNMENT ENJOYS ON LAND.

A. THE *CALIFORNIA* COURT'S VIEW THAT EXCLUSIVE FEDERAL PROPRIETARY RIGHTS IN THE CONTINENTAL SHELF ARE REQUIRED BY THE FOREIGN-AFFAIRS AND DEFENSE POWERS WAS ALWAYS UNSOUND AND HAS BEEN REPUDIATED BY THE STATE DEPARTMENT, BY CONGRESS, AND BY SUBSEQUENT DECISIONS OF THE COURT.

In *United States v. California*, 332 U.S. 19 (1947), and the two cases which followed the principles it announced, the Supreme Court held that, as against a coastal State, the Federal Government possessed "paramount rights" in the offshore submerged lands seaward of the low-water mark and outside inland waters. *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950). The controversy in the *California* case was limited to the three-mile belt off the coast. The Court's conclusion in that case was based partially on the finding that protection and control of the three-mile belt is a function of national external sovereignty. The Court discussed at some length the existence of a marginal territorial sea and justified it as a "necessity" for a government next to the sea. "[A coastal country] . . . must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars waged on or too near its shores." *Id.* at 35.

There can be little disagreement so far, for all the Court was saying is that the United States can claim, as against

foreign nations, special dominion over the waters close to its shore. The difficulty came when the Court moved on from this proposition to a claim of "paramount rights," including property rights, in the offshore seabed for the United States as against the States. Two exceedingly vague arguments were presented as the means for jumping this logical gap. First, the Court declared that:

> "The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so, if wars come, they must be fought by the nation. See *Chy Lung v. Freeman*, 92 U.S. 275, 279. The state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks." *Id.* at 35-36.

This statement reduces itself to the following argument: since wars may be fought in the ocean, and since the States possess neither navies nor large armies, therefore, the Federal Government must have property rights in the offshore seabed. The argument is a complete *non sequitur*. It also proves too much, since it would lead to the same conclusion as to the land territory of the United States. If that territory were invaded by a foreign power, it is the United States, not the States, which would defend it; but that has never been considered to mean that the United States must have title to all the land in the country, or even to all public lands.

The Court's second argument was as follows:

> "And insofar as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shores and within its protective belt, will most naturally be appropriated for its use. But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units. What this Government does, or even what the states do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations . . . . The very oil about which the state and nation here contend might well become the subject of international dispute and settlement." *Id.* at 35.

In effect, the opinion declares that the Federal Government must itself own property rights in the continental shelf because those rights may be the subject of international dispute or agreement. Again the Court's argument cuts too wide a swath. Property or other rights within the land territory of the United States may be the subject of international negotiations or treaty, and of course a treaty supersedes conflicting State law. *Missouri v. Holland*, 252 U.S. 416 (1920). State action within State boundaries, ranging from the issuance of speeding tickets to diplomats to the adjudication by State courts of lawsuits involving foreign-owned property or interests, may have foreign-relations aspects or create international difficulties.

The federal foreign-affairs power entails the right to supervise all such State action and to prevent any conduct by State governments that would create international problems, interfere with foreign policy or cause in-

ternational embarrassment. *Zschernig v. Miller*, 389 U.S. 429 (1968); *South African Airways v. New York State Division of Human Rights*, 315 N.Y.S. 2d 651 (Sup. Ct. N.Y. Co. 1970). Similarly, the defense power is ample, if exercised by the proper federal authorities, to exercise whatever control is necessary over natural resources, wherever located, to ensure their efficient harnessing for national-defense purposes. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). But no one has suggested that to avoid such problems the Federal Government must itself exercise very governmental function within the United States, let alone own title to all real property throughout the country. Similarly, the foreign-affairs and defense powers simply bear no relationship to the question whether the States or the Federal Government have the right to explore and to exploit the continental-shelf resources secured to the United States by international law and agreement.

Neither the foreign-affairs and defense powers nor the concept of external sovereignty[74] can create property ownership in the Federal Government; rather, they merely give authority for such activities as may be necessary and proper for the carrying out of these federal responsibilities. The States readily concede to the Federal Government the same rights and authority over the continental shelf as are properly exercised on land. "The power of the United States is plenary over these undersea lands precisely as it is over every river, farm, mine, and factory of the nation." *United States v. California*, 332 U.S. 19, 42-43 (1947) (Reed, J., dissenting).

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[74] It is difficult to understand why, if "external sovereignty" requires federal ownership of the seabed, it does not require such ownership of offshore islands as well. Each Atlantic State has such islands, some of which—*e.g.*, Nantucket—are more than three miles from the coast.

The majority in the *California* line of decisions may have been influenced by the fact that at the time of those decisions there was no international treaty which recognized and defined the exclusive continental-shelf rights claimed by the Truman Proclamation. In 1947-50, it was still possible that any property rights conceded to the States in the continental shelf might be objected to by other nations. While that possibility by no means required federal ownership, but only that State ownership be subject to the qualification that it might be defined, limited or even extinguished by federal action under the foreign-affairs power, the fact that in 1947-50 continental-shelf rights were a subject of considerable international controversy and uncertainty lent some faint color of reasonableness to the Court's holdings as of that time.

Any such justification, however, has long since disappeared. Since the conclusion of the Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. (Pt. 1) 471, let alone the International Court's decision in the *North Sea Continental Shelf Case*, [1969] I.C.J. 1, there has been complete international agreement on the existence and nature of continental-shelf rights, at least out to the 200-meter depth mark. State possession of such rights is no more likely today—indeed probably less likely—to give rise to international controversy than the police or judicial powers of the States within their own boundaries. And if any such problems were to arise—for example, problems concerning precisely which seabed and subsoil resources are subject to the States' exclusive rights—the States would of course be bound by any international agreement concluded on the subject by the Federal Government.

The *California* opinion failed even to mention two squarely inconsistent prior decisions which must have been either ignored or overruled *sub silentio*. In *United States v. Chandler-Dunbar Water Power Co.*, 209 U.S. 447 (1907)

(Holmes, J.), the Court had held that Michigan had title, as against the United States, to the bed of the Sault Ste. Marie River, through which the international boundary passed. The Solicitor General had argued that the river was not part of the internal waters of the State because of the international boundary, and that State ownership would interfere with the "international obligations" of the Federal Government. 52 L. Ed. 882-83. The Court thought these arguments so insubstantial that it did not even mention them in its opinion. *Accord*, as to the bed of Lake Ontario, *Massachusetts v. New York*, 271 U.S. 65 (1926). These international-boundary waters are obviously far *more* affected with an international or foreign-affairs interest than the submerged lands involved in *California* or in the present proceeding, which do not abut on the territory of any foreign nation. Until *California*, obviously, the Court had never doubted that federal concerns in such waters could be fully accommodated to State titles in the bed and subsoil.

As a reaction to the *California* line of decisions,[75] the Congress in 1953 adopted the Submerged Lands Act, 67

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[75]Not only were the decisions unsupported by precedent and disavowed by Congress; they were also strongly opposed by the great weight of scholarly opinion. See, *e.g.*, Exhibits 668, 699, 738; Bartley, The Tidelands Oil Controversy: A Legal and Historical Analysis (1953); Hanna, "The Submerged Land Cases," 3 Stan. L.Rev. 193 (1951); Comment, "Constitutional Law—Relation of Federal and State Governments—Title of United States to Tidelands," 50 Mich. L.Rev. 114 (1951); Comment, "The Settlement of Conflicting State and Federal Claims to the Continental Shelf," 15 Albany L.Rev. 85 (1951); Note, "The Tidelands Decisions," 21 Tenn. L. Rev. 676 (1951); Hardwicke, Illig, & Patterson, "The Constitution and the Continental Shelf," 26 Tex. L.Rev 398 (1948); Naugjoks, "Title to Lands Under Navigable Waters," 32 Marq. L.Rev. 7 (1948); Comment, "United States v. California: Paramount Rights of the Federal Government in Submerged Coastal Lands," 26 Tex. L.Rev. 304 (1948); Note, "Real Property—Ownership of California Tidelands," 21 S. Calif. L.Rev. 207

Stat. 29, 43 U.S.C. §§1301-1315. The Act relinquished to the coastal states all the rights of the United States in submerged lands at least to a distance of three geographic miles from the shore, and in the case of a Gulf Coast State, in certain circumstances, relinquished rights to a distance of three marine leagues, or approximately nine geographic miles, from the shore (§3; 43 U.S.C. §1311).

Congress clearly believed that it was not necessary for the resources of the relinquished seabed to be owned by the United States. The Secretary of the Navy, Robert B. Anderson, said as much before the Senate Committee considering the Submerged Lands bill:

> "Senator Long: Do you see any impediment to obtaining oil in time of national emergency by virtue of private or State ownership of some of that land on which that oil is located?
>
> "Secretary Anderson: No, sir.
>
> "Senator Long: Is private industry going to produce oil regardless of whether the oil is under State ownership or privately owned lands or federally owned lands?
>
> "Secretary Anderson: I would certainly assume it would, Senator.
>
> "Senator Long: So, in any event, the oil would be produced by private enterprise.

(1948); Keeton, "Federal and State Claims to Submerged Lands Under Coastal Waters," 25 Tex. L.Rev. 262 (1947); Note, "Submerged Lands: Conflicting Claims of Federal Government and States to Title in the Bed of the Ocean," 35 Calif. L.Rev. 605 (1947); Borchard, "Resources of the Continental Shelf," 40 Am. J. Int'l L. 53 (1946). Bartley found 43 articles on the decisions in legal journals, of which all but three were critical. *Op. cit.* at 247-48 n. 1.

"Secretary Anderson: I would certainly assume that. I doubt we would go into the drilling business." Hearings before the Senate Committee on Interior and Insular Affairs on S.J. Res. 13 and Other Bills p. 560 (83d Cong., 1st Sess.) (hereinafter cited as 1953 Senate Hearings).

The nation's experience during World War II, which was mentioned frequently during the hearings, indicated that an efficient and practicable system of production quotas, industry allocations, rationing, and price controls could easily be introduced during wartime over the petroleum industry, as indeed over the entire national economy. See Executive Order 9276, dated December 2, 1942 (7 F.R. 10091), as amended by Executive Order 9319, dated March 23, 1943 (8 F.R. 3687), which created the Petroleum Administration for War and defined its functions. No mention was made in the continental-shelf hearings of any disputes between State authorities and the Petroleum Administration for War. Certainly, if significant problems had arisen, they would have been used as an argument for keeping all the submerged lands under federal ownership.

Similarly, Congress must not have believed that exclusive State rights to the continental shelf out to three or ten miles was inconsistent with federal powers over foreign relations or that federal proprietorship of this area was a necessary incident of national sovereignty. In the consideration of various submerged-land bills, it was contended that the United States might be embarrassed in its dealings with other nations by permitting states to exercise rights in submerged lands beyond three miles. Mr. Justice Harlan's opinion in *United States v. Louisiana*, 363 U.S. 1, 30-31 (1960), explained why the Federal Government did not object to the bill on these grounds:

"The first objection was laid to rest by the testimony of Jack B. Tate, Deputy Legal Adviser

to the State Department. Mr. Tate stated that exploitation of submerged lands involved a jurisdiction of a very special and limited character, and he assured the Committee that assertion of such a jurisdiction beyond three miles would not conflict with international law or the traditional United States position on the extent of territorial waters. He concluded that since the United States had already asserted exclusive rights in the Continental Shelf as against the world, the question to what extent those rights were to be exercised by the Federal Government and to what extent by the States was one of wholly domestic concern within the power of Congress to resolve."

The testimony referred to in the opinion was quite clear that ownership by the States of the entire continental shelf would cause no international difficulties, nor would it conflict with treaty obligations. Mr. Tate's testimony before the Senate Committee was as follows:

"Mr. Tate. It depends upon what authority and jurisdiction you should grant. We have taken the position that whether this exploration of the seabed is done by the Federal Government or the State governments is not a matter that is of international concern, nor is it a matter that, as far as I know, would conflict with any of our treaty obligations.

* * *

"Senator Cordon. The Chair would like to ask one question here for the purpose of clarification. Is the Chair correct in the understanding that the witness has said in his answer to Senator Jackson that the utilization of the sea bed for the purposes of extracting values therefrom on the Continental Shelf, which right has been proclaimed by the

> President, is a use of the seabed of the Continental Shelf with respect to which the matter of whether the use be limited to the Government of the United States or by transfer from the Government of the United States by any of the several States, is not in the opinion of yourself and of the Department, as you understand it, an international question?
>
> "Mr. Tate. The Chairman is correct in that statement." 1953 Senate Hearings 1067.

During the floor debate on the bill, Senator Cordon presented a statement by the sponsors which made the point crystal clear:

> "As shown by the evidence furnished by the State Department and by the Presidential proclamation and Executive order of September 28, 1945, the vesting or establishment of these proprietary rights in the States is a matter of domestic concern and will not interfere with international law or present and future international agreements and obligations, so long as they are vested or established subordinate and subject to the constitutional governmental powers of the national sovereign." 99 Cong. Rec. 4385.

The State Department did suggest that the United States might be embarrassed by Congress' recognition of State *boundaries* extending beyond the three-mile territorial sea. Congress rejected the argument, and it was put to rest by the Supreme Court's conclusion that a State territorial boundary beyond three miles for limited purposes is entirely consistent with the executive policy establishing a three-mile limit for the territorial waters of the United States. *United States v. Louisiana*, 363 U.S. 1, 35-36 (1960).

Similarly here, the Common Counsel States are asking only for those rights in the continental shelf which the United States claims as against other nations as a matter of international law. The congressional hearings and the review by the Supreme Court in the *Louisiana* case of the legislative history of the Submerged Lands Act demonstrate that Congress intended to overturn the underlying policy determinations in the *California* decision relating to defense and foreign policy.[76]

In *United States v. Louisiana*, 363 U.S. 1 (1960), and *United States v. Florida*, 363 U.S. 121 (1960), the Court held that Texas and Florida had proved boundary claims of three maritime leagues and thus had qualified under the proviso in the Submerged Lands Act. As stated above, Justice Harlan's opinion discussed and dismissed objections based upon foreign-affairs considerations to State property rights in the seabed beyond three miles. The Court no longer believed that federal ownership of the seabed was required by defense and foreign-affairs considerations. Missing completely from the opinions was any allegation that property rights are necessarily inseparable from sovereign powers. The Supreme Court made manifest in

[76] "Whether this jurisdiction ["jurisdiction and control over the resources of the continental shelf"] is exercised by a state of the United States or by the United States itself is purely a domestic matter." Restatement (2d), Foreign Relations Law of the United States (Tentative Draft No. 2, May 8, 1958, p. 22).

By Section 4(a)(2) of the Outer Continental Shelf Act, 43 U.S.C. §1333(a)(2) (1971), Congress also made the outer continental shelf subject to "the civil and criminal laws of each adjacent State . . . for that portion of the subsoil and seabed of the outer Continental Shelf . . . which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area."

the *Louisiana* and *Florida* cases that State property rights in the seabed under the marginal sea do not involve the foreign-affairs or defense powers and do not infringe on attributes of national sovereignty. Thus the authority of the *California* line of cases on those points has been destroyed by these more recent decisions.

B. THE RECORD DEMONSTRATES THAT NO DEFENSE OR FOREIGN-AFFAIRS DIFFICULTIES WOULD RESULT FROM RECOGNITION OF STATE PROPERTY RIGHTS IN THE SEABED AND SUBSOIL OF THE CONTINENTAL SHELF.

Professor Kirkpatrick, called on behalf of the Common Counsel States, testified that in his opinion upholding the claims of the States would not adversely affect in any way the conduct of the foreign relations of the United States. Professor Kirkpatrick reasoned that:

> "A succession of events since 1945 has made such State claims even more consistent with the federal power over international affairs. It is now internationally recognized that the exclusive right to develop the resources of the Atlantic Seaboard continental shelf resides in this country. The question whether development is by the Federal Government, the States, or private operators under the auspices of either, is an internal matter which would not affect the conduct of foreign relations." App. 5.

Professor Kirkpatrick also testified that this position—that the allocation of shelf resources between the Federal Government and the States does not involve foreign-relations matters—was explicitly adopted by the Department of State in the hearings on the Submerged Lands Act. App. 7. This assertion was unquestioned in cross-examination.

Professor Kirpatrick also pointed out that operational control over the resources beyond the three-mile/three-league limit is in the hands of private individuals, since the Federal Government carries on no exploration or drilling itself but rather leases submerged lands to private concerns. He found it hard to understand how the foreign relations of this country could be affected by the fact that these leases would run from the States rather than from the United States. App. 8-10. Again there was no significant questioning of this conclusion by the United States in cross-examination.

The thrust of the cross-examination of Professor Kirkpatrick relative to foreign relations dealt with whether the States or the Federal Government had paramount authority to regulate various matters relating to offshore development: who should define which resources constituted the natural resources of the continental shelf; who should delimit the safety areas around surface platforms and should issue regulations to enforce them; who should give permission for scientific exploration by foreign countries of the continental shelf. Professor Kirkpatrick's position throughout his testimony was that the Federal Government is vested with sufficient power to define the rights of the United States in the continental shelf and to regulate such activities as may touch and concern relations with other nations. However, he repeatedly emphasized that this was no more and no less power than the Federal Government has on land.

Professor Kirkpatrick ended this portion of his testimony by noting that during the extensive hearings on the Submerged Lands Act no mention was made of any significant foreign-policy objections to State ownership of seabed resources, and concluded that this was "powerful evidence that no such objection exists." App. 12. The record is wholly devoid of any examples of federal-State conflicts

with respect to the seabed of the three-mile/three-league continental shelf. Professor Henkin knew of no such conflicts:

> "Q. Since the Submerged Lands Act, do you know of any grievous international problems or embarrassment to the foreign relations of the United States that have been caused by the alleged gift of some of the continental shelf to the states?"
>
> "A. I don't know of any." Tr. 2647.

Turning to the question whether the national defense or other military interests of the United States require federal ownership of the continental shelf, Professor Kirkpatrick was definite that they do not. Drawing on over thirty years' experience in defense policy, he testified that:

> "The powers exercised by the Federal Government which I have already referred to are in my opinion adequate, whether the Federal Government or the States own and develop the submerged lands in question, both to authorize activities by the military authorities in the ocean above the continental shelf and to prohibit activities by the States or by American citizens that are contrary to the defense interests of this country. In time of war or national emergency, and even in peacetime to the extent necessary for defense, local and private interests yield to the military needs of the nation.
>
> "In this regard, undue emphasis should not be placed on the need for Federal power. In my experience, the States of this country have cooperated significantly of their own volition where activity in the interests of national defense

called for action or restraint by individual States." App. 15-16.

Professor Kirkpatrick specifically noted the cooperation between the States and the Federal Government since the enactment of the Submerged Lands Act. For example, although the States possess the seabed resources in the three-mile/three-league belt, the Secretary of the Army has absolute authority to prohibit placement of any structures in the coastal sea. Yet, this allocation of responsibilities between the States and Federal Government has not been a source of discord. App. 15-17. Professor Kirkpatrick concluded that there was every reason to believe that this cooperative approach, in the defense area, could operate as easily beyond the three-mile/three-league limit. App. 17. Neither his evidence nor his conclusion was questioned by the United States.

Cross-examination of Professor Kirkpatrick centered on questions relating to whether the Federal Government could continue to carry on military activities in the waters of the continental shelf if title to the seabed was in the coastal States. The Professor believed the United States has all the authority necessary for that purpose, as plainly it does. He minimized the extent of possible interference of military activity with exploration and exploitation by the States, and emphasized that federal military authority need be no different from that exercised by the Federal Government on land. See, *e.g.*, Tr. 257-258. No evidence in the record indicates that the States have ever interfered with military operations in the three-mile/three-league belt, and nothing in the record indicates that the States would in the future inhibit such operations in the continental shelf. In cross-examination, Professor Kirkpatrick minimized the possibility of State interference:

> ". . . I think we are speculating on a very unlikely possibility that the states would inhibit or try to prevent an action for defense." Tr. 260.

And if they did attempt to do so, the federal defense power is obviously adequate to prevail.

Recognition of State property rights in the seabed of the continental shelf would not result in embarrassment to the United States in the conduct of its foreign relations, nor would it inhibit military activities on the seabed or in the waters over the seabed. To carry out its constitutional powers over foreign affairs and defense, the Federal Government no more needs to own the continental shelf than it needs to own the three-mile belt, the three-league belt in the Gulf or for that matter every acre of land in the United States or the air superjacent thereto.

The States, on the other hand, have substantial interests in the development and regulation of their continental-shelf resources. Besides their obvious fiscal interest they have a duty to protect their waters and coastlines from pollution and other environmental damage which is threatened by irresponsible exploitation of continental-shelf resources, and which has occurred on a massive scale under federal leasing arrangements. Congress has expressed its preference for "local controls" with respect to exploitation of continental-shelf resources and its awareness of "the fixed, inflexible rules and the delays and remoteness which are inseparable from a centralized national control." Quoted in *United States v. Louisiana*, 363 U.S. 1, 98-99 n. 25 (1960) (Black, J.).

XI.

THE SUBMERGED LANDS ACT AND THE OUTER CONTINENTAL SHELF ACT ARE UNCONSTITUTIONAL IF THEY PURPORT TO DEPRIVE THE ATLANTIC STATES OF TERRITORY OR PROPERTY.

Plaintiff appears to contend, though this is not altogether clear, that the legislation of 1953 furnishes an independent ground for extinguishing the States' claims even if they were valid until then.

It may be possible to view the Submerged Lands Act and the Outer Continental Shelf Act in such a way that neither unlawfully appropriates to the Federal Government property rights or territory belonging to the States. As to the belt of land lying between three miles and three leagues, the Submerged Lands Act gave to the Gulf States the right to qualify for a claim of up to three leagues. This was founded on Congress' belief that those States had an historic basis for the more extensive claim, and the exception written into the Act for their benefit underscores that Congress had no wish unlawfully to deprive them of territory or property. The fact that no such provision was made for the Atlantic States merely evinces Congress' lack of knowledge as to the strength of their claims; and in accordance with the policy of the Act, it seems only reasonable to interpret it in such a way that the Atlantic States may also quality. (See pp. 455-60, *infra*.) So far as the right to exploit seabed resources beyond three leagues and to the edge of the continental shelf is concerned, Congress did not intentionally attempt to transfer to the Federal Government rights which were vested in the States. The underlying purpose of the legislation was to reverse what was regarded as the Supreme Court's erroneous decision in the *California* case and to restore to the States all those submerged lands to which they had an historic title. See pp. 382-88, *supra*.

If, however, these statutes did purport to divest the Common Counsel States of the exclusive right to exploit their continental-shelf resources beyond three miles, they are *pro tanto* unconstitutional. The right to seabed resources may be seen as *proprietary*, in which case the statutes deprive the States of property without due compensation in violation of the Fifth Amendment; or as *territorial*, in which case they diminish the territory of the States in excess of the power granted to the Federal Government by the Constitution.

The rights possessed by the States are unquestionably property rights, though they have other aspects as well. The Federal Government has offered nothing in exchange for its attempted deprivation of these rights. Yet the Fifth Amendment explicitly states: "nor shall private property be taken for public use, without just compensation." It is well settled that the Fifth Amendment applies to State property taken by the Federal Government. While such property may indeed be taken under the power of eminent domain, the Federal Government is not relieved of its duty to pay just compensation. As the Court stated in *United States v. Carmack*, 329 U.S. 230, 242 (1946):

> "when the Federal Government thus takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it and it is conceded in this case that the Federal Government must pay just compensation for the land condemned."

See also *Oklahoma v. Atkinson Co.*, 313 U.S. 508, 534 (1941); *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 100-01 (1893); *Yalobusha County v. Crawford*, 165 F.2d 867, 869 (5th Cir. 1947); *Wayne County v. United States*, 53 Ct. Cl. 417, 423-24 (1918), *aff'd*, 252 U.S. 574 (1920).

Therefore, the purported divestiture of the States' rights, if there was such a divestiture, violates the Fifth Amendment.[77]

In reply, it may be urged that no compensation need be paid for the species of property involved here, *i.e.*, submerged lands belonging to a State, perhaps on some public-use or trust theory. Such a reply would invoke *Stockton v. Baltimore & N.Y. R.R. Co.*, 32 F. 9 (C.C.N.J. 1887), *appeal dismissed*, 140 U.S. 699 (1891). There the United States had authorized a railroad company to build a bridge across the Staten Island Sound, part of the internal waters of New Jersey. The Attorney General of New Jersey contended, *inter alia*, that because the piers of the bridge would rest on submerged lands belonging to the State just compensation was due. The court rejected the contention, holding that the submerged lands were held by the State in trust for public uses, and that when Congress pursuant to the commerce power used "a few square feet" (32 F. at 20) for the foundation of a bridge which was itself a public use, no compensation was due even if the submerged lands were "private property" within the meaning of the Fifth Amendment.

There are a variety of reasons why *Stockton* is not controlling and the above reply is inadequate. First, a very great difference exists between the "few square feet" of river bottom at issue in *Stockton* and the thousands of square miles of valuable submerged lands involved here.

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[77] Quite a different question would be presented, of course, if the United States, rather than attempting to take the States' continental-shelf rights for its own use and profit, renounced them by treaty or by acquiescence in a change in international law by which they would no longer be recognized. Such federal action, pursuant to the foreign-affairs power, would indisputably be valid and binding on the States; the hypothetical question whether compensation would be due is not involved in this proceeding. Any such renunciation by the United States in the future is in the highest degree improbable.

The *Stockton* opinion reveals some doubt as to whether any taking occurred by questioning whether the appropriation of a few square feet of river bed "is at all a diversion of the property" from its original use. *Id.* at 20. But the deprivation of rights to extremely valuable seabed resources is manifestly a taking of property, for which just compensation is required by the Constitution.

Second, a substantial difference in statutory purpose is involved. The statutes relating to the continental shelf purportedly grant the Federal Government the right to exploit natural resources such as oil and minerals; the purpose is fundamentally economic in character, since the Federal Government would gain, and the States would lose, a substantial amount of revenue. By contrast, the small amount of river bottom acquired in *Stockton* was taken for the public purpose of supporting the piers of a bridge.

Third, any public-trust theory that might be applicable to the continental shelf must be carefully distinguished from that which applies to inland waters and other State property. Rivers are often used for navigation, and Congress in the exercise of the commerce power may appropriate some small amount of river bottom to erect a bridge over the river. However, it is not even superficially plausible to suggest that submerged lands in the continental shelf are held for public use in navigation or commerce, save insofar as Congress might decide to authorize the erection of a lighthouse or the laying of a telephone cable. No public-use or trust doctrine exists that would justify depriving the States of the entire seabed, for ends unrelated to navigation or commerce, without just compensation.

Fourth, some slight authority exists for saying that in some circumstances if land is dedicated by a State to one public use (*e.g.*, as a park), the Federal Government can put it to another (*e.g.*, as a place for a post office), if the lat-

ter use is superior, without compensating the State or one of its subdivisions. *In re Certain Land in Lawrence,* 119 F. 453 (D. Mass. 1902). But no such doctrine has ever been applied to the seabed. Further, the Federal Government and the States propose here to put the land to the same use, so it can hardly be argued that the federal use is superior.

Fifth, the *Stockton* and *Certain Land* cases represent very much a minority view.

> "[T]he weight of authority is contrary to this view and supports the conclusion that the United States must make just compensation for any property taken by it under the power of eminent domain from a state or a political subdivision or agency thereof."

See Annotation, "Eminent domain: power of one governmental unit or agency to take the property of another such unit or agency," 91 L.Ed. 221, 224 (1947), and cases there cited.

The United States has recognized the obligation to pay just compensation for continental-shelf property it takes from the States. Under Section 6 of the Submerged Lands Act, 43 U.S.C. §1314 (1971), Congress provided as to the three-mile/three-league belt of land ceded to the States that the United States had the right to purchase undersea resources or portions of the ceded submerged lands, if required for national defense. The section explicitly provides that acquisition of the resources shall be "at the prevailing market price," and of the lands "by proceeding in accordance with due process of law and paying just compensation therefor."

The rights of exploitation possessed by the States should be seen alternatively, or additionally, as territorial. The power of Congress to diminish the territory of a State is very limited. Under Article I, Section 2, Clause 17, it may

acquire an area not to exceed ten square miles created by "cession of particular States" to serve as the seat of government, as well as lands purchased "by the Consent of the Legislature of the State in which the same shall be" for the erection of military bases and so on. No power is granted the Federal Government to deprive the States of thousands of square miles for use other than as the seat of the Federal Government, or other than for military or shipping purposes or the like. *A fortiori* no such power exists when the States have not consented or ceded land to the Federal Government. *Cf. Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). In view of the Tenth Amendment and the doctrine that the Federal Government has only those powers enumerated in the Constitution, Congress' attempt to deprive the Atlantic States of their territory in the continental shelf is unconstitutional.

XII.

THE DEFENDANT STATES SHOULD PREVAIL EVEN IF EXCLUSIVE RIGHTS TO PART OR ALL OF THE CONTINENTAL SHELF ARE DEEMED TO HAVE SPRUNG INTO EXISTENCE DE NOVO IN 1945.

A. THE ATLANTIC STATES ARE ENTITLED TO THE SHELF AS RESIDUAL SOVEREIGNS AND OWNERS OF PROPERTY OF THEIR LAND TERRITORIES, TO WHICH CONTINENTAL SHELF RIGHTS ARE AN "INHERENT" APPURTENANCE.

Let it be assumed that all the arguments advanced earlier fail and that prior to 1945 neither the Federal Government nor the States possessed any rights to exploit continental-shelf resources. Even under this assumption, the Atlantic States are still uniquely entitled to exploit those resources.

Likewise, if the States are held to have historic rights to part, but not all, of the continental shelf adjacent to their coasts, the considerations mentioned below are sufficient to give them the better right to the remainder as against the plaintiff.

Proclamation 2667, made by President Truman on September 28, 1945, declared that

> "the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." 3 C.F.R. 67, 68 (1943-48 Compil.).

The position taken by the Truman Proclamation has since been confirmed by international law. Article 2 of the 1958 Geneva Convention on the Continental Shelf, for example, recognizes the rights of a state, by virtue of its sovereignty over the land, to exploit seabed resources in the continental shelf. Such rights have also been acknowledged by the International Court of Justice in the *North Sea Continental Shelf Cases*. [1969] I.C.J. 1, 22, where they are characterized as "inherent" and "exclusive" rights. Hence, under settled doctrine of international law, rights of exploitation in the continental shelf off the United States unquestionably exist.

To whom, then, do these rights belong? Do they appertain to the Federal Government, or to the coastal States, or to both? This question was left open by the Executive Order accompanying the Truman Proclamation; for though the resources were placed under the control of the Secretary of the Interior, it was explicitly stated that

> "neither this Order nor the aforesaid proclamation shall be deemed to affect the determi-

> nation by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the continental shelf within *or* outside of the three-mile limit." Exec. Order 9633, 3 C.F.R. 437 (1943-48 Compil.).

Nor does international law answer the question; international law recognizes the rights on behalf of the United States considered externally, but cannot and does not determine whether those rights are allocated to the States or to the Federal Government by our constitutional system.

Under that system, it is submitted, these rights of exploitation belong to the Atlantic coastal States. In light of the Ninth and Tenth Amendments, and more basically in view of the nature of the American federal system, the Federal Government is a government of limited powers. It has only such powers, sovereignty and territory as have been granted to it by the States; all residual powers, sovereignty and territory are retained by the States. New rights in the continental shelf were, by hypothesis, acquired under international law after 1945. As argued earlier, these rights cannot be viewed as falling within the powers of the Federal Government to provide for defense and to conduct foreign affairs; and no other basis for federal ownership exists.

The United States will doubtless argue that continental-shelf rights were acquired by it for its own use, just as, for example, the Louisiana and California territories were acquired. There is, we submit, a profound difference. Continental-shelf rights were not acquired as new territory which bore no relation except that of geographical contiguity to the existing States. To the contrary, these rights were acquired through a development or crystalization of international law which recognized that the continental

shelf appertains inherently and naturally to the adjacent coastal area:

> "[T]he rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources." *North Sea Continental Shelf Cases*, [1969] I.C.J. 1, 22.

The Truman Proclamation itself recognized the unique nature of the acquisition of continental-shelf rights by not even purporting to acquire them on behalf of the Federal Government as against the States, but rather leaving that question open for determination by operation of law.

Under our constitutional system it is the States which are the residual sovereigns of their territory. Moreover, so far as the Atlantic States are concerned they are the residual owners of the soil as well. None of the Atlantic States, of course, ever ceded its public lands within its boundaries to the United States; and it is undisputed that those States remain the owners of all property within their boundaries that has not been granted or deeded out either by them or by their predecessor sovereigns. The United States has not title to land within any of the Atlantic States except so far as it has acquired it from them with their consent; as to such land the title of the United States derives from and depends upon the original title of the state or its predecessor, just like the title of any other property owner.

It follows from these undoubted facts, we think, that it is the defendant States which—not as a matter of international law, but as a matter of analysis under our federal system—possess the sovereignty and dominion over

their land areas to which international law holds that the continental shelf appertains as "a natural prolongation." It follows, we submit, that it is the Atlantic States and not the Federal Government which possess exclusive rights of exploitation of the continental shelf, even on the assumption that those rights came into existence at the time of the Truman Proclamation or thereafter.

This argument is especially compelling when it is recognized that in fact such rights of exploitation plainly existed in the 17th and 18th centuries. Even if, as the United States contends, the United States allowed them to lapse or renounced them after formation of the Union, it cannot equitably be the beneficiary of its own inaction by now acquiring these rights for itself when they are again recognized as the subject of exclusive ownership.

The argument just made, in our submission, entitles the Common Counsel States to the exclusive right to exploit the resources of any portion of their continental shelf which is held to be outside their historic boundaries but is within the limits of the shelf as finally determined by the United States in the exercise of the foreign-affairs power.

* * *

The argument just made has consumed few pages in relation to the rest of our Brief, and it comes almost at the end of it. For these reasons it risks being lost in the shuffle, as a makeweight or an afterthought. That, we submit, would be unfortunate. We are persuaded that the argument is wholly sound. It can be stated briefly because the concept is simple and because there are no specific precedents or analogies, at least none that we have thought of, either for it or against it, which require lengthy analysis.[78]

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[78] The closest analogy to the extension of territory by recognition of continental-shelf rights is the extension of a land territory by accretion or alluvion. Plaintiff will surely not deny that such extensions in this country accrue to the States, not to the Federal Government; a wealth

We submit, nonetheless, that as a constitutional matter, assuming a *tabula rasa* of continental-shelf titles or claims prior to 1945, the States' better right is clear and decisive.

Plaintiff has, by its own admission and indeed assertion, no claim whatever antedating 1945. The States have very substantial and deeply rooted historic claims. Even if, *arguendo*, the States' claims are found somehow to fall short of establishing a vested title, they are surely better than plaintiff's claim, which has no historic basic whatsoever.

Historic claims aside, the argument made in this section goes to the simple foundation of our entire constitutional system: that the Federal Government is a government of limited, delegated powers, and that all inherent and residual sovereignty and dominion rest with the separate States. If there is a single proposition that underlies our Constitution, our basis of government, our historic accommodation of unity and diversity, the pledge offered and accepted upon which whatever we have achieved as a ation has been founded, it is that.

If that underlying principle is now to be repudiated in law, as having somehow been rendered inoperative by the march of centralized power, then this nation and this government have renounced their roots, and are no better.

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of authority can be adduced for that proposition if it should be challenged. Professor Seidl-Hohenveldern, an eminent German publicist, used the alluvion analogy in arguing that in the German federal system continental-shelf rights accrue to the states. Annuaire Français de Droit International 723-24 (1964). *Accord*, Bohmert, Natur und Umfang der Bundesrepublik Deutschland am Kontinentalschelf Zustehender Rechte, im Internationales Recht und Diplomatie 128 (1967); Willeke, Der Festlandsockel Seine Volker und Verfassungsrechtliche Problematik in Deutsches Verwaltungsblatt 463 (1966). German law has accepted state ownership, and licensees of the states enjoy exclusive exploitation rights.

and have no better hope, than any squalid little dictatorship carried to power yesterday or last week on the ruins of whatever ephemeral system may have preceded it. That sort of usurpation accords ill with the genius that has made Anglo-American law the force for enlightened stability, for a sophisticated balance between the wisdom of the past and the needs of the present and the future, which has rendered it uniquely respected and envied throughout the world.

Under our constitutional system, if it still has any vitality in the courts, the separate States are the residual sovereigns of their coastlines and the owners in property thereof and of whatever seabed and subsoil rights depend thereon or are appurtenant or accrue thereto. The rights in dispute herein, never having been delegated, are plainly in that category. Therefore they belong to the States.

B. AT THE VERY LEAST, THE ATLANTIC STATES ARE ENTITLED TO PROVE HISTORIC BOUNDARIES OUT TO THREE LEAGUES UNDER FEDERAL LEGISLATION.

Even if every argument made hitherto is rejected, it is submitted that the Atlantic States should be allowed to establish ownership out to three leagues by proving historic boundaries on the same basis as the Gulf States, in order to avoid unconstitutionality of the Submerged Lands Act as discriminating among the States without rational basis.

All States have a right to be treated equally by the Federal Government in respect of their sovereignty and political rights. Though this doctrine of "equal footing" or "equal status" is not stated in so many words in the Constitution, that "equality of Constitutional right and power is the condition of all States of the Union, old and new" is well-established by judicial decision. *Escanaba Co. v. Chicago*, 107 U.S. 678, 689 (1882). As emphasized in *Coyle v. Smith*, 221 U.S. 559, 567 (1911):

> " 'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution with others whose powers had been further restricted by an act of Congress accepted as a condition of admission."

If equal status must be given all new States of the Union, it would be absurd to deny it to the original thirteen States.

The equal-footing doctrine has been said to apply to "political rights" rather than "property." *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900). Possibly it might have been lawful for Congress simply to make a gift of a greater portion of the continental shelf to Texas and Louisiana than to all other states. But that is not what Congress did; rather, Congress gave to the Gulf States, but not to the others, the political or legal right to establish the existence of historic boundaries extending beyond three miles as entitling them to exclusive continental-shelf rights. The Act allows to the Gulf States, but denies to all other coastal States, the right to qualify under the three-league provision. Section 2(b), 43 U.S.C. §1301(b) (1971). This is a "political" right and is embraced by the equal-footing doctrine. It is surely a sovereign or political right of the Atlantic States to be able to show that they qualify for the possession of rights of exploitation when the Gulf States are afforded the opportunity so to qualify.

No rational basis exists for the distinction drawn by the Act. Although Congress could perhaps treat States unequally if some States had a substantially different

historical background from all the others, it cannot do so when that difference is lacking—even though there was a misapprehension of the facts by Congress. *A fortiori* no rational basis can be found for statutory discrimination which allows *all* States to demonstrate that they possess a seaward boundary greater than three miles but permits only *some* States to enjoy rights of exploitation in consequence of any such demonstrated boundary. The three-league provision is thus underinclusive. It therefore violates the constitutional right of the Atlantic States to equal status.

It might be objected that the distinction drawn by Congress was reasonable because it was based on "the shallowness of waters in the Gulf and the alleged Spanish custom of claiming three leagues of territorial waters," *United States v. Louisiana*, 363 U.S. 1, 32 (1960), or on the "fact that the Gulf is very largely enclosed by land," *id.* at 32 n. 53. But even if the legislative history unequivocally supported such a view of why Congress allowed only the Gulf States to qualify, which it does not, it hardly endows the distinction with a rationality it has otherwise been shown to lack. Since the United States has claimed continental-shelf rights to a depth of at least 200 meters, it is hard to see what relevant difference obtains if the depth at which the rights of a State cease is ten meters, or 50, or 199; the "shallowness" of the Gulf is thus not in point. It is even more difficult to perceive why the fact that the Gulf is largely enclosed by land is germane, when the distance across it is still some hundreds of miles. And it is clear that the Gulf has never been regarded as an historic bay or something of that sort, which the United States could claim as internal waters or within which it could assert some other type of special status. 1 Hackworth, *Digest of International Law* 694 (1940). The reference to "Spanish custom" simply underscores congressional ignorance of the strength of the English-law claims of the Atlantic States; it is wholly inadequate to make rational the divergent treatment of the Atlantic and Gulf States.

It may also be contended that the equal-treatment claim has been resolved adversely to the Atlantic States by *Alabama v. Texas*, 347 U.S. 272 (1954). To this there are several responses. First, the Supreme Court did not pass on the merits of any of the claims advanced in that case; it merely refused to allow the protesting States to file a complaint. Second, the Court in *Alabama v. Texas* did not pass on the precise claim being made here. Though equal-treatment arguments of a sort may have been made in that case, if so they were submerged in a welter of contentions which had little or nothing to do with equal treatment. The general posture of *Alabama v. Texas* was in any event quite different; there the equal-treatment claim was aimed at depriving the Gulf States of land beyond three miles, while in this instance the claim seeks to provide an equal opportunity for the Atlantic States to obtain submerged lands in the belt between three miles and three leagues. Third, if *Alabama v. Texas* did resolve the present equal-status claim, that case was wrongly decided. This Court is free to correct prior errors of law, particularly when the statutory distinction was made in ignorance of the historic claims of the Atlantic States. Consequently, *Alabama v. Texas* cannot foreclose a decision in this case that the distinction drawn between the Gulf and Atlantic States was without rational foundation and therefore unconstitutional.

There remains for consideration the question of remedy. As Justice Harlan pointed out in *Welsh v. United States*, 398 U.S. 333, 361 (1970) (concurring in the result), where "a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Cf. Schacht v. United States*, 398 U.S. 58 (1970); *Skinner v. Oklahoma*, 316 U.S. 535, 543 (1942); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239,

247 (1931). The issue here is thus whether the rights acquired by Texas and Florida should be extinguished, or whether all coastal States, not merely the Gulf States, should be given the opportunity to qualify under the three-league provision.

The broad severability clause of the Submerged Lands Act should be taken to grant the Court wide discretion to fashion relief consonant with the underlying policy of the underinclusive provision. Section 11 of the Act, 67 Stat. 33 (1953), contains, in addition to the language usual for such a clause, a clause emphasizing the intention of Congress to hold valid the basic granting provisions of the Act, *i.e.*, Sections 3(a), 3(b) and 3(c), should some provision included within them be held invalid. Although the absence of such a severability clause would not preclude the result we seek, see *United States v. Jackson*, 390 U.S. 570, 585 n. 27 (1968), its existence "discloses an intention to make the Act divisible and creates a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained." *Champlin Refining Co. v. Comm'r.* 286 U.S. 210, 235 (1932). See also *Welsh v. United States*, 398 U.S. 333, 364-65 (1970) (Harlan, J., concurring in the result).

In this case, the better alternative is to leave the Texas and Florida three-league limit untouched and to allow the Atlantic States the opportunity to qualify under the three-league provision. As pointed out in Justice Harlan's opinion in *Welsh*, the relevant criteria are (1) the "intensity of commitment to the residual policy" and (2) the "degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." 398 U.S. at 365. In regard to the former, it is necessary to recall that Congress inserted the three-league provision for the Gulf States because it believed that owing to their history they might have some claim to the seabed beyond three miles.

The policy behind this provision was that any State having some special preadmission history that would entitle it to rights of exploitation beyond three miles ought to have the opportunity of perfecting those rights. While Congress was wrong in thinking that only the Gulf States might have such an historic claim, this misapprehension should not deter the Court from giving force to the residual policy of the three-league provision. The intensity of congressional commitment to this policy is evidenced by the special clause it inserted into the severability provisions of Section 11 whereby the basic granting clauses of the Act should to the greatest extent possible be upheld.

So far as Justice Harlan's second criterion is concerned, it is to be observed that abandoning the three-league provision altogether would not merely "disrupt" but would destroy the statutory scheme. Were that provision abrogated, Texas and Florida would be divested of the rights they acquired under the statute, in opposition to the directive contained in the severability clause. Moreover, all leases and other proprietary or contractual arrangements made by Texas and Florida with respect to submerged lands beyond the three-mile limit would lose their validity, thus creating uncertainty and confusion on the part of those who have rights under those arrangements. For all these reasons, the unconstitutional discrimination is best corrected by affording the Atlantic States the opportunity to qualify under the three-league provision.

CONCLUSION

For the foregoing reasons, the Court is respectfully requested to find that the Common Counsel States are entitled as against the United States to explore and to exploit the resources of the seabed and subsoil underlying the Atlantic Ocean adjacent to their coasts beyond three geographic miles therefrom.

Respectfully submitted,

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APPENDIX

BRITISH AND COMMONWEALTH LAW SINCE 1800

Post-1776 British law is, of course, not part of our law. If British law changed since 1776 in a fashion inimical to the Common Counsel States' contentions here, that would be irrelevant unless plaintiff could demonstrate that the same change occurred in our law as well. In fact, however, British law since 1776 has been generally faithful to the common law of maritime sovereignty and dominion as it existed prior to that date. An excellent summary of the subject is found at App. 963-87.

Our review of 18th-century British law (pp. 124-39, *supra*) has carried the history down to 1800; this Appendix will very briefly cover the period since then.

A. THE CROWN'S OWNERSHIP OF THE SEABED AND SUBSOIL OF BRITISH WATERS HAS CONTINUED UNCHANGED AND HAS BEEN APPLIED TO THE CONTINENTAL SHELF.

From 1800 to 1876, the British courts uniformly continued to apply the traditional law that the crown owns in property the seabed and subsoil of the marginal sea. For this point the Common Counsel States incorporate by reference App. 966-71 and pp. 129-30 of U.S. Exhibit 17, where most of the relevant case law is quoted and summarized. These cases relied without question on Hale and the other older authorities with respect to the English law of maritime sovereignty and dominion. None of these cases required a determination as to the outer limit of that sovereignty and dominion, and none of them mentioned the three-mile limit or the cannon-shot rule except for the *Whitstable* case, App. 970-71, which mentioned three miles but did not hold that the crown's ownership ended at that limit. In the *Gammell* case, App. 970, which dealt with surface fisheries, the

court held that the three-mile limit applied to such fisheries.

In *Attorney General v. Tomsett*, 2 Crompt. M. & R. 170, 5 Tyrwh. 514, 1 Gale 147 (1835), the question was raised in the Exchequer Court whether certain goods unshipped in the sea were unshipped within the United Kingdom as the term was used in a statute. The crown lawyers contended that they were, since "the narrow seas have always been considered as wholly within the kingdom of England." 2 Cromp. M. & R. at 172. Counsel for the defendant "submitted that the narrow seas are not part of the kingdom of England," whereupon Baron Alderson interjected that "the authority of Lord Hale is to the contrary: he says they are within the kingdom." *Id.* at 173. Defendant's counsel thereupon qualified his contention: "no doubt they are part of the dominions of the king of England, and so are the colonies; but it is submitted they are not within the kingdom of England. If they were, they would be within some county, but that is not pretended." *Ibid.* The court found resolution of the question unnecessary to decide the case.

For additional materials on the famous *Cornwall Mines* case, in which it was squarely held that the crown owned the mines and minerals lying below low-water mark under the open sea as part of the soil and territorial possessions of the crown, as against a claim by the Duke of Cornwall as first occupier, see App. 73; Exhibits 166, 167, 168, 169.

In *Officers of State v. Smith*, 8 Sess. Cas. (2d ser.) 711, 723 (1846), *aff'd sub nom. Smith v. Earl of Stair*, 6 Bell's App. Cases (House of Lords, 1849), Lord Cockburn declared:

> "I know nothing which I think might be predicated with greater safety or that less requires formal proof, than that the bed of the British seas

belongs in property to the British Crown." U.S. Exhibit 17, p. 130.

In *Duchess of Sutherland v. Watson*, 6 Sess. Cas. (3d ser.) 199, 213 (1868), Lord Neaves said:

> "Coming to the question that we have here at issue, I think, in the first place, that the *solum* or *fundus* of the deep sea—that is, not only the part between highwater and low-water mark, but the sea within such a line as may be reasonably drawn in connection with the shores—belongs in property to the Crown, and does so as a patrimonial right. That it does so belong to the Crown, at least within narrow limits near the shore, such as are here in question, is clear; and that would be clearly seen if a question were raised as to any minerals which might extend under the sea, and which might be worked outwards from the shore to a point under the deep sea. I think that that right is a patrimonial one. It is not a right held by the Crown in trust for the public. There are rights held by the public that are burdens upon it so far. There is the public right of navigation; and there may or may not be rights of fishing in the public—rights to catch fish that float in the public *fundus* or *solum*. These may be public rights, but the right of property in the *solum* of the sea I consider to be a clear patrimonial right of the Crown. And that right may be granted to one of the lieges subject always to those rights of navigation of which I have spoken, and it may be constituted by explicit infeftment, so as to make it a feudal estate."

The British treatise writers between 1800 and 1876 likewise affirmed the sovereignty and dominion of the crown in the British seas, and its ownership in property of

the seabed and subsoil thereof. These writers included Schultes, Chitty, Hall, Woolrych and Jerwood. See App. 687-92, 855-62, 889-90, 974-77; Woolrych, *A Treatise on the Law of Waters* 4-5, 19-21 (1830); Jerwood, *A Dissertation on the Rights to the Sea Shores* 1-128 (1850). None of these writers believed that the crown's sovereignty and dominion were confined within a three-mile or cannon-shot limit. In general they adhered to the boundaries of the British seas as traditionally defined, and quoted Hale and the other older writers with approval. Schultes adopted Bodin's 60-mile limit, and mentioned pearls, coral and amber as among the subjects of maritime property. App. 889-90.

The case of *Queen v. Keyn*, in 1876, has many times been exhaustively analyzed. On this subject we incorporate as part of this brief Professor Horwitz's testimony at App. 48-89. Professor Horwitz has demonstrated that the holding of the case was limited to the thesis that the admiralty jurisdiction did not extend to foreigners in the English seas without a specific parliamentary enactment to that effect. App. 80. That holding was based on an erroneous analysis of the history of the admiralty jurisdiction. App. 53-58; see pp. 25-31, 92-98, 132-33, *supra*. All the judges acknowledged the existence of various crown rights in the marginal sea, and the majority of them believed that the marginal sea was part of the territory of England. App. 58-74, 80-81. The holding as to the admiralty jurisdiction was promptly overruled by Parliament, which pointedly declared that the jurisdiction "extends *and has always extended* over the open seas adjacent to the coasts of the United Kingdom and of all other parts of her majesty's dominions to such a distance as is necessary for the defense and security of such dominions." App. 75-76, 646-47. (Emphasis added.)

In *Manchester v. Massachusetts*, 139 U.S. 240, 257 (1891), the Supreme Court of the United States regarded

the *Keyn* decision as dealing only with the admiralty jurisdiction, and refused to apply it as in any way casting doubt on sovereign jurisdiction in territorial waters or on the right of coastal States to control sea fisheries. For other authoritative comments on the *Keyn* case, see App. 138-40, 890-92, 977-87; U.S. Exhibit 7, pp. 109-11.

In decisions rendered since 1876, the British courts have, likewise, uniformly refused to allow the *Keyn* dicta to cast any doubt on the traditional law, and have uniformly reaffirmed the maritime sovereignty and dominion of the crown in the marginal sea. The case law has been exhaustively analyzed, and there is no need to discuss it in detail here. See App. 77-80, 963-65, 971-73, 983-85; Exhibits 162, 163, 164, 165; Exhibit 747, pp. 141-142. These decisions, written between 1892 and 1916 — during the heyday of the three-mile limit, especially in British opinion — did not regard the crown's ownership of the seabed as necessarily limited to three miles. Rather, they used such formulas as "for some distance below low-water mark" (App. 972), or "whether within the narrow seas, or from the coast outward to the three-mile limit" *(ibid.)*, or carefully pointed out that the status of the sea beyond three miles was not at issue and therefore need not be decided, Exhibit 165, p. 199.[79]

In the most recent of these cases, *Secretary of State for India v. Chelikani Rama Rao*, 43 L.R. Ind. App. 192 (1916), the Privy Council relied on Hale in holding that islands rising in the sea belong to the crown because " 'they are part of that soil of the sea, that belonged before [*i.e.*, while under water] in point of propriety to the king.' " The Privy Council had this to say about the *Keyn* case:

[79] In cross-examining Professor Horwitz, plaintiff's counsel incorrectly suggested that one case, Lord Advocate v. Clyde Navigation Trustees, concerned Loch Lomand, which is an inland lake. In fact the case concerned Loch Long, which is an arm of the sea and a part of the Firth of Clyde. Exhibit 162. The decision did, however, treat Loch Long as internal waters and limited its holding to such waters.

> "The doubt raised upon this proposition has been substantially rested on certain dicta pronounced in the case of *Reg. v. Keyn*. The Crown, admitted to be owner of the foreshore, is, so it was there suggested, bounded in its dominion of the bed of the sea by the range of the rise or fall of the tide. Crown property does not, it was said, extend further seaward. It should not be forgotten that that case had reference on its merits solely to the point as to the limits of admiralty jurisdiction; nothing else fell to be there decided. It was marked by an extreme conflict of judicial opinion, and the judgment of the majority of the Court was rested on the ground of there having been no jurisdiction in former times in the admiral to try offences by foreigners on board foreign ships whether within or without the limit of three miles from the shore.
>
> "When, however, the actual question as to the dominion of the bed of the sea within a limited distance from our shores has been actually in issue, the doubt just mentioned has not been supported, nor has the suggestion appeared to be helpful or sound." *Id.* at 199.

Thus in *Chelikani* the Privy Council, the highest court in Britain with respect to the colonies and dominions, squarely repudiated the dicta in *Keyn* and affirmed the traditional doctrine of crown ownership of the seabed.

In *Croft v. Dunphy*, (1933) A.C. 156, 162, the Privy Council upheld a statute authorizing seizures of ships in Canadian waters out to 12 miles from the coast. The court declared that "it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a state may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory."

In *Carr v. Francis Times & Co.*, (1902) A.C. 176, 181, it was declared:

> "For whatever purpose Queen v. Keyn was quoted, this, I think, is manifest: speaking of it as an authoritative judgment, I cannot forbear from saying that, somewhat unusually, the Legislature of this country in the next session but one passed an Act of Parliament reversing that judgment—that is to say, affirming in the strongest terms that the decision which had been arrived at by the majority (a very narrow majority) in that case was one that was not the law of England; because the Act does not purport simply to alter the law, but it declares the law and says, in very plain terms, that that is and always has been the law of this country." U.S. Exhibit 17, p. 110.

The legal rule that the crown is *prima facie* the owner of the foreshore, which as we have seen derived from the crown's ownership of the seabed, and which Professor Thorne regarded as accepted only in a few cases of dubious authority in the 17th century, has remained in full force and effect, without a break, down to the present. Moore, *op. cit.* at 436-613. Likewise, the crown continued to regulate sedentary fisheries in the sea and, on occasion, to grant or to lease them to subjects. App. 685-87; Exhibit 728, p. xlix; Exhibit 729, p. 181. And British law continues to recognize the exclusive right to surface fisheries in the sea or arms thereof granted in earlier ages by the crown. *Lord Fitzhardinge v. Purcell*, (1908) 2 Ch. 139.

By the Continental Shelf Act, 1964, c. 29, s.1.(1), Parliament enacted that "any rights exercisable by the United Kingdom outside territorial waters with respect to the seabed and subsoil and their natural resources . . . are hereby vested in Her Majesty."

Two conclusions are inescapable: (1) English law has always, without exception and without any break except for temporary doubts raised by the dicta in *Keyn*, regarded the seabed and subsoil of the marginal seas around England as belonging to the crown in property; (2) English law has never limited those property rights to three miles from the shore.

B. VIS-A-VIS FOREIGN NATIONS, BRITISH ADHERENCE TO THE THREE-MILE LIMIT HAS NOT BEEN CONSISTENT AND HAS NOT BEEN GENERALLY APPLIED TO THE SEABED AND SUBSOIL.

In 1800, in the case of the *Twee Gebroeders*, the British prize court referred to the three-mile belt as "lying within the limits to which neutral immunity is usually conceded." Exhibit 747, p. 144. The prize courts have not held that the three-mile limit is a maximum limit even for neutrality purposes; neither have they ruled on the extent of territorial waters as such.

At various times during the 19th century the king's chambers, which of course were far more extensive than any three-mile limit, were regarded as still in effect for neutrality purposes, and were deemed to apply also for purposes of "exclusive property and jurisdiction." 1 Phillimore, *International Law* 213 (1854).

Diplomatically, the British position throughout the 19th and 20th centuries has usually (though not invariably) been to insist on the three-mile limit with respect to claims of various types by other nations relating to surface waters; but Britain has taken great care at most times not to commit itself to a three-mile maximum in its own waters.

In the first decade of the 19th century, the British refused to renounce their alleged right to impress foreign seamen

found within the British seas as historically defined. Exhibits 713, 763; U.S. Exhibit 379, p. 369.

Throughout the period Britain has maintained its traditional customs jurisdiction over maritime expanses far beyond the three-mile limit, extending at times as much as 100 leagues from the coast. Masterson, *Jurisdiction in Marginal Seas* 67-173 (1929).

In negotiations with the United States in 1814-15, Britain, while eventually agreeing to an exclusive-fisheries treaty limit of three miles in Canadian waters, did so only after prolonged hesitation, and carefully avoided committing itself to a three-mile limit as a matter of general law. 1 *British and Foreign State Papers* Part II, p. 1580; 7 *British and Foreign State Papers* 93 *ff.*

In the 1820's, Britain was successful in persuading the Netherlands government to prohibit Dutch fishermen from coming within two leagues of the Scottish coasts; in practice the Dutch have generally remained more than 12 or 14 miles from shore. Fulton, *op. cit.* at 604-06; Crocker, *op. cit.* at 606.

In the 1830's it was widely believed in Britain that a three-league limit of exclusive fisheries was in force; however, in a convention with France in 1839 Britain adopted the three-mile limit for exclusive-fisheries purposes in return for similar privileges on the French coast. This three-mile treaty limit was not applied to the French sedentary fisheries, as to which a wider exclusive right of the coastal state was recognized. Fulton, *op. cit.* at 611-12.

The Territorial Waters Jurisdiction Act of 1878, overruling the *Keyn* decision with respect to the admiralty jurisdiction, specified a three-mile limit for that jurisdiction. As Lord Cairns pointed out, that statutory definition was not regarded as an abandonment of wider claims: "we have never limited our claim to three miles from the coast.

The argument . . . is quite sound, that the improvement in modern artillery and other circumstances may entitle a country to protect and exercise rights over a larger margin of the high seas . . . . So far as concerned the procedure introduced by the [Territorial Waters Jurisdiction] Act, the power taken was limited to the three-mile line, but this in no way abandoned the larger claim . . . ." Exhibit 747, p. 205; Riesenfeld, *Protection of Coastal Fisheries Under International Law* 149 (1942). Lord Salisbury, when Foreign Minister, likewise declared that "great care had been taken not to name three miles as the territorial limit." Fulton, *op. cit.* at 731; see also Riesenfeld, *op. cit.* at 151.

The Fisheries Act of 1889, 52 and 53 Vict. c.23, provided for a closed season for herring trawling within the Moray Firth off Scotland, drawing a closing line of 80 miles between the two headlands. A subsequent act asserted jurisdiction over trawling in Scottish waters generally out to 13 miles. Riesenfeld, *op. cit.* at 156. Under these statutes foreigners were apprehended, tried and convicted for violating British fishing regulations far more than three miles out in Scottish waters, and the convictions were upheld. *Poll v. Lord Advocate*, (1897) 5 Scots L.T. 167, 3 British Int'l Law Cases 747 (1965); *Peters v. Olsen*, (1905) 4 Adam's Justiciary Reports 608, 3 British Int'l Law Cases 750; *Mortensen v. Peters*, (1906) 8 F. 93, 3 British Int'l Law Cases 754; Riesenfeld, *op. cit.* at 153-61; Crocker, *op. cit.* at 587-90; Fulton, *op. cit.* at 717-37. While the British government subsequently restored some of the fines imposed and released the prisoners, it did so only on extracting an agreement from the Norwegian government to prevent Norwegian trawling in the Moray Firth. Riesenfeld, *op. cit.* at 158-59.

Likewise, with respect to sedentary fisheries and other resources of the seabed and subsoil, British adherence to the three-mile limit has been subject to many exceptions and limitations. Only two of these need be mentioned. With

respect to the pearl fisheries of Ceylon, Britain has insisted on exclusive jurisdiction far beyond the three-mile limit. Since those fisheries have been exploited for many centuries, of course Britain has cited their historic character as one basis for the exclusive right. App. 182-87. Likewise, pursuant to the Irish Oyster Fisheries Act of 1856, 31 and 32 Vict. c. 45, § 67, and subsequent legislation, Parliament empowered the Irish Fishery Commissioners to regulate the dredging for oysters within 20 miles of the Irish coast, "and all such byelaws shall apply equally to all boats and persons on whom they may be binding." Exhibit 729, p. 295; Fulton, *op. cit.* at 716-17; Tr. 570-72.

In 1928, responding to the Preparatory Committee for the Conference for the Codification of International Law, the British government, while adhering to the three-mile rule as to the surface of territorial waters, continued as follows:

> "No claim is made by His Majesty's Government in Great Britain to exercise rights over the high seas outside the belt of territorial waters.
>
> "There are certain banks outside the three-mile limit off the coasts of various British dependencies on which sedentary fisheries of oysters, pearl oysters, chanks or *bêches-de-mer* on the sea bottom are practiced, and which have by long usage come to be regarded as the subject of occupation and property. The foregoing answer is not intended to exclude claims to the sedentary fisheries on these banks. The question is understood to relate only to claims to exercise rights over the waters of the high seas." Riesenfeld, *op. cit.* at 166.

While the British of course attempted to justify their exclusive sedentary fisheries beyond three miles on the

ground of "long usage," they carefully specified that they were refraining from expressing an opinion adverse to seabed claims generally, and that their insistence on the three-mile limit related "only to claims to exercise rights over the waters of the high seas."

Australia responded to the Preparatory Committee as follows:

> "They make no claim to exercise rights over the high seas outside the belt of territorial waters. This answer is made on the understanding that the question relates only to claims to exercise sovereign rights over the waters of the high seas, and does not relate to claims to exercise jurisdiction over sedentary fisheries for pearl oysters and *bêches-de-mer*, etc., on certain portions of the sea bottom outside the three-mile limit which, by long usage, have come to be regarded as the subject of occupation and property." Riesenfeld, *op. cit.* at 167.

While Australia likewise justified its claims on the basis of "long usage," that term could not with respect to Australia have been used in the sense of any ancient or immemorial occupation, since the Australian sedentary fisheries dated only from the late 19th century. App. 194. The Australian Pearl Fisheries Act of 1953 excluded foreign fishermen from the Arafura Sea and adjacent proclaimed waters. 4 Whiteman, *Digest of International Law* 804 (1965).

In 1942, three years before the Truman Proclamation, Britain and Venezuela by treaty divided between them the seabed and subsoil of the continental shelf, outside territorial waters, of the Gulf of Paria, and Britain unilaterally proclaimed that its portion of the seabed and subsoil "shall be annexed to and form part of His Majesty's dominions." 2 Whiteman, *op. cit.* at 1162-63 (1963); 4 *id.* at 789-92 (1965).

By the Continental Shelf Act of 1964, c. 29, Parliament asserted the exclusive right to explore and to exploit the resources of the seabed and subsoil of the continental shelf of the United Kingdom.

C. THE CANADIAN AND AUSTRALIAN CASES TURNED ON THE ALLOCATION OF POWERS IN LATE 19TH-CENTURY BRITISH CONSTITUTIONAL LAW BETWEEN THE IMPERIAL CROWN AND UNCHARTERED IMPERIAL PROVINCES, AND THUS HAVE NO RELEVANCE TO THE ISSUES IN THE PRESENT LITIGATION.

1. The Canadian Advisory Opinion

For an analysis of the Canadian advisory opinion, *Re Off-Shore Mineral Rights of British Columbia*, we adopt and incorporate by reference herein Professor Horwitz' testimony at App. 85-89. The case turned on the particular history of British Columbia — a 19th-century, unchartered British administrative unit — and thus has no application or relevance to the historic rights of the Common Counsel States.

The advisory opinion has not been accepted by the Atlantic provinces of Canada as extinguishing their ownership of seabed and subsoil rights; and the Canadian federal government has not attempted to extinguish those rights, though the prime minister has opined that the principles of the advisory opinion are applicable to the east coast. The Atlantic provinces have asserted seabed and subsoil ownership and have, since the date of the advisory opinion, granted both exploration permits and licenses for exploitation of continental-shelf mineral resources. Exhibit 827.

That the Atlantic provinces' position is well founded is strongly suggested by the decision of the Quebec King's Bench in *Re Quebec Fisheries*, 35 D.L.R. 1 (1917), which held that the province of Quebec owned the soil of both its

internal waters and its territorial sea, and in consequence had the right to grant exclusive fisheries in the waters thereof. The Privy Council had previously reached a contrary result with respect to British Columbia, holding that the fisheries of that province were the property of the dominion government because of British Columbia's particular history. *Id.* at 4-6. The dominion government then contended, just as the prime minister has recently asserted with respect to continental-shelf rights, that the principles held applicable to British Columbia should be applied to other provinces as well. *Id.* at 13.

But in the *Quebec* case, it was squarely held that the crown's ownership of the *solum* of internal waters and of the territorial sea and the fisheries of the waters thereof had passed to the province of Quebec prior to the creation of the dominion government in 1867, and had never been transferred.[80] The court refused to apply the *Keyn* dicta:

---

[80] This was the view of three of the five judges. Cross, J., dissented; Archambeault, C.J., declined to express an opinion on the territorial-sea issue on the ground that the Privy Council had previously regarded it as "a question of international law upon which the national or municipal Courts should not express an opinion," at least where the imperial government had not been made a party. *Id.* at 8. Subsequently the Privy Council made the same holding in the *Quebec* case. Attorney General for Canada v. Attorney General for Quebec, (1921) 1 A.C. 413, 431. This in no way impeaches the authority of the *Quebec* case for our purposes: (1) today there is no doubt about the relevant international law; (2) the United States is a party here; (3) our courts have never been subject to the doctrine of judicial restraint applied by the Privy Council with respect to international-law questions.

The Privy Council also held that Quebec did not have the right to grant exclusive surface fisheries, on the ground of the public right to such fisheries since Magna Carta. (See p. 40, *supra.*) *Id.* at 428. But the Council affirmed the Quebec court's holding that the soil under tidal waters was vested in the province and therefore that the province had the right to grant exclusive fisheries requiring the affixing of "engines" to that soil. *Id.* at 428, 431-32.

"The Crown is owner of the soil and, consequently, the fisheries there belong to the province. Nevertheless a serious problem arises with reference to the area within the 3-mile limit. Although there is a controversy with regard to ownership by the Crown, it seems to me more logical to conclude in the affirmative, at least with reference to the profits of the fisheries. The weight of the authorities seems to me to be in that sense, notwithstanding the judgment in the case of (*Reg. v. Keyn* (1876) 2 Ex. D. 63) where the Judges were, nevertheless, divided. (Vol. 28, Hals. Laws of England, vo. Waters and Watercourses, p. 360, No. 653 and notes).

"The doctrine is there summed up as follows: The soil of the sea between the low-water mark and *so far out to sea as is deemed by international law to be within the territorial sovereignty of the Crown*, is claimed as the property of the Crown although outside the realm. The soil of the bed of all channels, creeks and navigable rivers, bays and estuaries, as far up the same as the tide flows, is *prima facie* the property of the Crown. The Crown also claims to be entitled to the mines and minerals under the soil of the sea within these limits." *Id.* at 19.

"Moreover, shortly after the judgment in *Reg. v. Keyn*, the Imperial parliament passed a declaratory Act, called 'The Territorial Jurisdiction Act.' 1878, 41-42 Vict., ch. 3, completely destroying the effect of that judgment." *Id.* at 20.

"The question is, moreover, of no importance even according to those who maintain that it is merely a matter of jurisdiction and not of proprietary right with regard to the soil; *there is*

no controversy respecting the ownership of the fisheries. Even in England, where the King cannot exclude his subjects from that fishing, aliens are nevertheless excluded. (14 Hals. Laws of England, p. 633, No. 1411 and note)." *Ibid.*

"That question of the 3-mile limit must, like the others, be decided in the affirmative [*i.e.*, in favor of the province]. It in nowise affects the rights of the federal government with respect to trade and navigation, nor respecting the regulation of the fisheries, even if we agree to decide for the case now before us, whether the fisheries in those territorial seas belong to the province as a domain which can be exploited to its own profit. Whatever alternative may be chosen, it seems to be that it must be said that they belong to it according to the spirit at least of the Confederation Act interpreted by the judgment of 1898, which says that the Dominion has no rights of ownership in the fisheries except in such as may be carried on in public harbours. This conclusion, naturally, does not exclude the Dominion's jurisdiction for all purposes within its competence. It seems to me, therefore, that it may be legitimately concluded that all existing rights in the fisheries, even within the three-mile limit, belonged to the province before Confederation and that the B.N.A. [British North America] Act has not had the effect of taking them away from it." *Id.* at 21.

If and when the continental-shelf question is determined by the Canadian courts, it would appear that the federal government will have considerable difficulty, in light of the *Quebec* decision, in achieving the application of the advisory opinion to the Atlantic provinces without a critical

examination of the historic rights of those provinces. Moreover, the *Quebec* reasoning is a square precedent in favor of the position herein of the Common Counsel States, which like Quebec owned their marginal sea and seabed before their federal government was created and have never transferred or renounced them.[81]

The issue in the *Quebec* case concerned only internal waters and the three-mile belt. Interestingly, the court found no need to examine whether international law had recognized such a belt prior to the formation of the dominion government. The court's theory was that, since sea and seabed ownership was fully established in municipal law prior to that date, the province's ownership extended out as far as was allowed by international law at any particular time. Present, not past, international law was the only limiting factor. It seems plain that this reasoning would today vest continental-shelf rights beyond three miles in the provinces, and in the Common Counsel States, even if it were believed that such rights first arose by a recent change in international law.

If and when the continental-shelf rights of the Canadian Atlantic provinces are litigated, the provinces will also be able to derive substantial support from the opinion of Currie, J., in *Re Dominion Coal Co.*, 40 D.L.R. (2d) 593, 606 (1963) (Nova Scotia Supreme Court). The case involved the right of the municipality of Cape Breton County to tax

[81] The British North America Act of 1867, which created the dominion government, preserved the pre-existing boundaries of the Atlantic provinces, just as the Constitution of the United States preserved the boundaries of the States. The act also (§109) preserved to the Atlantic provinces "all lands, mines, minerals and royalties" belonging to them. In Attorney General for Canada v. Attorneys General for Provinces, (1898) A.C. 700, the Privy Council held that by that section the provinces preserved their proprietary rights with respect to fisheries and submerged lands, except for certain rights expressly transferred by other sections to the dominion government.

subsea coal mines. A majority of the court found it unnecessary to reach the question whether the mines in question were within the boundaries and dominion of the province of Nova Scotia; but Currie, J., did reach those questions and, rejecting the *Keyn* dicta, held as follows:

> "In my opinion the law is as stated in the more recent *Chelikani* case, which decides that the Crown owns the territorial waters and the subjacent land, the proprietary rights of which may be vindicated like other rights of property." *Id.* at 617.
>
> "Before leaving *The Queen v. Keyn*, mention may be made of the *Territorial Waters Jurisdiction Act* passed by the Parliament of Great Britain, 1878 (U.K.), c. 73 the preamble of which would indicate that Parliament regarded the majority opinion as being in error that sovereignty of the Crown stops at low-water mark. The Act was passed to correct the unsatisfactory situation created by *The Queen v. Keyn.*" *Ibid.*
>
> "I have come to the following further conclusions:
>
> "1. The Crown in the right of Great Britain, as expressed by many acts of Parliament, Crown grants, etc., exercised property rights and jurisdictional rights over the three-mile zone of the coast, territorial and inland waters. This, I think, was the common law. . . ." *Id.* at 619-20.
>
> "2. Prior to Confederation of Canada, Nova Scotia exercised jurisdiction over an area of territorial waters three miles in width measured from its coasts, bays and rivers. See particularly the 'hovering' Act, 1836, 6 Wm. IV, c. 8, approved by the King in Council, thus recognizing

that the control and administration of these waters reposed in the Province of Nova Scotia.

"3. By virtue of s. 109, *B.N.A. Act*, all property rights held by Nova Scotia before Confederation were retained: *Re Provincial Fisheries* (1896), 26 S.C.R. 444; (1898) A.C. 700. The subsoil in territorial waters belongs to the Provinces rather than to Canada, subject to certain reservations in the *B.N.A. Act. . . .*" *Id.* at 620.

"4. Since Confederation Nova Scotia has exercised exclusive jurisdiction and administration over the submarine coal areas of the Province, as is evidenced by the many statutes, leases, grants, etc." *Ibid.*

2. Bonser v. La Macchia

For an analysis of this case the Common Counsel States adopt and incorporate by reference herein Professor Horwitz's testimony at App. 83-85.

As there shown, *Bonser v. La Macchia* did not purport to resolve, and did not resolve, any questions concerning either the territorial boundaries of the Australian states in the marginal sea or the ownership of the seabed and subsoil of the marginal sea as between the Australian states and the federal government. The federal government has introduced legislation on the latter subject, but no such legislation has yet been enacted. Exhibit 823. On the question whether the territorial limits of the Australian states extend below low-water mark, *Bonser v. La Macchia* is wholly inconclusive: two judges (Kitto and Menzies) held in the affirmative, two (Barwick and Windeyer) held in the negative, and two (McTiernan and Owen) found it unnecessary to decide the question. The question of continental-shelf ownership was not addressed at all.

By agreement between the Australian federal government and the states, the states have exclusive management and licensing authority over all petroleum exploitation in the Australian continental shelf, both within and without territorial waters. Lumb, "The Off-Shore Petroleum Agreement and Legislation," 41 Australian Law Journal 453 (1968).

Both the territorial-limits issue and, aside from petroleum, the continental-shelf issue are still entirely open as a matter of Australian law. On May 31, 1973, the states of Tasmania and Queensland petitioned the Queen to refer the continental-shelf question to the Privy Council for decision. Exhibits 823, 824, 825. The other Australian states have joined in these petitions. Exhibit 826. The states have received large numbers of applications for mineral licenses with respect to portions of the continental shelf, but have refrained from acting on them pending resolution of the legal issue.

In 1964, in language strongly reminiscent of the Territorial Waters Jurisdiction Act of 1878, the Queensland legislature declared that its exclusive jurisdiction over subsea mining extends and applies, and shall be deemed always to have extended and applied, to the adjacent seabed and subsoil out to the 200-meter depth mark or beyond that limit as far as exploitation is possible. Mineral Resources (Adjacent Submarine Areas) Act of 1964.

* * *

It is notable that in the present proceeding plaintiff has placed its primary reliance on four decisions in four different common-law jurisdictions: *United States v. California*, *Queen v. Keyn*, *Re Offshore Mineral Rights* and *Bonser v. La Macchia*. Not one of these decisions, to the extent that it dealt with the subject at all, has been regarded as finally and correctly determining the ownership of seabed and subsoil rights. The result in *United States v. California*

was overruled by act of Congress and its reasoning was repudiated by subsequent decisions of the Supreme Court. The holding of *Queen v. Keyn,* which was with respect to the admiralty jurisdiction, was overruled by act of Parliament. Both Congress and Parliament went out of their way to declare in pointed language their opinion that the *California* and *Keyn* decisions, respectively, had been erroneous when decided. Subsequent British decisions have refused to apply the dicta in *Queen v. Keyn* as in any way altering or casting doubt on the traditional English law of maritime sovereignty and dominion. The Canadian advisory opinion has been ignored by the Atlantic provinces, and the federal government has not felt confident enough of its position to attempt to extinguish their rights. *Bonser v. La Macchia* determined no seabed and subsoil issues; those issues, as between the federal government and the states, have been resolved as to petroleum primarily in favor of the states; otherwise they are still open for decision and have recently been presented by the states in seeking a determination by the Privy Council.

No. 35, Original

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, Plaintiff,

v.

STATE OF MAINE, ET AL., Defendants.

APPENDIX TO EXCEPTIONS AND BRIEF OF THE COMMON COUNSEL STATES

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DIRECT EXAMINATION OF LYMAN B. KIRKPATRICK, JR.

67 BY MR. CLAGETT:

Q. Will you please state your name and address and describe your background and experience? A. My name is Lyman B. Kirkpatrick, Jr. I am a Professor of Political Science and a University Professor at Brown University in Providence, Rhode Island. I reside in Narragansett, Rhode Island.

I was born in Rochester, New York, and I graduated from the Princeton University School of Public and International Affairs in 1938. As a student at Princeton, I majored in International Relations in the Department of Politics and wrote my thesis under Professor Edward S. Corwin on the subject of "The Power of Congress in Foreign Relations."

Upon graduation from Princeton, I worked for the United States News Publishing Corporation in Washington in a variety of capacities, but primarily in the field of reporting on foreign relations and international affairs. In
68 the period from 1939 to 1942, I was also the Washington Editor and Publisher of a newsletter originating in London called "The Whitehall Letter", a weekly analysis of world affairs.

In 1942, I joined the Office of Strategic Services, and served with that organization throughout the war, primarily in Europe. I was Chief of the Reports Division in London from 1942 to 1944 and then the Intelligence Officer of the OSS Unit assigned to the First United States Army for the landing in Normandy. In August of 1944, in Normandy, I was recruited by the staff of the Twelfth

U.S. Army Group to become the Intelligence Briefing Officer for General Omar N. Bradley. I served in this capacity until the end of the war in Europe, at which time I was reassigned to the China-Burma-India theatre, but due to the Japanese surrender, never served in that area.

On leaving the Army with the rank of Major, I returned to the United States News Publishing Corporation and served as a writer on a new magazine called "World Report" (One of the predecessor magazines to the present "U.S. News & World Report"). In this capacity, I covered the Department of State, the Congressional foreign relations committees, and other developments in international affairs.

In January of 1947, I was asked to take leave from the
69 United States News to assist in the organization of what has become the Central Intelligence Agency. That leave lasted for 18 years. In the CIA, I served initially as the Chief of the Domestic Office for the Collection of Foreign Information in the United States. From 1950 to 1951, I was the Executive Assistant to the then Director of CIA, General Walter Bedell Smith. In 1951 and 1952, I was the Assistant Director in charge of the office responsible for all intelligence collection throughout the world. From 1953 to 1961, I served as the Inspector General of CIA responsible for inspecting every aspect of all of its operations – in the United States and overseas. In this capacity, I personally made inspection trips throughout Africa, Latin America, Asia and Europe.

In 1961, I was appointed Executive Director-Controller of CIA, the third ranking officer in the Agency. This position, in effect, is the General Manager of the agency responsible for its day-to-day activity under the policy direction of the Director.

For my work in CIA, I received in 1960 an award from the Civil Service League as one of the 10 outstanding officials of the U.S. Government. In 1964, I received one of

the four Presidential awards for Outstanding Federal Civilian Service, the highest honor for a career civilian in the government.

70 In 1965, I resigned from CIA to fulfill a life-long ambition to teach and accepted a University Professorship at Brown. In this capacity, I have developed four courses. One is entitled "American Security Policy," which treats all aspects of our international relations ranging from defense policy through diplomacy to intelligence operations and military affairs. This course largely deals with a study of the military-industrial complex, including many aspects of federal-state relations such as the allocation and regulation of natural resources. A corollary of this course is one entitled "Communist Cold War Operations," which analyzes in detail the foreign relations of the Soviet Union and other Communist countries. My two seminars deal with "Problems of National Strategy" and "Domestic Decision-Making." In the former, which is a graduate seminar, we deal with aspects of problems in the defense and diplomatic establishments. In the "Domestic Decision-Making" seminar, the emphasis is primarily on internal affairs, but these include such matters as the defense budget, the draft, regulation and allocation of natural resources, and so on.

In addition to these courses at Brown University, I also present two courses at the Naval War College in Newport, Rhode Island, dealing with cold war operations and prob-
71 lems of national security. During the academic year 1971-1972, I am taking leave from Brown University to occupy the Chester A. Nimitz Chair of Political and Social Philosophy at the Naval War College.

My books include The Real CIA, Captains Without Eyes: Major Intelligence Failures in World War II, American Defense Policy (a text prepared for the United States Navy to use as a prototype for the presentation of courses on

American security policy), and Russian Foreign Policy Under Czar and Commissar (to be published in 1972). I have also written numerous articles for various publications: for twelve years I wrote "Armies of the World" for the Encyclopedia Britannica Yearbook; I wrote a series of 12 articles for the Naval War College on cold war operations, and an article in "Military Review" on "The U.S. Intelligence System." I am contemplating a study next year on "The Military Professional" and have proposed the establishment at Brown of a Center for Strategic Studies.

Among the organizations to which I belong are the Military Division of the International Studies Association, the American Academy of Political and Social Science and the Political Science Association.

* * * * *

72 A. I am a member of the Board of Visitors of the Defense Intelligence School in Washington. I have lectured regularly at the Foreign Service Institute of the Department of State, the International Police Academy of A.I.D., and the Army War College.

* * * * *

73 Q. Professor Kirkpatrick, the United States has claimed in the present case an exclusive right to develop the resources of the seabed of the continental shelf adjacent to the Atlantic Seaboard beyond three miles. The Atlantic Seaboard States have denied that claim and assert that such exclusive rights belong to individual States as to various portions of the seabed which may in some instances extend substantially beyond the three-mile coastal belt. Do you have an opinion whether the sustaining of such exclusive claims of the States would adversely affect the United

States in the conduct of its foreign relations and if so, would you state your opinion and the reasons for it? A. I do not believe that upholding the claims of the States would adversely affect the conduct on foreign relations by the United States. A succession of events since 1945 had made such State claims even more consistent with the federal power over international affairs. It is now internationally recognized that the exclusive right to develop the resources of the Atlantic Seaboard continental shelf resides in this country. The question whether development is by the Federal Government, the States, or private operators under the auspices of either, is an internal matter which would not affect the conduct of foreign relations.

On September 28, 1945, President Truman proclaimed
74 that the United States regarded the resources of the subsoil and seabed of its continental shelf as "appertaining" to the United States. The proclamation appears in the Federal Register, Vol. 10, p. 12303. In succeeding years foreign states made similar or more extensive claims asserting their authority over their own continental shelves; many of those claims were in this hemisphere.

In 1953 the Outer Continental Shelf Lands Act made explicit this country's exclusion of other nations from development of our continental shelf resources, by reaffirming United States authority over those resources and establishing a satutory regime for their disposition.

In 1958 the Geneva Convention on the Continental Shelf recognized the exclusive claims of coastal nations over the seabed resources of their respective continental shelves. The Convention is set forth in Volume 15 of United States Treaties (Part I) at page 471. The United States and a large number of foreign states are parties to that Convention, including France, Great Britain, the Soviet Union, Canada, and Mexico. These states are listed in Department of State Treaties in Force, pp. 324-25 (1971). It

is therefore far less likely now than ever before that the principle of this country's authority to exclude other na-
75 tions from development of our continental shelf will be the subject of international dispute.

This is not to say that the Convention has eliminated the question of continental shelf resource rights from international affairs. On the contrary, there is at present, for example, controversy regarding the definition of the seaward limit of the shelf for purposes of delimiting the exclusive development rights of coastal states. The matter has been discussed recently by the Special Subcommittee on the Outer Continental Shelf of the Senate Committee on Interior and Insular Affairs in its Report on the Outer Continental Shelf, 91st Cong., 2d Sess. pp. 7-16 (1971).

For present purposes, however, what matters is that this nation has asserted its authority over the adjacent continental shelf vis-a-vis all foreign powers. It is my understanding that the States do not claim for themselves any more than that the United States claims for itself. Nor would it be possible as a practical matter for the States to claim more since it is the United States' assertion of these claims in the international community which makes those claims effective.

This country's authority over the continental shelf being
76 established, whether the shelf is developed under the authority of the Federal Government or under that of the States is essentially an internal matter not affecting the interests of foreign states and thus not involving the foreign relations of the United States. This distinction – between (1) the claims of this country to shelf resources as against all other countries and (2) the question how those resources should be allocated between the Federal Government and the States – is well grounded in both practice and common sense. President Truman's Executive Order 9633,

issued in connection with his 1945 proclamation referred to above and reported at Vol. 10, p. 12305 of the Federal Register, made clear that he viewed the two matters as entirely separable. That Executive Order stated that this country's assertion of authority over the continental shelf resources was not intended to prejudice the respective claims of the Federal Government and the States to "the ownership or control of the sub-soil and seabed of the continental shelf within or outside of the three-mile limit."

This position – that the allocation of shelf resources between the Federal Government and the States does not involve foreign relations matters – was adopted explicitly by the United States Department of State in testimony of
7 Jack B. Tate, Deputy Legal Adviser, in 1953 to the Senate Committee on Interior and Insular Affairs concerning legislation affecting the submerged lands. The testimony appears in the volume titled Hearings Before the Senate Committee on Interior and Insular Affairs on S.J. Res. 13, 83d Congress, 1st Sess. (1953). Mr. Tate in the testimony just mentioned, stated as follows at p. 1067.

"Mr. Tate. *** We have taken the position that whether this exploration of the seabed is done by the Federal Government or the State governments is not a matter that is of international concern, nor is it a matter that, as far as I know, would conflict with any of our treaty obligations.

* * * * *

"Senator Cordon. The Chair would like to ask one question here for the purpose of clarification. Is the Chair correct in the understanding that the witness has said in his answer to Senator Jackson that the utilization of the seabed for the purposes of extracting values therefrom on the Continental Shelf, which right has been proclaimed by

the President, is a use of the seabed of the Continental Shelf with respect to which the matter of whether the use be limited to the Government of the United States or by transfer from the Government of the United States by any of the several States, is not in the opinion of yourself and of the Department, as you understand it, an international question?

"Mr. Tate. The Chairman is correct in that statement."

78 I, of course, am not a lawyer and cannot comment on the legal aspects, but in my judgment this is a correct analysis of the situation so far as the practicalities and customs of international relations are concerned.

In the same hearings Mr. Tate repeatedly made the point I made a few moments ago, that as an international matter no State can make a greater territorial claim than that made by the United States. Hearings, pp. 1053, 1059-60.

This evaluation was carried forward in the Submerged Lands Act which emerged from the congressional inquiry in which Mr. Tate testified. That legislation conferred on the respective adjacent coastal states the right to develop the seabed resources of the continental shelf out to a distance of three miles in most cases and, as matters eventuated after appropriate judicial proceedings, three marine leagues into the Gulf of Mexico in the case of Florida and Texas.

Thus Congress obviously concluded that no interference with federal control over foreign affairs would result from recognizing State ownership to that extent.

Operational control of such resources even beyond the three-mile/three-league limit is not confined to the United States and its agencies. Under the Outer Continental Shelf Lands Act, these resources can be developed under lease

78-A by private individuals. There is no reason why a State

could not undertake such development under the legislation. If Congress has consented to such a course, as it has, it is difficult to see how direct State ownership of these resources poses any substantial difficulty for federal interests in the conduct of foreign relations.

The possibility that property claimed by citizens of the United States may become a subject of dispute with foreign nations or their citizens can, of course never be foreclosed. However, in view of the firm status of this country's claims to the seabed resources of our continental shelf, such disputes seem less probable than disputes respecting American vessels in foreign ports, American property in foreign countries, and property subject to contract between Americans and foreign nationals. Indeed, the boundary lines of the States of this country which border Canada and Mexico may at times involve negotiation and agreement with those countries.

In my opinion, the powers exercised by the Federal Government have been ample to secure the foreign relations interests of the United States where the ownership of property by organizations or individuals under the protection of the United States has become involved in disputes with foreign nations or where other foreign relations
79 interests are involved. While I cannot speak as a lawyer would concerning the precise terms and limits of these federal powers, the number and variety of powers which the Federal Government exercises are patent: direct authority over foreign relations, commerce with foreign nations, treaties, imports and exports, defense, taxation and eminent domain.

The development by the States of the resources in question will, therefore, not involve the interposition of the States between the United States and foreign nations. When the country speaks officially to other governments, it does

so through the Federal Government which is entrusted with authority over foreign affairs under our Constitution. There is no reason why any other course would be adopted in connection with continental shelf resources.

As a practical matter the development of the continental shelf seabed resources will largely if not entirely be carried on by private enterprises, whether their leases or licenses run from the United States or the States. Such designated rights were granted to private developers by the States well before the 1953 federal legislation. Since that time substantial leasing to private developers has been done by the Federal Government and today "(t)here is an extensive record of outer continental shelf mineral leasing for oil and gas resources," quoting in the words of the U.S. Public Land Law Review Commission in Vol. 1 of its Study of the Outer Continental Shelf Lands of the United States, p. 462 (1968).

The salient fact is that those private lease operators will be doing the same work whether the resources appertain to the Federal Government or the States. If in the event of dispute the United States does not wish to sponsor particular claims or positions of American private operators in the international community, it will not do so whether it or a State is the lessor.

It is also my view that there is no reason why State ownership of the resources should prevent any international arrangement which the United States may promote or adopt for the governance of seabed resources or other uses of the seas. In this connection, I should note that President Nixon, on May 23, 1970, proposed that all nations renounce by treaty their rights in the seabed beyond a water depth of 200 meters and further proposed an international authority to explore for the benefit of all nations the resources of the seabed beyond that depth.

Assuming that any of the submerged lands claimed by
81 the States lie beyond the 200 meter isobath, I cannot imagine that the powers of the United States previously mentioned – I refer in particular to the treaty power – are not adequate to ensure that such lands be included in such a proposal. The United States compromises claims of its citizens against foreign nations in general settlements; it affects the legal liabilities of its soldiers through status of forces agreements; it confers diplomatic immunity on foreign nationals who might otherwise be subject to suit in this country, and State courts and other State authorities must recognize that immunity. Whatever the technicalities of procedure, the Federal Government is in no way helpless to protect its foreign relations interests in the development of shelf seabed resources, whoever may possess them.

I have, in considering the general question posed to me, examined testimony presented in Congress at the time the Submerged Lands Act and Outer Continental Shelf Lands Act were passed. This testimony includes not only the Senate hearings previously mentioned but also testimony which appears in the volume titled Hearings Before Subcommittee No. 1 of the House Committee on the Judiciary on H.R. 2948, 83d Congress, 1st Session (1953).

Examination of this testimony does not indicate any
82 significant foreign policy objection to State as opposed to Federal control over the resources in question. It is true that questions were raised about the wisdom of recognizing state boundaries as such beyond three miles. This is an objection now laid to rest, I believe, by the clear distinction, since confirmed by the 1958 Convention on the Outer Continental Shelf, between territorial waters and the continental shelf. Moreover, the questions raised were directed to legislation which might have appeared to

validate boundary claims of the States, in the sense of boundaries of territories under full territorial sovereignty, no matter how far they extended.

Both the testimony of Mr. Tate quoted above and the legislation which ultimately evolved show that the question how State control of continental shelf seabed resources might affect such foreign relations interests was a subject of attention. Among the many witnesses who testified before the Senate Committee were the Secretary of the Navy, the Attorney General, the Secretary of the Interior, the former Solicitor General of the United States, and two representatives of the Legal Advisor of the Secretary of State. Witnesses of similar stature appeared in the House hearings. Under the circumstances, the lack of mention of
83 any significant foreign policy objection to State ownership of seabed resources as such seems to me powerful evidence that no such objection exists.

Q. In asserting the claims described in the preceding question, the States may assert that they possess historical boundaries in the ocean extending the same distance seaward as the continental shelf lands whose resources they claim. Do you have an opinion whether the assertion of such boundaries would prejudice the foreign relations, defense or other interests of the United States and, if so, will you state that opinion and the reasons for it? A. In my opinion, a recognition of State boundaries as described in your question will not prejudice any such interests, it being understood that such boundaries delineate State authority over seabed resources. If State boundaries were claimed for other purposes, such as to establish the right to exclude foreign vessels from the ocean surface in that area or to assert exclusive property rights to the fish and like resources of the water above the seabed, then a different question would be posed.

It is certainly true that the boundaries in the sea, so far as they assert rights beyond property ownership of seabed resources, are an important and presently disputed subject
84 of international relations. Many different positions have been taken by various countries concerning, for example, the distance from the coastline within which the foreign fishing vessels require permission to operate. No firm international accord has been reached on the limits of boundaries for this and similar purposes.

The different positions taken by foreign states on the boundaries of their respective "territorial seas" are illustrated readily. As of 1965, 41 foreign states claimed a three-mile limit, 20 claimed a six-mile limit, 34 claimed 12 miles (including the Soviet Union and Mainland China), and 12 claimed other distances ranging from four miles to 200. This data is taken from the Department of State's Geographic Bulletin No. 3 (1965). In August 1970, at a Congress held in Peru, fourteen nations declared that all nations have a right to claim as much of the sea and seabed near their coasts as necessary to protect valuable resources.

The latest effort to reach uniformity on this question of the boundaries of "territorial seas" was at the 1958 Geneva Conference on the Law of the Sea. It failed because a two-thirds vote could not be achieved for a United States proposal that the territorial sea be universally fixed at six miles with an additional six-mile contiguous zone
85 for fishing rights.

The interests of the United States are certainly involved in determining where territorial-sea boundaries lie, to protect American interests in fishing, to secure the right of passage of our naval vessels, and for similar purposes.

The use of the term "boundaries" for various different purposes is well established. The Convention on the Continental Shelf itself makes clear that the distance that it

established for exclusive coastal state jurisdiction over seabed resources is limited to those resources and does not embrace other interests of the kind just mentioned. The Submerged Lands Act and the Outer Continental Shelf Lands Act adopt a similar approach in distinguishing exploitation of mineral resources from other rights in the ocean. Thus State ownership of the submerged lands would not encroach upon such basic American principles as freedom of the seas and limiting territorial waters to the minimum.

So long as the State boundaries involved in the question which you have posed are directed only to secure such resources I do not believe their assertion differs in practical consequence from any other phrasing of the States' claim to such resources. Such boundaries would not,
86 for example, affect the right of passage possessed under international custom by foreign vessels over the waters of the continental shelf. While I conceive it to be most unlikely that a State would ever seek to interfere with such passage, my present point is that international interests of this kind do not depend upon whether or not submerged lands are being developed, or by whom, and that boundaries demarcating seabed development rights do not imply the assertion of boundaries for other purposes.

Indeed, foreign merchant vessels possess a right of passage within the three-mile limit for most purposes. The Congress has expressly provided for State ownership of seabed resources as well as other state authority to the three-mile limit. The Submerged Lands Act actually speaks of the three-mile limit in the Atlantic as representing the "seaward boundary of each original coastal State." The same provision itself states that it is not designed to prejudice the existence of any State's seaward boundaries beyond that distance. So it seems clear that Congress did

not believe state boundaries beyond three miles, at least for some purposes, would be inappropriate.

Q. Do you have an opinion whether the States' claims would interfere with the defense or other military interests of the United States were those claims sustained and,
87 if you have such an opinion, would you state that opinion and the reasons for it? A. In my opinion, State ownership and development of the seabed resources of the continental shelf need not interfere with the defense of the United States or other military interests of this country, in view of the powers exercised by the Federal Government which are ample to protect those interests.

The ocean area adjacent to the coasts of this country is, of course, of great importance to the security of this country, but hardly more so than the on-shore lands within the boundaries of the States. Military activities are carried on in this ocean area and fixed military installations may be necessary there, while the activities of other governments or of private citizens in this ocean certainly may affect this country's defense. Once again, this is no less true of activities carried on within the land area of the United States itself.

The powers exercised by the Federal Government which I have already referred to are in my opinion adequate, whether the Federal Government or the States own and develop the submerged lands in question, both to authorize
88 activities by the military authorities in the ocean above the continental shelf and to prohibit activities by the States or by American citizens that are contrary to the defense interests of this country. In time of war or national emergency, and even in peacetime to the extent necessary for defense, local and private interests yield to the military needs of the nation.

In this regard, undue emphasis should not be placed on the need for Federal power. In my experience, the States

of this country have cooperated significantly of their own volition where activity in the interests of national defense called for action or restraint by individual States.

In fact, cooperation between the Federal Government and the States and shared responsibility has been the premise of the Submerged Lands Act. Thus, within the three-mile belt on the Atlantic Coast, the States possess the right to develop seabed resources while the United States has retained control over the same area for purposes of commerce, navigation, national defense, and international affairs.

For example, ever since 1899 the Secretary of the Army has had an absolute right to prohibit placement of any structures in or over navigable waters of the United States, including the three-mile coastal belt. This authority is found in Section 10 of the Rivers and Harbors Act of 1899, which
89 is reprinted in section 403 of Title 33 of the United States Code. Thus in the three-mile belt, although the States possess the seabed resources, the Secretary of the Army has a veto power over construction of structures and therefore over means of exploiting the resources.

The premise that an allocation of responsibilities is feasible has recently been emphasized by the federally sponsored Report of the Commission on Marine Science, Engineering and Resources, which has been reprinted as House Document No. 91-42, 91st Congress, 1st Session (1969). In discussing the future of the coastal zone, the Report (pp. 56-57) proposes new federal and state machinery for cooperation based on the recognition that:

"The states must be the focus for responsibility and action in the coastal zone. . . . An agency of the state is needed with sufficient planning and regulatory authority to manage coastal areas effectively and resolve problems of competing issues.

* * * * *

"However (the States) will need Federal assistance and support and the Federal Government must assure the protection of national interests in the coastal zone."

This cooperative approach, which allots resource development to the States and preserves defense functions to the Federal Government, can operate as easily beyond three miles.

The three-mile belt of the ocean immediately adjacent to the coasts of this country represents the area of the sea frontier traditionally regarded as most critical to the defense of the United States. In supporting my conclusion to the questions you have posed, I believe it is significant that the Congress, in the Submerged Lands Act, has entrusted the seabed resources of this belt to the States and in the Gulf of Mexico has countenanced the claims of Texas and Florida to three marine leagues. If State development of these resources so close to shore is feasible in terms of the defense interests of this country, I believe that it follows that development of resources beyond three miles is also feasible.

At the same time the traditional importance of the three-mile belt has diminished because modern military technology permits activities of foreign nations carried on on the high seas far from our shores to pose very significant threats. Thus, ballistic missiles can be fired from the ocean at great distances from their targets. While these developments enlarge the danger to our country, they diminish the importance of a fixed belt of the ocean closely adjacent to our coast as a military boundary of unique significance to national defense. The exploitation of the resources of the seabed of the continental shelf could enhance the defense of the United States by providing added facilities for detection of submarines and other fixed installations of early warning.

The legislative testimony taken in 1953, which I have previously commented upon, contains some discussion pertinent to the relationship between defense interests and State

development of seabed resources. In the House hearings previously cited the Secretary of the Navy was represented by Admiral Nunn, the Judge Advocate General. After endorsing the decision to confer resource development rights on the States as the legislation contemplated the following colloquy occurred (House Hearings, p. 212):

"Mr. Hillings. And the Navy also, as I understand your testimony, makes no contention that the national defense program will suffer in any way if these oil deposits are developed under State ownership and supervision, rather than Federal ownership?

"Admiral Nunn: That is correct, sir. The Department of Navy makes no such contention as that. It does urge, however the desirability of proceeding with the development of all petroleum resources, and we are conscious of the difficulties
92 of doing that under the auspices of the Federal Government, particularly within the historical boundaries of the states."

I see no reason why the policy views represented by Admiral Nunn's testimony are not applicable to the submerged lands now claimed by the Atlantic States. In fact, it appears that various drafts of the legislation pending before Congress when Admiral Nunn spoke contained no three-mile limit on Atlantic submerged lands to be recognized as State property but contemplated recognizing State possession of all such lands within State historical boundaries (House Hearings, pp. 2-171).

* * * * *

I should add at this point that my examination of the legislative testimony suggested no substantial reason why the defense interests of the United States would be hazarded by recognition of the State claims here involved, just
93 as it suggested no such reason relevant to foreign relations interests.

A statement by Secretary Forrestal to the Committees on the Judiciary, 80th Congress, 2d Session, read in part (Hearings on S. Res. 1988, p. 607 (1948)):

"It is the view of the National Military Establishment that development of the tidelands areas should proceed as rapidly as possible and that all necessary action should be taken to permit rapid development of those areas. Delays in the development of the oil potential in the tidelands is considered contrary to the best interests of the United States from the viewpoint of national security. . . . I do wish to emphasize that underdeveloped oil fields provide no power for the machines of either war or peace."

The seabed resources of the continental shelf are themselves important to our national defense to supplement supplies of oil and other mineral resources. Within the land boundaries of the United States these resources are generally within the boundaries of the individual States and have been developed under the authority of the States, the Federal Government reserving certain petroleum deposits for its own future military use. In the future these resources which the States have principally managed in the past must
94 come increasingly from the ocean seabed.

The resources of the seabed are vast and their full extent is only beginning to be measured. As the United States Geological Survey recently summarized in the concluding chapter of its study entitled "Potential Mineral Resources of the United States Outer Continental Shelf" (1968): "Even if usable shelf resources were to consist only of the petroleum fluids, however, their potential contribution to the Nation's future security and prosperity would be enormous and would more than justify the efforts to bring about their efficient development."

Our technological ability to exploit these resources is increasing apace. A producing oil well is now in operation over a deposit 300 meters beneath the surface of the sea

and in 1968 a deep sea drilling project successfully drilled sediment cores from 2,500 feet below the ocean floor working in depths up to 17,600 feet. New York Times Almanac, 1971 p. 343. With man's demand for energy resources outdistancing available supplies, the greatest untapped areas are under the sea.

As previously indicated, the Department of Defense has gone on record to the effect that exploration and exploitation
95 of these materials in peacetime is essential to our military strength. To the extent that State development of seabed resources of the continental shelf would promote such exploration and exploitation, I believe such development would affirmatively contribute to the military interests of this country. State development has served the military capability of this country in the past on land and I would expect it to continue to do so in the future to the extent the states are permitted to develop areas of the continental shelf.

Q. Do you have an opinion whether the assertion of State police powers over certain conduct occurring in the area of the seabed of the Outer Continental Shelf and any artificial structures affixed to it would interfere with the foreign relations, defense or other interests of the United States and, if you have such an opinion, would you state it and the reasons for it? A. My opinion is that there would be no such adverse effect. The Convention on the Continental Shelf itself recognized that the coastal state exercises over the continental shelf "sovereign rights" for purposes of exploring and exploiting its natural resources. Whether the law generally applicable to such
96 activities is federal, State, or some admixture of the two, does not by itself seem to me to have any significant effect upon federal interests.

Congress itself in the Outer Continental Shelf Lands Act provided that the governing substantive law for the Outer

Continental Shelf should be the law of the respective adjacent State with certain limited exceptions affecting federal interests. So far as these interests exist, I believe the federal powers already discussed are adequate to secure them.

Once more it is pertinent to note the analogy between the situation on-shore and in the ocean. Many of the powers exercised by the States within their settled boundaries have consequences for foreign relations, defense and other interests of the United States. At the same time the United States is able to protect those interests by overriding legislation, recognition of sovereign immunity, treaties, condemnation of property for military installations, and similar means. I see no reason why this same approach is not adequate for the continental shelf resources.

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DIRECT EXAMINATION OF MORTON J. HORWITZ

BY MR. CLAGETT:

Q. Professor Horwitz, would you please state your name, background and experience? A. My name is Morton J. Horwitz. I am Assistant Professor of Law at Harvard Law School. I teach courses in American Legal History and English and American Constitutional History.

I received my B.A. from The City College of New York in 1959, a Ph.D. in government from Harvard University in 1964, and LL.B. Magna Cum Laude from Harvard Law School in 1967. My doctoral work was in the area of constitutional history and the history of political thought.

I am a member of the Massachusetts bar. In 1967-68 I served as law clerk to Judge Spottswood W. Robinson,

III, of the United States Court of Appeals for the District of Columbia Circuit. From 1968 through 1970 I was Charles Warren Fellow in legal history at Harvard
110 Law School. I was appointed in 1970 to the Harvard Law School faculty.

I am a member of the Selden Society, a group of scholars interested in English legal history, and of the American Society for Legal History, the closest American counterpart to the Selden Society. I have written a number of articles, the latest of which is "The Emergence of an Instrumental Conception of American Law, 1780-1820," to be published this summer in Perspectives in American History, which contains considerable material dealing with English law of the 17th and 18th centuries.

* * * * *

111 Q. In your opinion, are there special difficulties associated with ascertaining English law and practice in and before the 17th and 18th centuries that would make it useful for the Court to hear the testimony of an expert? A. Yes, I believe there are several difficulties in ascertaining English law in this period. First, there is the very difficult problem of sources. Before the advent of printing in England – that is, before the end of the 16th century – all sources of English law are in manuscript form. I have studied a number of manuscripts which still have not been published. Of even greater significance, however, is the fact that even the published sources are usually not found among materials with which modern lawyers are familiar. With the arguable exception of Coke's Institutes no general treatise on English law makes its appearance until Blackstone's Commentaries in 1765. The result is
112 that there is no generally agreed-upon source of English

law until the late 18th century. One must therefore begin a rather difficult search among technical and specialized treaties written beginning in the 17th century. Moreover, when we come to the very important abridgements – the main general source of English law in the period in question – it is the legal historian who can sort out the contemporaneously influential abridgements, such as those by Rolle, Bacon, Viner and Comyns, from the flood of unreliable and pedestrian manuals on English law that simultaneously appeared.

Above all, however, the main consequence of the lack of general legal treatises in the 17th and 18th centuries is that we must often find the true scope of the law in the practice of the period, which is a rather formidable task. Thus, it is necessary to do extensive research in the various calendars of British public documents, such as State Papers, Domestic and Colonial; Treasury Papers and Books; Acts of the Privy Council, etc.

A second difficulty requiring expertise deals with the reading of manuscript sources. Not only are these sources difficult and time-consuming to find, but they are often impossible to read for one not familiar with the writing style of the period. Some of them are written in Mediaeval French.

A third problem arises from difficulties associated with the rather technical and archaic legal formulations characteristic of the period. For example, in the area of admiralty jurisdiction, the numerous issues that turn on whether the Admiral had jurisdiction "within the body of a county" are not at all apparent to a modern lawyer unfamiliar either with English legal institutions of the 17th century or with the historical significance of the great battle to limit the jurisdiction of admiralty.

Finally, in my opinion the main justification for expert legal testimony in this area is that it is so difficult for one not familiar with the historical context of ancient legal doctrines to extract from stark and unadorned hornbook statements the subtlety, richness, texture and actual social significance of particular legal rules. Not only do the meaning of words, technical as well as untechnical, change, but legal conceptions themselves change unannounced. Thus, it is primarily in their historical context that these legal formulations can really have any meaning for us today.

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119 Q. Professor Horwitz, do you have an opinion as to English law and practice of the 17th and 18th centuries concerning ownership of the seabed under the high seas off English coasts? If so, will you state it? A. Under
120 English law and practice of the 17th and 18th centuries, ownership of the seabed under the high seas off English coasts was vested in the Crown. The precise distance this ownership extended from the coast was a matter of some uncertainty. But that English law then recognized Crown proprietary rights in the seabed is altogether clear. I would propose to use the term "marginal sea" to mean that belt of water to which such rights extended, incorporating in that term the uncertainty as to precise distances.

Q. Please explain the basis for your opinion. A. First, let me provide some of the background. Although the question of ownership of the seabed first became of central significance in English law during the 17th century as a result of controversies over fishing rights, the boundaries of coastal lands, and the jurisdiction of admiralty, there was a much older English legal tradition recognizing the

King's sovereignty over the English seas. For example, one scholar traces the origin of the English Admiralty Court to the King's assertion of sovereignty over the sea during the years between 1340 and 1357. He writes:

"Its origin was intimately connected with the claim made by Edward III. and his progenitors to be sovereigns of the sea. The phrase 'sovereignty of the sea' is variously expressed in documents of the period as 'superioritas',
121 'custodia', or 'Admirallatus maxis', and the institution of a Court of Admiralty to deal with piracy and other offenses committed at sea was the outward and visible sign of the existence of the sovereignty to which the kings of England laid claim. The battle of Sluys left Edward III. in a position to enforce this claim by the institution of an Admiralty Court, of which the principal function was to keep the king's peace upon the sea." Reginald G. Marsden, ed., 1 Select Pleas in the Court of Admiralty, p. xv. Maine et al., Ex. No. 200.

Sometime in the first half of the 17th century, there was discovered in The Tower of London a manuscript proclamation by King Edward I (1272-1307) entitled "De Superioritate Maxis Angliae & jure officii Admiralitatis in eodem," in my Latin, "Of the Superiority Over the English Sea and the Office of Admiral." The proclamation, first translated by Sir John Boroughs in his The Soveraignty of the British Seas (1633) (1651 ed.), pp. 28-42, Maine et al., Ex. No. 177, 176, was of great influence in the 17th century, especially after it appeared in the posthumous edition of Lord Chief Justice Coke's *Fourth Institute*, first published in 1644, at pp. 142-45. Maine et al., Exhibit No. 183. The proclamation, dated by Boroughs at around 1299, declares "that . . . the Kings of England . . . have been in peaceable possession of the Dominion of
122 the Sea of England, and of the Isles being in the same . . . "

Boroughs trans., pp. 29-30. It was frequently cited in the 17th century as demonstrating the long-standing claims of the Crown to sovereignty over the sea.

Another historian confirms the early assertion of royal authority with respect to fishing.

"The English kings had since the time of Edward III. definitely asserted their claim to sovereignty in the seas lying about the coasts of their kingdom. Edward III. issued a proclamation making this claim, and had his right admitted by the Treaty of Paris, 1360; this same right was upheld by Henry V., (1413-22), Henry VI., (1422-61), and Henry VII. (1485-1509)" John Rawson Elder, *The Royal Fishery Companies of the Seventeenth Century*, p. 4. Maine et al., Ex. No. 186.

Q. Is there other evidence before the 17th century of King's ownership of the land beneath the sea? A. One of the more impressive statements is that of Mr. Stuart A. Moore. *Moore's History and Law of the Foreshore and Sea Shore and the Law Relating Thereto* (London, 1888), Maine et al., Ex. No. 203, represents the first comprehensive restudy of the original manuscript records since the work of Sir Mathew Hale (circa 1667). Written to refute royal claims to the land between high and low water
123 mark, it is consistently hostile to unsupported assertions of ownership by the Crown. Nevertheless, Moore maintained that the King "has the soil of the sea by his prerogative, and may grant it to a subject." Moore, *supra*, at p. 418. And he states that he has found "many cases" before the 17th century that "show that oyster grounds, which are below low-water mark, pass by grant." Moore, *supra*, at p. 418 n. 1. Indeed, Sir Mathew Hale himself, about whom I shall have a good deal to say in a moment, concluded that the King owned the seabed on the basis of his study of records going back as far as Edward I (1272-1307).

Q. When does the issue of the King's ownership of the seabed begin to become central in English law? A. Well, the first important treatise on the subject was written by Thomas Digges during the reign of Queen Elizabeth in 1568 or 1569. It is important to keep in mind, however, the then recently discovered invention of printing, which accounts for the absence of printed sources before the end of the 16th century. In any case, Digges' treatise, entitled "Arguments Proving the Queens Maties Propertye in the Sea Landes and and Shores Thereof," reprinted in Moore, *supra*, fully sustains the Crown's assertion of propriety in the sea. Digges stated, in part:

124 "And in this estate regall of Englande wee see that the Kings of most auncient times haue in the right of theire crowne helde the seas abowte this Ilande so proper and entire unto them . . .

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"For yt is a sure Maxime in the Common Lawe that whatsoever lande there is wthin the kinges dominion whereunto no man cann iustly make propertye yt is the kinges by his prerogatiue." Moore, *supra*, at pp. 187, 203.

Q. What was the occasion for the writing of Digges' treatise? A. The purpose was primarily to assert the King's right to ownership of the foreshore, the land between high and low water mark. Now, this claim was not yet clearly established in English law at the end of the 16th century. It is therefore important to see how Digges attempted to deduce the disputed claim from the indisputable proposition that the Crown owned the marginal sea. Treating the sea and the foreshore alike, Digges first dealt with the sea, stating that as the chief of all the waters it should belong to "the cheefe the Kinge himself." He then

argued that under the civil law islands arising in the sea belong to the King as well. Finally, he maintained that there was no difference between islands and the foreshore,
125 which also belong to the King. He concluded that the King owned the property in the sea and its shore "not only from the lowe water marck downward but also upward to the full sea. . . ." Moore, *supra*, at pp. 185, 187, 191-192.

Q. Is there other evidence in the 16th century confirming Digges' view of the law? A. Yes. It appears to be universally acknowledged during the reign of Queen Elizabeth (1558-1603) that the Crown owns the seabed in the marginal sea. For example, in the admiralty case of Officium Domini c. Dulinge (1591), printed in Reginald G. Marsden, ed., 2 Select Pleas in the Court of Admiralty, 1547-1602 (London, 1897), Maine et al., Ex. No. 201, grantees of the foreshore bring an action against Dulinge for erecting a weir without having obtained a license from the admiral. It was argued that the Crown owned the sea and hence the foreshore, as follows:

"Firstly, that you know or believe that, as well our most serene lady Elizabeth, queen of England that now is, as all and singular her illustrious and invincible progenitors and predecessors, kings of England, from and for time whereof the memory of man runneth not to the contrary, have in right of their royal prerogative (and) in right of their kingdom ever been lords and owners, as also she, our lady Elizabeth, queen that now is, is
126 now owner and proprietor of the sea adjacent to and encircling and washing (the shores of) the realm of England, at least for 300, 200, 100, 50, 40, 30, 20, or 10 miles from the land or shore, towards the deep sea, and of all and singular the rights, privileges, fruits, emoluments, hereditaments, profits, royalties, and lordships, whatsoever

they may be, arising coming and issuing from the said sea and shores, and of all lands lying beneath and under the sea, and overflowed by it, and also of the public rivers and ports in all and singular the maritime parts of the kingdom of England, and of all edifices, structures, things, and engines, used for catching fish or for any other purpose, built, placed, and existing, on the said shores of the sea or in the said harbours, lands, and places, at least within the ebb and flow of the sea, up to full sea mark; and further, that they have of their royal (and) general prerogative, for all time possessed, occupied, and held, the profits of (all) fisheries and salt ponds, and other the revenues therefrom received, or in any way issuing and arising (therefrom), and (also) all and singular the premises, the things, rights, privileges, profits, and other royalties or lordships (aforesaid), whatsoever they may be, as also she, the lady queen of England that now is, has for all time possessed, occupied, and held (the same), and
27 throughout all the time aforesaid have been and are commonly deemed, held, and reputed as owners, proprietors, possessors, (and) occupiers of all and singular the premises, as also she, the aforesaid lady the queen that now is, has been and is commonly called, deemed, held, and reputed." Reginald G. Marsden, 2 Select Pleas in the Court of Admiralty, 1547-1602, pp. 174a-174b. Maine et al., Ex. No. 201.

Another late 16th century treatise writer, William Welwood, confirms the Crown's claims in his An Abridgment of all Sea-Lawes (1590). Maine et al., Ex. No. 209. In the 1613 edition, Welwood reasserts the views of Bartolus, who "extends and allowes for Princes and people at the sea side, an hundreth miles of sea forth from their coasts" if they can extend protection that far. *Id.* at p. 69. Distinguishing between the marginal and main seas, he

recognizes freedom of the seas only in "that part of the maine sea or great Ocean, which is farre removed from the just and due bounds above mentioned. . . . " *Id.* at p. 72.

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128 Q. Professor Horwitz, now perhaps we are in a position to explore your opinion about English law and practice in the 17th and 18th centuries. Did the earlier view that the King owned the seabed of the marginal sea continue through that period? I might interpolate for the record a slight change in the phrasing of that question from the mimeographed version. A. Yes, in fact, it was frequently reiterated and elaborated upon during this period and became of major practical significance as well.

Q. On what do you base this opinion? A. First, there are dozens of treatise writers of the period who acknowledge the King's sovereignty, dominion and ownership of the seabed. Second, there are hundreds of official acts based on a recognition of this position. Third, there are a number of judicial pronouncements recognizing the Crown's proprietary interest in the seabed.

The first important treatise of the 17th century con-
129 sisted of a series of lectures on the Statute of Sewers delivered at Gray's Inn in 1622 by Serjeant Robert Callis. Callis stated that by the common law of England the seas around the British Isles, together with the shores, belonged in property to the King. Callis stated in part (1647 ed.), Maine et al., Ex. No. 178:

"First, touching our Mare Anglicum. . . . the King hath therein these powers and properties, videlicet.

1. Imperium Regale.
2. Potestatem legalem.

3. Proprietatem tam soli quam aquae.
4. Possessionem & proficuum tam reale quam personale.

"And all these he hath by the Common Laws of England. In the 6.R. 2. (6th of Richard the Second), Fitz. Prot. 46. it is said, "That the Sea is within the Legiance of the King, as of his Crown of England; this proves that on the seas the King hath dominationem & imperium ut Rex Angliae, and this by the Common Law of England." *Id.* at p. 17.

* * * * *

"So I take it I have proved the King full Lord and owner of the seas, and that the Seas be within the Realm of England; and that I have also proved it by Ancient Books and Authorities of the Laws, and by Charters, Statutes, Customes, and Prescriptions, that the Government therein is by the Common Laws of this Realm . . . But the King hath neither the properties of the Sea, nor the real and personal profits there arising, but by the Common Laws of England, . . . for no Law gives the King any soil but only the Common Laws of England." *Id.* at p. 19.

Q. What was the occasion for Callis' lectures? A. The question of the extent of the King's ownership of lands under the sea was no abstract issue for 17th century jurists. The increasing activities of the Commission of Sewers in draining and improving lands made it necessary to determine the Commission's jurisdiction. As early as 1598, the Crown expressed concern over "the loss of the Commonwealth by continuing those grounds under water, and the loss and decay of outfalls to the sea; of the rich

profit which would arise by their recovery, and the multitude of people which might be relieved and nourished thereby. . . . " S.P. Dom., Eliz., CCLXVIII, p. 115. Maine et al., Ex. No. 213.

Callis' lecture was undertaken to determine the extent of the Commissioners' jurisdiction under the Statute of 23 Hen. VIII, which set up the Commission. He argued that this statute "hath his extent within all the Realm of England," Callis, *supra*, at p. 20, and, as we have seen, concluded "that the Seas be within the Realm of *Eng-*
131 *land.* . . . " *Id.* at p. 19. Finally, he maintained that "the grounds gained from the Sea pertained to the Queen," *id.*, a conclusion which, as we shall see in a moment, had vast practical significance for 17th century England.

Q. Are there other English treatise writers of the 17th century who follow Callis' conclusion? A. In Gerard Malynes, Lex Mercatoria (1622), Maine et al., Ex. No. 197, the author distinguishes between dominion over the main sea and the marginal sea, recognizing the King's propriety over the latter, but not over the former. *Id.* at p. 186.

John Boroughs, in The Soveraignty of the British Seas Proved by Records, History, & the Municipale Lawes of this Kingdome (1633) (1651 ed.), Maine et al., Ex. No. 177, begins his treatise with the following assertion:

"That Princes may have an exclusive property in the soveraigntie of the severall parts of the Sea, and in the passage, fishing & shores thereof, is so evidently true by way of fact, as no man that is not desparately impudent can deny it." *Id.* at p. 43.

At another point he states:

"By all which presidents it is manifest that by the
132 common Law of the land the King is proprietory Lord of our seas; that the seas of England are under the legeance of the King, that the King is the soveraigne conservator

of the peace as well upon the sea as land; That not onely things floating on the superficies of the water but such as lye upon the soile or ground thereof, belong properly unto the King . . . *Id.* at p. 92.

In *the First Part* of the Institutes of the Lawes of England (1628), Lord Chief Justice Edward Coke declared:

". . . if a man be upon the Sea of England, he is within the Kingdome or Realm of England, and within the ligeance of the King of England, as of his Crowne of England." *Id.*, Section 439, at p. 260(b). Maine et al., Ex. No. 182.

In The Fourth Part of the Institutes of the Lawes of *England* (1644) Lord Coke, as I previously observed, published the full text of the then recently discovered Proclamation of Edward I, *De Superioritate Maris Angliae.* This record, Coke concluded, demonstrates "the great prerogative and interest that the King of England hath in the Seas of England, and . . . the antiquity of the Court of the Admiralty of England. . . ." 4 Inst. p. 142.

The two most important and influential English treatises of the 17th century on this subject are John Selden's Mare Clausum (1635) and Lord Chief Justice Mathew Hale's famous work De Jure Maris (c. 1667). Selden's treatise was a political work designed to answer the arguments in favor of freedom of the seas in Hugo Grotius' Mare Liberum (1609). Not only were Selden's pronouncements "a definite expression" of the views of Charles I, but they "were in great measure merely a reiteration of those opinions concerning the rights of the kings of England to the hereditary sovereignty of the sea" that had been expounded by James I twenty years before. Elder, *supra*, at p. 70.

The first English translation of Selden's Mare Clausum by Marchamont Needham in 1652 was appropriately

entitled Of The Dominion or, Ownership of the Sea. Selden argued "that all kinds of Law, even the most known and approved, . . . do acknowledg and allow a proprietie and private Dominion over the Sea, as well as the Land." *Id.* at p. 3. (All quotes are from the Needham edition.) Citing historical sources, he concluded that the rulers of England

"have enjoied the Dominion of (the) Sea by perpetual occupation, that is to say, by using and enjoying it as their own after a peculiar manner, as an undoubted portion either of the whole bodie of the estate of the British Empire, or of som part thereof, according to the state and condition of such as have ruled it; or as an inseparable appendant of this Land. Lastly, that the Kings of Great Britain have had a peculiar Dominion or proprietie over the Sea flowing about it, as a Bound not bounding their Empire, but (to borrow the Terms used by Surveiors of Land) as bounded by it; in the same manner as over the Island it self, and the other neighboring Isles which they possess about it." *Id.* at p. 182. Maine et al., Ex. No. 204.

Q. So Selden conceived of the Sea as part of the territory of the Crown? A. That is correct.

Q. Does Selden recognize any limits to the King's Dominion? A. Yes, but they are rather vague. First of all, he limited his own claims to the Four Seas. "The Sea encompassing great Britain," he wrote, "which in general wee term the British Sea, is divided into four parts, according to the four Quarters of the World." *Id.* at p. 182. Thus, for example, he claimed dominion of the sea all the way to the French coast.

One other important limitation should be noted, however. Selden was prepared to concede that the extent of dominion was an empirical question to be determined by historical fact. Arguments for dominion, he acknowledged,

"are not to bee derived altogether from a bare Occupation or Dominion of Countries, whose Shores are washed by the Sea: But from such a private or peculiar use or enjoiment of the Sea, as consist's in a setting forth Ships to Sea, either to defend or make good the Dominion; in prescribing Rules of Navigation to such as pass through it; in receiving such Profits and Commodities as are peculiar to every Kinde of Sea – Dominion whatsoever; and, which is the principal, either in admitting or excluding others at pleasure." *Id.* at p. 188. As a result, he was prepared to "make diligent inquirie" into those indicia of dominion mentioned above. *Id.* at p. 188. Thus it is careless, in my opinion, to assume that Selden thoughtlessly laid claim to everything in Britain's name.

Q. Does Selden deal with actual exploitation of the sea-bed? A. Yes, he does – at great length. First, it should be emphasized that the Selden-Grotius dispute arose out of the English-Dutch contests in the early 17th century over fisheries, about which I will have a good deal to say in a moment. Second, in Mare Clausum one of Selden's main arguments is that there must be a property right to the seabed because its products are not inexhaustible. Because of fishing, he states, "less profit ariseth. . . ." This "more evidently appear's in the use of those Seas, which produce Pearls, Coral, and other things of that Kinde. Yea, the plentie of such seas is lessened every hour, no otherwise then that of Mines of Metal, Quarries of stone, or of Gardens, when their Treasures and Fruits are taken away." *Id.* at p. 141.

Q. Is Selden's analogy of pearls and coral to undersea mines usual in this period? A. Yes, I have found many 17th and 18th century sources which conceive of undersea fishing in the same terms as mining.

For example, a manuscript entitled "The Incomparable Benefitt of the Fishery in his Maties Seas – I might add here this was a manuscript that I saw before I realized it was reprinted in Elder – written during the reign of Charles II observes that the Dutch called their herring fisheries "the principle golden myne of the United Provinces." Elder, *supra*, at p. 122.

Q. Can you briefly describe Selden's influence on the modern law of the sea? A. Professor Fenn, in his The Origin of The Right of Fishery in Territorial Waters (1926), Maine et al., Ex. No. 188, concludes "that the basic principles maintained by Selden, apart from his extreme claims, more nearly approximate the principles of modern international law touching territorial waters, than do those advanced by Grotius." *Id.* at p. 196.

137 Professor Fulton in his work on The Sovereignty of the Sea (1911), Maine et al., Ex. No. 189, observes "that Mare Clausum became in a sense a law-book, an authoritative work to which eminent lawyers, as Lord Chief-Justice Hale and Hargrave, appealed as proving the existence and the legality of the rights of the crown of England to the dominion of the British seas. Even as late as the year 1830," he concludes, "this doctrine held its place in certain recognized treatises on the law of England, together with Selden's definition of the extent of those seas." *Id.* at p. 374.

Q. You mentioned Lord Chief Justice Mathew Hale's treatise, De Jure Maris, along with Selden's work as the two most influential 17th century works on the extent of the Crown's ownership of the seabed. Can you discuss Hale's contribution? A. Hale's De Jure Maris was written in manuscript form around the year 1667. Though it was well known throughout the late 17th and 18th centuries, it was first published in Hargrave A Collection of

Tracts Relative to the Law of England (1787). Maine et al., Ex. No. 194. Although there was once a dispute over the authorship of the manuscript published by Hargrave that controversy seems to have been put to rest by Moore's discovery of a similar, earlier, manuscript indisputably written by Hale as early as 1636. See Moore,
38 *supra*, at pp. 318, 370; Fulton, *supra*, at p. 543.

Hale's treatise, unlike Selden's, was not a work of international law but of the common law of England in its municipal or internal sense. Though Hale accepted Selden's broad conclusions, his treatise was not motivated by international political considerations. Thus, more realistically than Selden, Hale acknowledged the Crown's sovereignty and ownership of the seabed only in the narrow sea adjoining the coast of England. He wrote:

"The narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions of the King of England, whether it lie within the body of any county or not.

"This is abundantly proved by that learned treatise of Master Selden called Mare Clausum; and therefore I shall say nothing therein, but refer the reader thither.

"In this sea the king of England hath a double right, viz, a right of jurisdiction which he ordinarily exerciseth by his admiral, and a right of propriety or ownership. The latter is that which I shall meddle with." 1 Hargrave, *supra*, at p. 10.

Q. Before we continue this survey of the treatise literature, perhaps you would describe the legal controversies
39 of the 17th century in which these treatises played a part.
A. The first important controversy, which, as we have seen, led to the publication of such books as those of Welwood's Boroughs' and Selden's, concerned disputes over fishing, mainly between the English and the Dutch.

The claims to British sovereignty over the sea were based on the actual practice of the 17th century. For example, there is considerable evidence that other nations regularly submitted to licensing of their fishermen by English authorities. Here is Professor Elder's description:

"That this claim to sovereignty was much more than a mere idle assertion is clear from the fact that in the reign of Mary (1553-58) when the fishermen of the Low Countries wished to seek new fishing grounds, there was granted to King Philip's subjects in Flanders a twenty-one years' lease of the fishings about the North Coast of Ireland, this lease being granted in consideration of a fine and £1000 paid annually to Sir Edward Fitton, Treasurer for Ireland. A like privilege to fish in the Irish seas was granted under similar conditions by the same queen to 'The Company of the Old Hans'. Foreigners desirous of fishing in English waters were, at this time, regularly granted licenses at Scarborough Castle." Elder, *supra,* at pp. 4-5.

140 When in 1635 – the same year as Selden's Mare Clausum was published – Charles I demanded that all Hollanders fishing in the North Sea should be licensed by him, he was merely reasserting, Professor Elder tells us, "this ancient right of the English kings to demand payment from foreigners for the privilege of fishing in the seas surrounding the English dominions." *Id.* at p. 5. "No foreigners had fished off the island of Lewis till 1594 when the Hollanders began to fish in the seas about the island by virtue of a license, which kept them, however, at a distance of twenty-eight miles from shore." *Id.* at p. 6. "It had always been understood that for a certain distance from the shore the fishing was reserved for native fishermen; the exact distance had varied considerably with varying conditions. . . . " *Id.* at p. 9.

Professor Elder does give us some general idea of the extent of the Crown's assertion of dominion. When the Dutch asked and received permission to fish in Scottish waters in 1594, it was agreed that they should not come "within the sight of the shoar. . . ." *Id.* at p. 9. An instruction to an English official in 1618 fixes the limit of Dutch fishing at 14 miles from the British coast. *Id.* at p. 10. When in 1622 the Dutch gave orders "that Dutch fishing vessels were not to approach so near the land as to give offense to British fishermen," Elder observes, they
41 were "thus tacitly agreeing to respect the ancient rule that foreign fisherman should not come within the sight of the British coast." *Id.* at p. 12. Finally, two manuscripts written in 1618 each state that up to that date the Dutch had stayed at least 40 miles from the British coast. *Id.* at pp. 19, 26.

The second important legal controversy of the 17th century concerned the boundaries of coastal lands, which, as I have already suggested, induced Digges, Callis and especially Hale, to write their treatises. One legal issue, as I previously indicated, concerned ownership of the land between high and low watermark. But that issue is relevant to our inquiry only to the extent that the answer to it was deduced from propositions about ownership of the seabed.

Another related question, however, is central to our inquiry. That dealt with ownership of so-called derelict land or lands from which the sea had receded due to changes in the tide. The most important decision upholding the Crown's right to derelict lands was rendered in *The King v. Oldsworth, Hillary* 12 Charles I (1636-37). Here, too, I have seen the manuscript. The decision is fully described by Sir Mathew Hale in De Jure Maris (c. 1667), published in 1 Hargrave, *A Collection of Tracts*

Relative to the Law of England, p. 31 (1787), where he
142 writes: "(T)he true reason of it is, because the soil under the water must needs be of the same propriety as it is when it is covered with water. If the soil of the sea, while it is covered with water, be the King's, it cannot become the subject's because the water hath left it." Hale's conclusion is confirmed by a report of a further hearing of the same case in the Exchequer Chamber in Trinity, 13 Charles I (1637). One of the decisions for the King, by Baron Trevor, is reported as follows:

"The first point: that the King has such land jure coronae: As the King is supreme upon the land, so he is upon the sea; . . . and all the land at first was derived out of the Crown, and the case is the same in all commonwealths in foreign nations. Also the King, by his prerogative, has all things of excellency, as royal mines, so the sea being the chiefest and most excellent of waters . . . for the same reason the King shall have it . . . "

* * * * *

"Thirdly: The Question whether custom shall prevail against the King, negatively. For as the sea was in the King when it was parcel of the sea; now, when it is made parcel of the dry land, it shall not be taken from him; and the reason is, because the King shall be preferred
143 in such case. . . . " Moore, *supra*, at pp. 302-03.

Q. I believe that should have read "as the land was in the King." You said "as the sea." A. That is correct.

The books are filled with grants by the King of derelict lands. Indeed, one case turned on interpreting the King's grant of "all soil ground, sand, and marsh land contiguous to the premises now overflown, or which at any time in

the future should be recovered by the withdrawal of the sea." *Attorney General v. Sir Edward Farmer,* 2 Lev. p. 171, Maine et al., Ex. No. 159, 2 Mod. p. 106. Maine et al., Ex. No. 158, Sir T. Raymond p. 241 (1676). (The original is: "omne solum, fundum, terram, arenam, terram mariscal, contigue adjacen, praemissis, quae modo inundat, vel aqua maris cooperta existunt, et quae and aliquod tempus imposterum recuperat forent per relictionem maris. . . . ") After the grant, 100 acres became derelict and the question was whether they belonged to the King or the patentee. Two of the reports state that the case was adjourned without result. 2 Mod. p. 106, Sir. T. Raymond p. 241. The third report indicates that nothing passed because the words of the grant were too general. 2 Lev. p. 172. But it is especially noteworthy that both sides conceded the King's power to grant lands under the sea. In his argument for the King, Lord Holt declared:

"This grant is of part of the sea, which being parcel of the prerogative, ought to be expressly named; and the sea is the soil of the king, Selden's Mare Clausum 223. . . . " Raymond, p. 241.

For the grantee, it was argued:

"Here is a capacity in the King, because he is absolute lord of the British seas, as appears by Selden's Mare Clausum, he may grant part of his marine patrimony as well as his lands. 2. Here is a person capable to take; subjects are capable of a property in the sea. . . . " Raymond pp. 241-42.

There are hundreds of 16th and 17th century royal grants of either overflowed lands or lands that were reclaimed from the sea. One of the earliest was a 1571 grant by Queen Elizabeth to Thomas Digges of "all such lands in or adjoining the County of Kent heretofore covered by the sea and by work of God or otherwise

'inned' or recovered from the sea. . . . " Patent Rolls, 13 Eliz., pt. ix., p. 297. Maine et al., Ex. No. 214. In 1603 the Crown made a grant of "Ballingmarsh, and other lands in Kent gained out of the sea." S.P. Dom., Jac. I, 1623-25, Vol. 11, p. 531. Maine et al., Ex. No. 215. In 1616 we find a grant to Henry Gibb "of lands called Brading, Isle of Wight, which have been much overflowed by the sea, and are to be inclosed at his expense." S.P. Dom., Jac. I., LXXXVIII, p. 381. Maine et al., Ex. No. 216. In
145 1623 we find a warrant to Charles Barrett "to recover marsh lands left by the sea. . . . " S.P. Dom., Jac. I., CXLVIII, p. 625, Maine et al., Ex. No. 217. In 1639 the King claimed "certain lands in Guernsey" that "have been for sundry years past, overflowed by the sea, and that the same are, by the laws and customs of the island, belonging to us, to dispose of." S.P. Dom., Car. I., CCCCXXIX, p. 534, Maine et al., Ex. No. 218. By the end of the century, hundreds of grants of derelict lands had been made. In 1694 Attorney General Ward informed the Lords of the Treasury that if "any land is derelict by the sea, such derelict lands doth of common right belong to the Crowne. . . ." 1 Cal. Treas. Papers, p. 383. And as the century came to a close there was a continued outpouring of royal grants of derelict lands. See, *e.g.*, 1 Cal. Treas. Papers, pp. 537-38 (1696) Maine et al., Ex. No. 219; 2 Cal. Treas. Papers, pp. 233-34 (1697-98). Maine et al., Ex. No. 220.

Q. Are there other treatise writers who affirm the King's ownership of the seabed? A. Let me emphasize that there are dozens more in 17th and 18th century England. For a general survey of the treatise literature, I refer you to Fenn, *supra*, pp. 150-233, and Fulton, passim.

Q. Can you discuss some of the more prominent?
146 A. In 1665, Robert Codrington wrote His Majesties Propriety and Dominion of the British Seas Asserted. Maine et al., Ex. No. 181. He declared:

"First, that the Sea by the Law of Nature and Nations is not common to all Men, but is capable of Private Dominion, as well as the Land.

". . . Second, . . . that the King of Great Brittain is Lord of the Sea Flowing about, as an Inseparable and Perpetual Appendant of the British Empire." *Id.* at p. 1.

In 1676, Molloy wrote De Jure Maritimo et Navali or A Treatise of Affaires Maritime and of Commerce, in which he recognizes the King's ownership of the sea. Professor Fulton notes that "it was for a long time considered the standard work on the maritime law of England, and went through many editions . . ." Fulton, *supra*, at p. 514.

Sir Philip Medows, in his Observations Concerning Dominion and Sovereignty of the Seas (1689), Maine et al., Ex. No. 202, while urging that England and Holland define by treaty the respective limits of their dominion over the sea, nevertheless maintained that "every Prince, whose Country adjoyns to the Sea, . . . has some portion of the Sea belonging to him in property, as an accession of the Land, or appendant to it, or rather incorporated with it, like Veins and Arteries, integral Parts of the same Body." 147 *Id.* at pp. 42-43. Moreover, he was clear that "he who affirms a Sea-Dominion, and by it understands anything less than Property, embraces a Cloud for Juno." *Id.* at p. 9. The difficulty was that "there be no certain Standard in Nature, whereby to ascertain the precise Boundaries of that peculiar Marine Territory, I am now speaking to, which belongs to every Prince in Right of his Land; yet, by Treaty and Agreement, they may easily be reduced to certainty. For, as to the Judgment and Opinion of private Persons, we cannot fetch from thence any true measure; for though they all agree unanimously, that there is something due of Right, yet they vary in the Quantum, or How much." *Id.* at p. 43.

Beginning with Chief Justice Rolle's Abridgment (1668), – again, here is a case of translation – there is a stream of authority by English text writers affirming the Crown's ownership of the seabed. See 2 Rolle Abridgment, p. 170. Maine et al., Ex. No. 206.

All of the four most influential English common law text writers of the 18th century concur in this conclusion.

First, Mathew Bacon, in his New Abridgment of the Law (1736) (2d ed. 1759), Maine et al., Ex. No. 171, wrote:

"It is universally agreed, that the King hath the Sovereign Dominion in all Seas and great Rivers; which is
148 plain from Selden's Account . . .; and therefore the Territories of the English Seas and Rivers always resided in the King.

"And as the King hath a Prerogative in the Seas, so hath he likewise a Right to the Fishery and to the Soil; so that if a River as far as there is a Flux of the Sea leaves its Channel, it belongs to the King." 4 Bacon's Abridgment p. 156.

Next, Charles Viner, in A General Abridgment of Law and Equity (1742), Maine et al., Ex. No. 208, wrote:

"The Sea is not only under the Dominion of the King . . . But it is also his proper Inheritance; and therefore the King shall have the Land which is gained out of the Sea. . . ." 16 Viner Abridgment p. 576.

"(T)he Sea is of the Allegiance of the King and Parcel of his Crown of England." 16 Viner Abridgment p. 577.

Third, Sir John Comyns, whose Digest of the Laws of England appeared in 1762, stated:

"The King and his Progenitors have at all Times been Lords of the Sea. . . .

"And therefore, the Dominion of the whole Sea which surrounds England belongs to the King. . . .

"And the Ligeance or Dominion of the Sea belongs to the King, as to his Crown of England. . . .

149 "And therefore, the King gives License to the Men of Zeland, etc. to fish in his Sea. . . ." 4 Comyns p. 388 (1766 ed.). Maine et al., Ex. No. 185.

Finally, Sir William Blackstone in his 1765 Commentaries on the Laws of England recognized the King's ownership of lands under the sea, writing:

". . . But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the King: for, as the King is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry." 2 Blackstone Commentaries p. 262, Maine et al., Ex. No. 174.

Q. Before we leave the treatise literature is there anything you wish to add? A. I have intentionally saved for last a review of the admiralty treatises of the 17th and 18th centuries because they raise some technical problems which I thought best to discuss separately.

First, let me state generally that all of the writings on admiralty of the period recognize that the King exercises sovereignty and ownership of the Sea.

Sir Henry Spelman's "Of the Admiral-Jurisdiction and the Officers Thereof" was written sometime before 1643,
150 the year of his death. It was first published in The English Works of Sir Henry Spelman (1723). Maine et al., Ex. No. 207. Spelman wrote:

"(T)he the Soyle of the Shore and Sea adjoining, is now the King's, and particular Lord's according to their Titles. . . ." *Id.* at p. 229.

In 1663, Richard Zouch, in his The Jurisdiction of the Admiralty of England Asserted, Maine et al., Ex. No. 212, wrote:

"(T)hat the Kings of England . . . time out of mind, have been in peaceable possession of the Sovereign Dominion

of the Sea of England, and of the Islands therein situate . . . that (the Admirall of the Sea deputed by the King of England, and all other Admiralls appointed by him, and his Ancestors, heretofore Kings of England, have been in peaceable Possession of the said sovereign Protection. . . . " *Id.* at pp. 19-20.

* * * * *

"First it appears by antient Record of the time of King Edward the first, De Superioritate Maris (of Superiority over the Sea), That it was acknowledged by the Deputies of the parliament of England, and of divers other Nations, That the Kings of England time out of mind injoyed the Dominion and Soveraignty of the English Seas. . . . " *Id.* at p. 38.

One year later John Exton published his The Maritime
151 Dicaeologie or Sea-Jurisdiction of England (1664). Maine et al., Ex. No. 187. He stated:

"(T)he King of England and his predecessors, . . . have had the supreme Government of the English Seas, and the Islands thereof. . . .

"(T)hese things I have cited out of Mr. Selden not only to shew here for my purpose, that the Kings of England have had from antient times the power and dominion over the British Seas . . . England's Admirals have likewise as antiently had jurisdiction under them over those maritime affairs, which fell sub isto regimine & dominio." *Id.* at pp. 22-23.

The same assertion of the Crown's sovereignty over the sea appears in John Godolphin, A View of the Admiral Jurisdiction, pp. 28-30 (1661) (2d ed. 1685). Maine et al., Ex. No. 191.

Let me emphasize at this point that these admiralty tracts were an accurate expression of the legal practices in the late 17th century. We have, for example, "A Charge given at an Admiralty Sessions held at the Old-Baily" by Sir Leoline Jenkins, who was judge of the Admiralty Court from 1664 to 1668 and probably the greatest admiralty judge in English history. Jenkins carefully distinguished between the Crown's dominion over the territorial sea and a more modest concurrent jurisdiction in the seas beyond. Jenkins declared:

"Every Englishman knows, that his Majesty hath an undoubted Empire and Soveraignty in the Seas that en-
152 viron these his Kingdoms, which by the ancient Statute Laws (18 Edw. I), are called the quatuor Maria, by Foreigners and by our modern Treaties, the British Seas. . . .

"But besides these four Seas, which are the peculiar Care, and as it were, Part of the Domaine of the Crown of England, his Majesty hath a Concern and Authority (in Right of his Imperial Crown) to preserve the publick Peace, and to maintain the Freedom and Security of Navigation all the World over. . . .

"This Power and Jurisdiction which his Majesty hath at Sea in those remoter Parts of the World, is but in Concurrence with all other Soveraign Princes that have Ships and Subjects at Sea. . . ." 1 Wynne, The Life of Sir Leoline Jenkins, pp. xc-xci (1724) Maine et al., Ex. No. 210.

These views of the 17th century admiralty writers continued into the 18th century. In 1713, Sir Charles Hedges, Judge of the Admiralty Court, wrote to Josiah Burchett, Secretary of the Admiralty, after the Lords of Admiralty asked his opinion as to the limits of the British seas. Hedges had no doubt that the four seas "are within her Majesty's sea dominions, as queen of Great Britain." He

noted that "All nations pretend to dominion at sea on their coasts; some extend it to no further than they can reach, some sixty miles, some a hundred or more, with
153 regard to the seas which wash their borders, or opposite shores." Though he could not fix the exact boundaries of British dominion, he concluded "that the British sovereignty has in all ages been asserted to the utmost extent of those seas which have been possessed by the Brittains and Irish in the vast oceans of the North and West." R.G. Marsden, ed., 2 Documents Relating to Law and Custom of the Sea pp. 231-33 (1916). Maine et al., Ex. No. 199.

Q. You mentioned a moment ago that you had reserved your discussion of admiralty writings for the end of your survey of the treatise literature because there were technical questions that you wished to discuss. Can you tell us what these technical problems are? A. Most of the admiralty treatises just referred to were written in the midst of the great 17th century controversy over the jurisdiction of admiralty. It is necessary, I think, to review this controversy in order to correct certain misconceptions that appear in the English case of Queen v. Keyn, L.R. 2 Exch. Div. p. 63 (1876) Maine et al., Ex. No. 160.

Q. Can you briefly describe that case? A. By a 7-6 vote, the court held that the Central Criminal Court had no jurisdiction to try a foreigner for a manslaughter committed on board a foreign ship sailing within three
154 miles of the English coast. In several of the majority opinions, especially that of Sir Alexander Cockburn, there is puzzling language indicating that the realm of England stops at low water mark. What I hope to show is that it would be a serious misreading of history to follow the majority's conclusion that admiralty did not have jurisdiction over cases of this sort or to concur in the court's assertion that the traditional jurisdiction of admiralty was not regarded as territorial.

Q. Can you give us your reasons for this conclusion? A. There are two separate lines of historical development I should like to examine. The first deals with restrictions imposed on the land jurisdiction of admiralty, mainly during the 17th century, though with strong roots earlier. The second deals with the transfer of the criminal jurisdiction of admiralty to royal commissioners and then to the regular criminal courts of England.

In two statutes passed during the reign of Richard II, Parliament attempted to limit the jurisdiction of admiralty. 13 Rich. II., c. 5. (1389); 15 Rich. II., c. 3 (1391). The latter statute denied the Admiral jurisdiction over "all manner of Contracts, Pleas, and Quarrels, and of all other things done, or arising within the bodies of Counties, as well by Land as by Water. . . ."

These statutes became the basis for the great struggle in the early 17th century led by Sir Edward Coke to restrict the land jurisdiction of the Admiral.

Q. What were the reasons for the struggle? A. First, as Coke pointed out (4 Inst. p. 134), The Admiral could not have jurisdiction "within any County of the Realm" because there was no trial by jury in admiralty. The County, it should be emphasized, was the administrative unit out of which juries were chosen. Second, as we shall see in greater detail in a moment, there was great opposition by the common lawyers to application of admiralty civil law doctrines within the land jurisdiction of common law courts.

Q. What conclusions do you derive from this branch of your historical survey of admiralty? A. There is much talk in the 17th century about admiralty's jurisdiction being limited to "outside the Realm," which apparently has misled many modern jurists such as Sir Alexander Cockburn in Queen v. Keyn into believing that

the Admiral's jurisdiction was conceived of as being extra-territorial. In fact, however, the "out of the realm" formulation had an entirely different meaning for the 17th century jurist. It was only a short-hand for "out of the
156 body of a county of the Realm" which in turn merely raised the problem of the absence of jury trials in admiralty. Since there was no county from which a jury could be assembled, there could be no jury trial according to the common law model.

On the other hand, 17th century jurists recognized that the "out of the realm" formula did not deny a conception of the territorial seas, for it only meant that the territorial sea was "out of the body of a county of the Realm." Callis, for example wrote:

"But yet I am likewise of opinion, That a new Island risen from the bottom of the sea, although it be within the Realm, yet it is neither within county, Parish nor Town of this Realm, till the King by his Edict or Proclamation have so declared it." Callis, supra (1647 ed.), at p. 22. (Maine et al., Ex. No. 178.)

Similarly, Sir Mathew Hale was explicit in asserting that "the narrow sea, adjoining the coast of England, is part of the wast and desmesnes and dominions of the king of England, whether it lie within the body of any county or not." 1 Hargrave, Law Tracts, p. 10. (Maine et al., Ex. No. 194.)

Even so staunch an opponent of admiralty's inland jurisdictional claims as Sir Edward Coke agreed that the Admiral's jurisdiction in the narrow sea was within England's territorial waters. Thus, while Coke opposed all in-
157 land admiralty jurisdiction because the Statutes of Richard II restricted the Admiral to cases outside "bodies of counties," he nevertheless agreed that "if a man be upon the Sea of England, he is within the Kingdom or Realm of

England. . . ." First Institute, pp. 260(b)-261(a), Sec. 439. (Maine et al., Ex. No. 182.)

In conclusion, the fact that the Admiral's jurisdiction was occasionally spoken of as being "outside the Realm" should not mislead us into believing that admiralty jurisdiction was regarded as extra-territorial within the narrow seas.

Q. Can you now discuss the transfer of criminal jurisdiction from admiralty? A. This is a crucial step in any understanding of Queen v. Keyn. The first change occurrs in the statute 28 Henry VIII, c. 15 (1536), which recited that "traitors, pirates, thieves, robbers, murderers, and confederates upon the sea" often escaped punishment because under the civil law administered by admiralty judgment of death could be entered only after the defendants either confessed their offenses or these offenses were proved by impartial witnesses.

The statute required that the King appoint Commissioners to try most major offenses committed at sea, ac-
58 cording to the common law" as if any such offences had been committed or done in or upon the land . . ." It further provided for trial by jury.

The statutes of 5 Elizabeth, c. 18 (1562-3), and 39 George III., c. 37 (1799), further expanded the jurisdiction of the Commissioners to include all crimes.

Finally, the statute of 4 & 5 William IV., c. 36, s. 22 (1834), places all offences formerly within the admiralty jurisdiction in either the Central Criminal Court or the ordinary judges of the land.

In Queen v. Keyn, Sir Alexander Cockburn declared that the result of the case turned on determining what the ancient admiralty jurisdiction encompassed. If there was jurisdiction in admiralty before the Statute of 28 Henry VIII, c. 15 (1536), to try foreigners for crimes

committed on the seas, then he conceded that this power over criminal offenses was transferred to Commissioners under the 1536 Statute. Likewise, he conceded that this jurisdiction would again have been transferred from the Commissioners to the Central Criminal Court by the Statute 4 & 5, William IV, c. 36, s. 22. Here are Cockburn's words (2 Exch. Div. at pp. 168-69):

"We must, therefore, deal with this case as one which would have been under the ancient jurisdiction of
159 the admiral. But the jurisdiction of the admiral, though largely asserted in theory, was never, so far as I am aware – except in the case of piracy, which, as the pirate was considered the communis hostis of mankind, was triable anywhere – exercised, or attempted to be exercised, in respect of offences, over other than English ships. No instance of any such exercise, or attempted exercise, after every possible search has been made, has been brought to our notice. Nor, for the reason already given, could such jurisdiction be so exercised consistently with legal principle. And though, by 25 Henry 8, c. 15 (sic) " – that should be 28 – "the trial of offences previously within the jurisdiction of the admiral was transferred to commissioners to be appointed by commission from the King, under which the trial was to be held in such county as the commission should direct, and, 'according to the common course of the laws of the realm, used for such offences when done upon the land within the realm,' it is, I think, beyond dispute, that all that was effected by this statute, or by those that have succeeded it, as regards jurisdiction, was a transfer of the criminal jurisdiction of the admiral, such as it was, to Courts proceeding according to the ordinary procedure of the common law – not an extension of it. The statute created no new offence, effected no extension of jurisdiction. It simply transferred the jurisdiction

of the admiral, talem qualem, to the Common Law Courts, to be exercised according to the procedure of the common law. As to this the received authorities are, as I shall have occasion more fully to shew hereafter, entirely agreed. The Central Criminal Court Act, 4 & 5 Wm. 4,.c. 36, which gives power to try 'offences committed on the high seas and other places within the jurisdiction of the Admiralty of England,' has, obviously, carried the matter no further. If the admiral had not jurisdiction as to offences committed on foreign ships, the commissioners, to whom the jurisdiction was transferred by the statute, must be equally without it."

Cockburn disputes the clear statement in 2 Hale, Pleas of the Crown, p. 12, that admiralty exercised such territorial criminal jurisdiction. He argues that, of the eight cases cited for Hale's proposition, "four were cases of piracy, which may have been dealt with on the principle that piracy is triable anywhere and everywhere (and, in any case,) two of the latter cases (may have been) committed within the body of a county, and therefore triable at common law." 2 Exch. Div. at p. 163.

Q. Does the historical evidence support Cockburn's understanding of the history of admiralty's criminal jurisdiction? A. No, I believe it does not. First, it seems to me that Cockburn has strangely altered the burden of historical proof. It is very clear, it seems to me, that the Statute of 28 Hen. VIII, c. 15 (1536), intended to transfer admiralty jurisdiction over "traitors, pirates, thieves, robbers, murderers, and confederates upon the sea" without regard to nationality. We have already seen that there is an abundance of evidence demonstrating that the narrow seas were conceived of as part of the territory of England. And since admiralty records only begin in 1524, failure to find any confirmatory evidence among the very

sparse records still in existence for the period before 1536 ought not to alter the very explicit statement of the statute. In any event, as I shall show, there is some additional affirmative evidence of the practice before 1536. And there is good reason to believe that virtually all major offences committed on the seas by foreigners were indiscriminately punished as piracy.

Now, let me refer to the evidence that I have suggested. First, I have been able to find two cases in which foreigners were prosecuted for crimes before 1536. In 1370, Hugo de Peyntour, a Venetian, was tried in admiralty for both treason and piracy. He was acquitted by a jury of merchants and others. 1 R.G. Marsden, Select Pleas in The Court of Admiralty, p. xlvii. In 1455 Runball Harrysone,
162 a Dutchman ("Duchemanus"), was tried for murder before the Admiral. He too was acquitted. 1 The Black Book of the Admiralty, p. 255 (ed. Sir Travers Twiss). Maine et al., Ex. No. 173.

Q. For the reporter, Professor Horwitz has an additional sentence, not in the prepared testimony, which he would like to add at this point. A. In this connection, I would like to add one comment not in my prepared testimony. The report of Harrysone's trial referred to him as Runball Harrysone, Dutchman of Ipswich. It is barely possible that he was an English subject of Dutch origin, but it is more likely that he was an alien resident at Ipswich.

In addition, there still exists a document written in 1361 in which King Edward III revokes a Commission to try crimes committed on the seas. The grant of the Commission was occasioned not only by piracy but by the murder of 100 people aboard a ship going to Flanders. While the original commission gave the common law judges jurisdiction "to hear and determine according to

the law and custom of our realm diverse trespasses and felonies committed and perpetrated . . . by certain of our subjects and others, upon the sea, against certain merchants, as well English and foreign . . . ," the Commission was recalled because "according to the law and custom of our realm, felonies, trespasses, or injuries done upon the sea ought not to be dealt with or determined before our justices at the common law, but before our Admirals according to the maritime law . . . " Thus, it seems fairly clear that admiralty power was not limited to English nationals before 1536. 1 R.G. Marsden, Law and Custom of the Sea. pp. 84-89. Maine et al., Ex. No. 198.

There is considerable evidence in the 17th century that confirms the general power of admiralty to try foreigners for crimes within the territorial seas. A 1681 Statute of Scotland, where the Stat. of 28 Henry VIII did not apply, grants to the High Admiral jurisdiction:

". . . for the more ready and quick dispatch of justice in maritime and seafaring causes, foreign and domestic, whether civil or criminal, within this realm, and over all persons in so far as they are concerned in the same, both to natives and strangers . . . " Baker, The Office of Vice-Admiral of the Coast, p. 125, Maine et al., Ex. No. 172.

That the admiralty criminal jurisdiction in the 17th century continued to be based on a territorial conception within the narrow seas can be seen from the various writings of the great admiralty judge, Sir Leoline Jenkins (1664-1668). In "A Charge given at an Admiralty Session held at Old-Baily." Jenkins underlined the identity between the land jurisdiction of common law courts and the sea jurisdiction of Admiralty. He declared:

"Therefore you must take this one general Rule along with you, that whatever is Treason, whatever is Felony . . .

whatever is Misprison, or an Abuse committed upon the Land, and is enquirable by a Jury within the Body of a County, the same Thing being committed upon the Sea, or within the Limits of this Commission, must be reputed and adjudged Treason, Felony, Misprison, Offence, Misdemeanour, Nusance, Abuse, etc. it is the same Thing it carries with it the same Guilt, it is liable to the same Degrees of Punishment, and you are bound to enquire of it, and present it." 1 Wynne, The Life of Sir Leoline Jenkins, p. xcvii. Maine et al., Ex. No. 210.

Among the papers of Sir Leoline Jenkins, we find two more instances of foreigners being tried by admiralty commissioners for criminal offenses other than piracy. In a letter to Sir Thomas Exton, which appears to have been written in 1677, Jenkins advises Exton on a charge he is about to give to a grand jury. Although the defendant's nationality is not stated, the first subject of the charge strongly indicates it involved a foreigner, for there is a
165 long discussion of punishment for not striking the flag to acknowledge the Crown's sovereignty. Of the second subject, mayhem, Jenkins writes:

"For the Mayhem, that the Admiral hath Cognisance of it, if committed upon the High Seas . . . Therefore you may give it in Charge to the Jury, to enquire of all Mayhems committed within the Jurisdiction of the Admiralty. If they find the Fact, it is my humble Opinion, that as to the Form of the Indictment, the Verdict, and whole Manner of Proceedings, it ought to be the very same as if the Indictment were preferr'd at the King's-Bench, for a Mayhem committed within the Body of the County of Middlesex. . . ." 2 Wynne, The Life of Sir Leoline Jenkins, p. 709. Maine et al., Ex. No. 211.

In a second case, Jenkins advises the Lords Commissioners of the Admiralty concerning charges to be levelled

against a Dutch captain, who had detained and robbed two English ships. There is, however, no mention of bringing piracy charges. Jenkins writes:

"As for the Way of punishing the Captain, for his Violences and Menaces of Torture and Death; as also those of his Officers, for torturing our Pilot with such barbarous and unmanly Cruelties; the regular Way is, at a Sessions of Oyer and Terminer for the Admiralty (under the statute of 28 Hen. VIII.)." 2 Wynne at p. 774.

The failure to consider the issue of nationality in discussions of admiralty criminal jurisdiction continued into the 18th century as well. In 1725, the English Attorney and Solicitor-General were asked for an opinion on the power of the common law court to punish a person who from the shore of the colony of Barbadoes had fired on a ship about two miles into sea, killing one mate and wounding another. Without at all considering the question of nationality, the crown law officers wrote:

"We are of opinion, that the (person) who fired the shot cannot be tried for the death of the mate in any court of common law, but that he ought to be tried for the same either in the court of admiralty at Barbadoes, or by special commission under statute of 11th and 12th W. 3. cap. 7 (which, in effect applied the statute of 28 Hen. VIII to the English colonies) which is now the most known and usual method of proceeding in cases of felonies done upon the sea in those parts." Chalmers, Opinions of Eminent Lawyers on Various Points of English Jurisprudence, p. 525. Maine et al., Ex. No. 180.

Still another piece of evidence suggests that in the 18th century lawyers acknowledged the power of admiralty to try criminals for sea crimes without regard to nationality. In 1761, the King's Advocate, Attorney and Solicitor-General delivered an opinion to the Lords Commissioners

for Trade and Plantations concerning which court had jurisdiction to try "the master, mate, and several of the crew of a privateer, charged with the murder of some men" on an English ship within New York Bay. Nowhere does the opinion even allude to the nationality of the defendants. Yet, the Crown law officers declared:

"We are of opinion, that the statute 28 Henry VIII. does extend to the case of murder committed any where on the high seas; and consequently that a commission might issue in the present case. . . ." Chalmers, Opinions of Eminent Lawyers on Various Points of English Jurisprudence, p. 526.

In conclusion, let me state that although the evidence is not overwhelming, to the extent that the majority decision in Queen v. Keyn turns on the historical scope of the admiralty criminal jurisdiction, it is probably incorrect.

Q. Apart from the question whether Queen v. Keyn was rightly or wrongly decided, is the decision inconsistent, in your opinion, with the proposition that the Crown as a matter of English law owned the seabed under the English marginal seas? A. No, my opinion is that the decision is entirely consistent with the proposition that the Crown owned the seabed under the marginal seas.

168 Keyn is a decision dealing with the sole question whether, without a statute conferring jurisdiction, the Central Criminal Court had jurisdiction to try a foreigner for a crime under English law which was committed on board a foreign ship within three miles of the English coast. The Court held that in absence of a statute, the Central Criminal Court had no jurisdiction to try a foreigner in such circumstances.

A close examination of the opinions shows that the question of criminal jurisdiction was the only question involved in the case. Furthermore, such an examination

shows that all of the judges acknowledged Crown rights in the the marginal sea, and that a majority of them considered that the marginal sea was part of the territory of England.

Judges Lindley, Denman, Grove, Amphlett, Brett and Coleridge, the six dissenters, held that there was jurisdiction in the court. Their decisions supported the existence of a territorial sea.

Lindley, J., held that there was criminal jurisdiction, noting that:

"It is laid down in English law books of the highest authority that the seas adjoining the English coast are part of the realm of England, and are subject to the dominion of the Crown. Indeed there is considerable author-
169 ity for stating that those seas are to some distance part of the property of the Crown, subject to the right of the public freely to navigate them." 2 Exch. Div. at p. 86. Maine et al., Ex. No. 160.

He stated that it is not necessary for the purposes of the case to affirm this latter proposition to its full extent and it is sufficient to show that the English criminal law extends over the seas in question. *Id.*

Lindley cited with approval Bishop's Criminal Law S. 104 (5th ed.) to the effect that "the sea adjoining the coast is within the territorial sovereignty which controls the adjacent shores." 2 Exch. Div. at p. 89. He also stated that "the weight of authority is entirely in favour of a general dominion for all purposes consistent with peaceful navigation." *Id.* at p. 90. He concluded his opinion by holding:

"(T)he waters around the coasts of England are under the protection of English law, and . . . all persons, whether English or foreign, who recklessly navigate those waters and thereby cause others to lose their lives, are punishable by the criminal law of this country." *Id.* at pp. 98-99.

Denman, J., held that there was jurisdiction on two grounds: (1) that the offense was committed on board a
170 British ship because the defendant rammed a British ship causing a death on the British ship, and (2) that a foreigner committing manslaughter in the course of navigation of a foreign ship within three miles of the coast is subject to criminal jurisdiction. *Id.* at p. 108. As to this second branch of his decision he stated that he agreed with the judgment of Sir Baliol Brett. *Id.* I will discuss Brett's opinion shortly.

Grove, J., held that there was jurisdiction in this case. He held that there is jurisdiction within the marginal sea subject to a right of passage; but that the right of passage must be "exercised, with due regard to the safety of the subjects of the nation over whose territorial waters the right is to be used." *Id.* at p. 114.

He reviewed the publicists and categorized them as follows:

"1st. Those who affirm the right in what are generally termed territorial waters to extend at least to the distance at which it can be commanded from the shore or as far as arms can protect it.

"2ndly. Those who, assigning the same origin to the right, recognized it as being fixed at a marine league of three geographical miles from the shore.

"3rdly. Those who affirm the right to be absolute
171 and the same as over an inland lake, or, allowing for the difference of the subject-matter, as over the land itself.

"4thly. Those who regard the right as qualified: And the main if not only qualification that seems to me fairly deducible from the authorities is, that there is a right of transit or passage, and as incident thereto possibly a right of anchorage when safety or convenience of navigation requires it, in the territorial waters for foreign ships." *Id.* at p. 110. He also stated:

"In addition to the authority of the publicists, this three-mile range, if not expressly recognized as an absolute boundary by international law, is yet fixed on, apparently without dispute, in Acts of Parliament, in treaties, and in judgments of courts of law in this country and America." *Id.* at p. 111.

He cited with approval the English case of Whitstable Fishers v. Gann, 11 C.B. (N.S. 337), which stated: "The soil of the seashore to the extent of three miles from the beach is vested in the Crown." 2 Exch. Div. at p. 112.

Amphlett, J.A., held that there was jurisdiction in this case. He drew the following conclusions from the opinions of "almost every accredited writer on international law who has dealt with this question of maritime territory" (*id.* at p. 122);

"1. That all these writers, and, as far as I can see, with complete unanimity, acknowledge the right of a maritime state to an extension of their territory over some portion of the adjacent sea.

"2. That, although there is found a great variety of opinion among these writers as to the distance to which such maritime territory should be allowed, not one of them puts such distance at less than three miles.

"3. That all the earlier writers, including Grotius, the vigorous adovcate of the free navigation of the high seas, and many of the later writers, maintained that within the zone of three miles the state had, without qualification, a proprietary, as well as a territorial, right, so that it might at its pleasure exclude foreign ships from passing along the same; but that others of the later writers contended that the state had a territorial, but not a proprietary, right over the zone, or that, at all events, the innocent use of the zone by foreign ships for the purpose of navigation could not without wrong be interfered with.

"4. That not one of the last-mentioned writers maintained that the sovereign state had no jurisdiction to
173 prevent what I may call external wrong committed by them on board a foreign vessel within the zone. Indeed the writers most relied upon for the defence, such as Ortolan and Calvo, I think, imply, if they do not say, the contrary, for while arguing against the right of the maritime state to exclude foreign ships from the zone, they all appear to me to admit in substance that they have the right to make laws of 'police and surety.'" *Id.* at pp. 122-23.

Brett, J.A., also held that there was jurisdiction. After reviewing the foreign commentators, he concludes:

"(A)ll foreign writers on international law . . . agree in asserting that, by the consent of all nations, each, which is bordered by open sea, has a right over such adjacent sea as a territorial sea, that is to say, as a part of its territory; and that they all mean thereby to assert that it follows, as a consequence of such sea being a part of its territory, that each such nation has in general the same right to legislate and to enforce its legislation over that part of the sea as it has over its land territory." *Id.* at p. 135. And he further stated that while there is some dispute among writers as to the extent of the teritorial sea, "all are agreed as to three miles." *Id.* at p. 136. He then held:

"Considering the authorities I have cited, the terms used by them, wholly inconsistent, as it seems to me, with
174 the idea that the adjacent country has no property, no dominion, no sovereignty, no territorial right; and considering the necessary foundation of the admitted rights and duties of the adjacent country as to neutrality, which have always been made to depend on a right and duty as to its territory, I am of opinion that it is proved that, by the law of nations, made by the tacit consent of substantially all nations, the open sea within three miles of the

coast is a part of the territory of the adjacent nation, as much and as completely as if it were land a part of the territory of such nation." *Id.* at p. 143. He said that this is subject to the right of free navigation of all nations, if such navigation is with an innocent or harmless intent or purpose. But such right of free navigation, he said,

"by no means derogates from the sovereign authority over all its territory of the state which has agreed to grant this liberty, or easement, or right to all the world." *Id.* at p. 144.

Lord Coleridge, C.J., held that there was jurisdiction in the case. He declared,

"I think the offence was committed within the realm of England; and if so, there was jurisdiction to try it." *Id.* at p. 152.

175 The offense was committed within three miles of the low-water mark and, therefore, he said, upon English territory. *Id.*

He stated that Brett and Lindley

"have shewn that by a consensus of writers, without one single authority to the contrary, some portion of the coast waters of a country is considered for some purposes to belong to the country the coasts of which they wash." *Id.* at p. 153. He noted that Lord Coke, Lord Stowell, Dr. Lushington, Lord Hatherley, L.C., Erle, C.G., and Lord Wensleydale had squarely held that

"the realm of England, the territory of England, the property of the State and Crown of England over the water and the land beneath it, extends at least so far beyond the line of low water on the English coast as to include the place where this offence was committed." *Id.* at p. 155.

I have just examined the opinions of the six dissenters who held that there was jurisdiction in the case. Their opinions show that they believed that there was a territorial sea of at least three miles in width.

I will now examine the judgments of the seven Judges who held that there was no jurisdiction – Bramwell, Lush, Phillimore, Kelly, Cockburn, Pollock and Field.

Two of these, Bramwell and Lush, seem clearly not to
176 have based their conclusions on a denial of the conception of a territorial sea.

Bramwell was of the opinion that since there was great uncertainty on the question of the historical bounds of England's sea criminal jurisdiction, the decision ought to be left to Parliament. He appears to have reached his decision on the very narrow ground that all ambiguity in a criminal statute should be resolved against the State. If the law were clear, he wrote,

"we ought to declare it, regardless of consequences. But if it is a measuring cast which opinion is right, I think we ought to leave it to the legislature, and not make a law ourselves with imperfect powers. On the ground, then, that no such jurisdiction as now claimed has ever been claimed before, I hold that none exist." 2 Exch. Div. at p. 150.

There is nothing in Bramwell's opinion that even remotely suggests that he deduced this conclusion from a denial of a conception of a territorial sea, let alone that he believed the Crown had no rights in marginal waters.

Lush affirmatively believed that there was clearly a conception of territorial water in international law. He wrote:

"I think that usage and the common consent of nations,
177 which constitute international law, have appropriated these waters to the adjacent State to deal with them as the State may deem expedient for its own interests. They are, therefore, in the language of diplomacy and of international law, termed by a convenient metaphor the territorial waters of Great Britain, and the same or equivalent phrases are used in some of our statutes denoting that this belt

of sea is under the exclusive dominion of the State." 2 Exch. Div. at pp. 238-39.

However, Lush seemed also to believe that it was beyond the historical function of the common law to define the extent of the State's sea dominion. He wrote: "(T)he dominion is the dominion of Parliament, not the dominion of the common law. That extends no further than the limits of the realm. In the reign of Richard II. the realm consisted of the land within the body of the counties. All beyond low-water mark was part of the high seas. At that period the three-mile radius had not been thought of. International law, which, upon this subject at least, has grown up since that period, cannot enlarge the area of our municipal law, nor could treaties with all the nations of the world have that effect. That can only be done by Act of Parliament. As no such Act has been passed, it follows that what was out of the realm then is
78 out of the realm now, and what was part of the high seas then is part of the high seas now; and upon the high seas the Admiralty jurisdiction was confined to British ships. Therefore, although, as between nation and nation, these waters are British territory, as being under the exclusive dominion of Great Britain, in judicial language they are out of the realm, and any exercise of criminal jurisdiction over a foreign ship in these waters must in my judgment be authorized by an Act of Parliament." 2 Exch. Div. at p. 239.

Thus, the opinions of both Bramwell and Lush clearly recognize that Parliament has power over the territorial sea. Both voted to dismiss the indictment because of their view that the court lacked jurisdiction in the narrow, technical sense of that term. More significantly, neither opinion is ultimately grounded upon a rejection of the historical conception of Crown rights over the marginal sea, and at least Lush expressly recognized the existence

of those rights. The result is that there was a clear majority of the Court which recognized a territorial conception of the sea.

There is language in the judgments of the remaining five judges that does deny a fully territorial conception of the marginal sea. There are reasons, however, for doubting the force of some of this general language. (Such language
179 is in any event pure dictum with respect to Crown proprietary rights, since they were in no way involved in the case.)

For example, at least four of these five judges believed that Parliament had the power to impose criminal jurisdiction on foreigners for acts committed in the marginal sea. Sir Alexander Cockburn's opinion, in which Pollock and Field concurred, explicitly stated that Parliament could confer such jurisdiction. 2 Exch. Div. at p. 231. Phillimore appears to have agreed. *Id.* at pp. 68, 83-86. Kelly said nothing on this point.

Further, Sir R. Phillimore expressly recognized important Crown rights in the marginal sea. In answer to his own question, "Is a state entitled to any extension of dominion beyond low-water mark?" (*Id.* at p. 71), he replied:

"(T)he answer may be given without doubt or hesitation, namely, that a state is entitled to a certain extension of territory, in a certain sense of that word, beyond low-water mark." *Id.*

Later, he amplified this view:

"The consensus of civilised independent states has recognised a maritime extension of frontier to the distance of three miles from low-water mark, because such a frontier or belt of water is necessary for the defence and security of the adjacent state.

180 "It is for the attainment of these particular objects that a dominium has been granted over this portion of the high seas." *Id.* at p. 81.

He then stated that the state does not, however, have all the same rights of jurisdiction and property over this belt of sea as it has over land; the state has the right to refuse passage to foreigners over its territory by land but does not have the same right to prevent the passage of foreign ships over the marginal portion of the high seas. The defense and security of the state do not, he stated, warrant the exclusion of peaceable foreign vessels from passing over these waters, and the custom and usage of nations has not sanctioned it. *Id.* at pp. 81-82.

Thus Phillimore did not, even by way of dictum, say anything inconsistent with recognition of some Crown proprietary rights in the marginal sea; he said only that the Crown's rights are founded on defense and security and that they are different from Crown rights on land in that they are limited by, at least, the right of passage of foreign ships.

Kelly, C.B., held that there was no jurisdiction in the case. He stated that he agreed substantially with the opin-
181 ions of both Cockburn and Phillimore. He also said that he had participated in the preparation of the opinion of Phillimore and that Phillimore's judgment could be taken to be "his judgment and my own." *Id.* at p. 151. Kelly, therefore, held, along with Phillimore, that while there are some acknowledged Crown rights in the territorial or marginal sea, those rights are subject to the right of free passage.

Kelly's opinion shows that he limited his holding to the nonexistence of criminal jurisdiction over foreign ships and based the holding on the right of free passage: "(I)nasmuch as it cannot be disputed, that the high seas, that is to say, all the whole seas of the world below low-water mark, are open to the whole world, and that the ships of every nation are free to navigate them, I hold that no one nation has the right to exercise criminal

jurisdiction over the ships of other nations, or the subjects of other nations within such ships, navigating the high seas, that is, passing through the high seas (without casting anchor or stopping) between one foreign port and another, unless by treaty, or express agreement, or unless by some uniform, general, and long-continued usage, evidenced by the actual exercise of such jurisdiction acquiesced in by the nation or nations affected by it." *Id.* at p. 151.

182 Kelly acknowledged a jurisdiction for some purposes, other than criminal jurisdiction over foreigners on foreign ships, within the territorial sea:

"The limited jurisdiction exercised within three miles, or some other space or distance, for some purposes has been established and sanctioned by a long-continued actual exercise of it by the one nation, acquiesced in by all others against or in respect of whom it has been claimed. But the right to seize and try in England for an offence committed on the high seas by a foreign commander of a foreign vessel on a foreign voyage, can, in my opinion, no more exist than the right to seize and try in England any foreigner for an act done in his own country, a foreign territory, which act may happen to constitute a criminal offence by the law of England." *Id.*

Cockburn, C.J., held that there was no jurisdiction in the case. Analysis of this opinion shows that Cockburn did not hold that there were no Crown rights in the marginal sea. It is true that Cockburn based his holding in part on the conclusion that the marginal sea was not within the realm in the sense of full territorial sovereignty – just as, I might remark in passing, the modern view of rights in the continental shelf does not involve full territorial sovereignty. However, Cockburn's opinion acknowledges the existence of Crown rights in the mar-

183 ginal sea for purposes other than criminal jurisdiction over

foreigners on foreign vessels. He made it clear that the case involved only the question of criminal jurisdiction over foreigners on foreign ships in the marginal sea in the absence of a statute, and not the question of dominion over the marginal sea for other purposes:

"This unanimity of opinion that the littoral sea is, at all events for some purposes, subject to the dominion of the local state, may go far to shew that, by the concurrence of other nations, such a state may deal with these waters as subject to its legislation. But it wholly fails to shew that, in the absence of such legislation, the ordinary law of the local state will extend over the waters in question – which is the point which we have to determine." *Id.* at p. 193.

Much of the evidence cited by Cockburn establishes the existence of Crown rights and was distinguished by him merely on the grounds that it was not evidence specifically for criminal jurisdiction in the particular circumstances of this case. For example, in reference to legislation dealing with foreign shipping, he stated:

"(I)t is undoubtedly a strong assertion of dominion over foreign ships, and is a striking instance of the adoption of the three-mile principle. It may, however, be doubted
184 whether the enactment would apply to a ship on a foreign voyage." *Id.* at p. 218.

He acknowledged the statement of Dr. Lushington in The Leda, Sw. Adm. 42, that "the limits of the United Kingdom (are) the land of the United Kingdom and three miles from the shore." And he distinguished it on the following grounds:

"We have here to a certain extent a judicial recognition of the three-mile principle, but the decision had not, it should be observed, any reference at all to foreign ships." 2 Exch. Div. at p. 223.

He distinguished the case of General Iron Screw Colliery Co. v. Schurmanns, 1 J.&H. 180, on similar grounds:

"There is here, no doubt, a clear recognition of the three-mile principle for certain purposes; but, as in the preceding case, the foreigner was seeking redress by the application of the local law. . . . (T)he language of the learned Vice-Chancellor is certainly very far from saying that the sea in question, without the intervention of the legislature, is to be taken to be the territory of the local state for all pruposes whatsoever, so that, independently of legislation, the local law will apply universally within it." 2 Exch. Div. at pp. 224-25.

Similarly, he acknowledged the statement of Erle, C.J.,
185 in Whitstable Fishers v. Gann, 11 C.B. (N.S.) 387, that " '(t)he soil of the sea-shore to the extent of three miles from the beach is vested in the Crown. . . .' " 2 Exch. Div. at p. 228. He then cited The Saxonia, 1 Lush. Adm. 310, which, he said, involved a collision occurring in the Solvent within 3 miles of the shore. The Judicial Committee of the Privy Council, he said, held that, as foreign ships had the right of navigating through this water, such a ship passing through it was not affected by the rules as to navigation established by the Merchant Shipping Act. He then said:

"This case is a very strong authority for the position that a foreign vessel having a right of passage within 3 miles of the shore, and not being bound to a British port, cannot be held liable under the local law by an English Court." 2 Exch. Div. at p. 228.

The use of *The Saxonia* to distinguish Whitstable Fishers shows that Cockburn was deciding only the narrow question of jurisdiction over foreigners on foreign vessels in territorial waters and, further that he based that decision largely on the existence of the right of free navigation over such waters, a right which does not deny the rights of the coastal state within such waters for other purposes.

Cockburn indicated that the prior judicial decisions he
186 had discussed had no relevance because of the very narrow question presented:

"One common observation arises on all these decisions, though, perhaps, not on all these dicta. They all arise on the construction of Acts of Parliament. In no instance has the judge been called upon to decide how far without legislation the law of this country can be applied to foreigners on the littoral sea, which is the question we are called upon to decide. They are, therefore, but of little avail to the decision of this question." *Id.* at p. 229.

He similarly dismissed learned writers on the marginal sea on the grounds that they were not dealing with the jurisdictional question involved here:

"None of these writers, it should be noted, discuss the question, or go the length of asserting that a foreigner in a foreign ship, using the waters in question for the purpose of navigation solely, on its way to another country, is liable to the criminal law of the adjoining country for an offence committed on board." *Id.* at p. 192.

* * * * *

187 The writers cited by Cockburn provide persuasive evidence of the existence of extensive rights of the coastal state in the marginal sea. To give just one example, Cockburn characterizes the writing of the publicist M. Hautefeuille in terms which are strikingly similar to modern concepts of the Continental Shelf:

". . . M. Hautefeuille argues that the products of the sea are not inexhaustible, and that the pursuit of them requires to be kept under proper regulation; while the people in possession of the shore are deeply interested in possessing the adjoining waters also, in order to protect themselves against pirates. Hence the distinction

between these waters and the open sea; hence the former may be possessed and considered as an accessory to the shores they wash." *Id.* at p. 184.

Cockburn summarized the authorities, acknowledged their persuasiveness for some purposes and distinguished them on the ground that they did not go as far as to
188 give criminal jurisdiction in the case at bar:

"Taken together, decisions and dicta no doubt shew that the views and opinions of the foreign jurists as to a territorial sea have been received with favour by eminent judicial authorities of this country, and that the doctrine respecting it has been admitted in the construction of statutory enactments; but none of them go the length of establishing, or even suggesting, that, independently of statute, the criminal law of England is applicable to the foreigner navigating those waters." *Id.* at p. 229.

Cockburn further acknowledged several instances in which "the legislature has applied the principles of three-mile jurisdiction." *Id.* at p. 219. He distinguished them by noting that, with the exception of the penalties imposed for violation of neutral duties or for breaches of the revenue and fishery laws, there had been "no assertion of legislative authority in the general application of the penal law to foreigners within the three-mile zone." *Id.* He indicated that a court should not make the whole penal law applicable to foreign vessels within three miles of the coasts, when the legislature has failed to do so. *Id.*

It is true that Cockburn spoke of "vain and extravagant pretentions" as to certain rights in the sea which "have
189 long since given way to the influence of reason and common sense." *Id.* at p. 175. These pretentions to which he referred, however, were, *e.g.*, the claim of England "to maintain the freedom and security of navigation all the world over," the claim of Venice to the Adriatic, of Genoa to the Ligurian Sea, and of the Portuguese "to

bar the ocean route to India and the Indian Seas to the rest of the world." *Id.* at pp. 174-75. He went on to state that there is no longer such broad jurisdiction, particularly over foreigners. *Id.* at p. 175.

I now turn to Cockburn's treatment of the Act of Parliament of 21 & 22 Vict. c. 109 ("The Cornwall Submarine Mines Act") (1858). 2 Exch. Div. at pp. 199-202. Maine et al., Ex. No. 166. This Act confirmed the arbitration award in a dispute between the Crown and the Duchy of Cornwall concerning the right to minerals, first, between high and low-water mark, and second, below low-water mark. Maine et al., Exs. Nos. 167, 169. The award of Sir John Patteson, the arbitrator, decided, first, that the Duchy was entitled to minerals between high and low-water mark and second that "the right to the minerals below low-water mark remains, and is vested in the Crown, although those minerals may be won by workings commenced above low-water mark, and extended below it." Maine et al., Ex. No. 168. The Act of 21 & 22 Vict. c. 109 confirmed this arbitration award. Concerning the
190 rights to minerals below low-water mark, the Act recited: "All Mines and Minerals lying below Low-water Mark under the open Sea, adjacent to but not being Part of the County of *Cornwall,* are, as between the Queen's Majesty in right of Her Crown on the one hand, and His Royal Highness *Albert Edward* Prince of *Wales* and Duke of Cornwall in right of His Duchy of *Cornwall* on the other hand, vested in Her Majesty the Queen in right of Her Crown as Part of the Soil and territorial Possessions of the Crown."

Cockburn attempted to limit the force of this parliamentary recognition of the Crown's ownership of the seabed and, with all respect, I believe he is completely unconvincing. Taken in the context of centuries of English law and practice recognizing the Crown's ownership of the

seabed, his expression of surprise at this parliamentary result is very difficult to understand.

While Cockburn does thus seem to deny Crown rights of property in the seabed of the marginal sea, his statements on that question are clearly dicta. Cockburn's view that full territorial sovereignty did not extend to the marginal sea was probably crucial to his decision on the narrow issue of criminal jurisdiction which was before the Court. But his views on the question of Crown property rights in the seabed were plainly not crucial to
191 that decision.

Pollock, J., and Field J., concurred without opinon in Cockburn's judgment. *Id.* at p. 239.

From this examination of the opinions in Queen v. Keyn, it is clear, I believe that the decision, to the extent to which it deals with the existence of Crown rights in adjacent waters as distinguished from the criminal jurisdiction of English courts over foreigners on those waters, supports the existence of such Crown rights, including proprietary rights in the seabed under such waters.

I would like to point to just two important pieces of evidence which were never alluded to in *Queen v. Keyn* and which might well have changed the result. In 1848, under Customs Regulations, the limits of the Port of Dover were declared to extend three miles out to sea. This would have included the area in which the collision in *Keyn* took place. This fact alone, it would seem, should have been determinative of the result in the case. Furthermore, in 1833 the Select Committee on British Channel Fisheries stated that it understood that "one league from the shore at sea is considered to be the territory of the adjoining country." Parl. Pap. vol. 14, No. 676, p. 59 (1833).

BY MR. CLAGETT:

92 Q. How have Parliament and the English courts treated the decision in *Queen v. Keyn*? A. The narrowness of the decision in *Keyn* is made clear from later cases. *Harris v. The Hamburg-Amerikanische Packetfahrt Actiengesellschaft*, 2 C.P.D. 173 (1877). Maine Ex. 161, deals with the same accident as that involved in *Keyn*. Lord Coleridge, C.J., Grove, J., and Denman, J., who were on the court which decided *Keyn*, interpreted that case as dealing with jurisdiction of the court. Although Lord Coleridge said in colloquy that the majority of the judges in *Keyn* were of the opinion "that the territory of England stopped at low-water mark," *Id.* at 177, he immediately thereafter stated in the text of his opinion that the *ratio decidendi* of *Keyn* is that

"*for the purpose of jurisdiction* (except where under special circumstances and in special Acts parliament has thought fit to extend it), the territory of England and the sovereignty of the Queen stops at low-water mark." *Id.* Grove, J., said "I am of the same opinion." Denman, J., said:

"The case of *Reg. v. Keyn* clearly goes the length of holding that, for all purposes, apart from any express statutory provision, the moment you get *beyond low-water mark you get beyond the jurisdiction within which the Queen's writs run.*" *Id.* at p. 178.

93 Two years after *Queen v. Keyn* was decided, Parliament repudiated that decision by enacting the Territorial Waters Jurisdiction Act, 41 & 42 Vict. c. 73 (1878). Maine et al., Ex. No. 170.

The Preamble declares;

"Whereas the rightful jurisdiction of Her Majesty her heirs and successors, *extends and has always extended* over the open seas adjacent to the coasts of the United

Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions. . . ."

Section 2 declares:

"An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly."

Section 7 declares in part that:

"for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured
194 from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions. . . ."

It is apparent from the Territorial Waters Jurisdiction Act that Parliament did believe there had always existed territorial waters below low-water mark. The fundamental point of Cockburn's analysis in *Queen v. Keyn, supra,* was that there could be no such jurisdiction exercised over foreigners "consistently with legal principle," *Id.* at p. 169, unless such jurisdiction were exercised within English territory. But the Act expressly states that the Crown's jurisdiction "extends and has always extended" over the territorial sea. In short, the highest authority in England, Parliament, overruled the decision of the Exchequer Division.

Professor John Bassett Moore has stated of the Territorial Waters Jurisdiction Act:

". . . the government and Parliament of Great Britain, after the decision in *Queen v. Keyn*, considered it imperative to adopt legislation nullifying its effect for the future,

besides declaring it wrong as to the past." 7 *The Collected Papers of John Bassett Moore* p. 294.

English courts since that time have frequently reaffirmed the classical position that the Crown owns the soil under the marginal sea.

195 In Lord Fitzhardinge v. Purcell, 2 Ch. 139, 166-67 (1908), Maine et al., Ex. No. 164, Mr. Justice Parker gave this summary of the common law position: "Clearly the bed of the sea, at any rate for some distance below low-water mark, and the beds of tidal navigable rivers, are prima facie vested in the Crown, and there seems no good reason why the ownership thereof by the Crown should not also, subject to the rights of the public, be a beneficial ownership. The bed of the sea, so far as it is vested in the Crown, and a fortiori the beds of tidal navigable rivers, can be granted by the Crown to the subject. There are many several fisheries which extend below low-water mark or exist in the beds of navigable rivers. The whole doctrine of "incrementa maris" seems to depend on the beneficial ownership of the Crown in the bed of the sea, which in the older authorities is sometimes referred to as the King's royal waste. It is true that no grant by the Crown of part of the bed of the sea or the bed of a tidal navigable river can or ever could operate to extinguish or curtail the public right of navigation and rights ancillary thereto, except possibly in connection with such rights as anchorage when there is some consideration moving from the grantee to the public. It is also true that no such grant can, since Magna Carta, operate to the detriment of the public right
196 of fishing. But, subject to this, there seems no good reason to suppose that the Crown's ownership of the bed of the sea and the beds of tidal navigable rivers is not a beneficial ownership capable of being granted to a subject

in the same way that the Crown's ownership of the foreshore is a beneficial ownership capable of being so granted."

The Judicial Committee of the Privy Council has also affirmed the Crown's common law right to property below low-water mark and in 1916 applied it to Indian territorial waters. *Secretary of State for India v. Chelikani Rama Rao*, L.R. 43 Indian Appeals 192 (1916) Maine et al., Exhibit No. 165. The Judicial Committee expressly followed the views enunciated by Lord Hale in the 17th century and expressly rejected the contrary dictum of Sir Alexander Cockburn in *Queen v. Keyn* as against principle. It wrote:

"It should be added, with reference to the suggestion that the territory of the Crown ceases at low-water mark, and that the right over what extends seawards beyond that is merely of the nature of jurisdiction or the like, that there are manifest difficulties in seeing what are the grounds for this in principle. There is nothing to recommend a local jurisdiction over a space of water lying above a res nullius. As to practical results: The confusion that might be produced by leaving islands, emergent within the three-mile limit, to be seized by the first comer is clear beyond controversy." *Id.* at pp. 201-02.

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It further emphasized the fact that *Keyn* was a decision on admiralty jurisdiction, and not a decision as to rights over the seabed:

"It should not be forgotten that (*Reg. v. Keyn, supra*) had reference on its merits solely to the point as to the limits of admiralty jurisdiction; nothing else fell to be there decided. It was marked by an extreme conflict of judicial opinion, and the judgment of the majority of the Court was rested on the ground of there having been no jurisdiction in former times in the admiral to try offences by foreigners on board foreign ships whether within or without the limit of three miles from the shore.

"When, however, the actual question as to the dominion of the bed of the sea within a limited distance from our shores has been actually in issue, the doubt just mentioned has not been supported, nor has the suggestion appeared to be helpful or sound." *Id.* at p. 199.

Two Scottish cases decided at the end of the 19th century also reject the dictum of Sir Alexander Cockburn in *Queen v. Keyn*. In *Lord Advocate v. Clyde Navigation Trustees*, 19 Rettie p. 174 (1891), Maine et al., Ex. No.
198 162, the judge, Lord Kyllachy, stated:

"Is the Crown's right in that strip of sea proprietary, like the Crown's right in the foreshore and in the land? or is it only a protectorate for certain purposes, and particularly navigation and fishing?

"I am of opinion that the former is the correct view, and that there is no distinction in legal character between the Crown's right in the foreshore, in tidal and navigable rivers, and in the bed of the sea within three miles of the shore. In each case it is of course a right largely qualified by public uses. In each case it is therefore to a large extent extra *commercium*; but none the less is it, in my opinion, a proprietary right – a right which may be the subject of trespass, and which may be vindicated like other rights of property." *Id.* at p. 177.

In the second Scottish case, *Lord Advocate v. Wemyss*, A.C. 48 (1900), Maine et al., Ex. No. 163, concerned with submarine mineral deposits, Lord Watson declared:

"I see no reason to doubt that by the law of Scotland, the solum underlying the waters of the ocean, whether within the narrow seas, or from the coast outward, to the three-mile limit, and also the minerals be-
199 neath it, are vested in the Crown." *Id.* at p. 66.

Q. Perhaps at this point it would be useful if you were briefly to summarize your conclusions as to the

holding in *Queen v. Keyn* and its significance with respect to the question with which we are here concerned, namely, whether the Crown owned the marginal sea in the 17th and 18th centuries. A. I would summarize my conclusions as follows:

1. Plainly, the only issue in the case was whether English criminal courts had jurisdiction, in the absence of statute, over crimes committed by foreigners within three miles of the English coast. On that issue the court held by a vote of 7 to 6 that there was no such jurisdiction. I believe, for the reasons I have stated, that this holding was probably incorrect. At most, on the specific issue it decided, *Queen v. Keyn* represents the law of England only for a brief period in the late 19th century, not in the 17th and 18th centuries. And as we have seen, the decision was promptly repudiated and overruled by Parliament.

2. The holding that there was no criminal jurisdiction over foreigners in the absence of statute neither required, involved nor implied a decision or a belief contrary to the existence of Crown rights, including property rights, in the marginal sea. In fact, the opinions taken as a whole
200 strongly support the existence of such rights. A clear majority of the court – the six dissenters plus Lush – expressly held that the marginal sea out to at least three miles constituted territorial waters and a part of the territory of England. Five of the other six judgments all recognized the existence of some Crown rights in the marginal seas; the remaining opinion, that of Bramwell, simply did not address the question. Moreover, it was repeatedly recognized in both the opinions of those who held there was jurisdiction and those who held there was not that in the past England had made very wide claims to ownership and sovereignty over what were sometimes called the

"narrow seas." See, *e.g.*, p. 70 (Phillimore), p. 109 (Grove), p. 119 (Amphlett), pp. 174-78, 195-96 (Cockburn). Thus it was recognized that in the crucial period for our purposes, the 17th and 18th centuries, the law of England was that the Crown had very broad rights in the marginal sea, and that the law of England had changed in the 19th century in the direction of limiting those rights. Cockburn recognized that broad claims of sovereignty were made as late as the reign of Charles II (p. 174). There is nothing in any of the opinions which indicates that the broad claims asserted as law in the 17th and 18th centuries had been limited prior to the period in which the American colonies became independent.

3. Several of the opinions recognized that the existence of property rights of the Crown in the seabed, as distinguished from criminal jurisdiction over foreigners, was not at issue in the case and that there was no need to decide it. See p. 86 (Lindley), p. 109 (Grove); *cf.* p. 134 (Brett). It is true that dicta in Cockburn's opinion are adverse to such property rights, but that opinion represented the views of only 3 of 13 members of the court, and in any event the dicta in question were plainly unnecessary to the holding. The decision, therefore, cannot be said to be adverse to the existence of such property rights, even as a matter of 19th-century law, let alone as a matter of the law of the 17th and 18th centuries. Especially as to that earlier period, as I have indicated, the opinions recognize that the Crown had such rights of property.

4. The holding in the case – that the English criminal courts had no jurisdiction in the marginal sea over foreigners in the absence of statute – was based on considerations which have nothing to do with property rights in the Crown and which are not at all inconsistent with

recognition of such rights. The principal reason for rejecting criminal jurisdiction relied on by most of the opinions
202 which held there was no jurisdiction was that it was thought to be inconsistent with the right of innocent passage of foreign ships through territorial waters, particularly in the absence of a statute explicitly warning foreigners that the courts of England would assert such jurisdiction. Whether or not the majority judges were correct in believing that criminal jurisdiction over foreigners is inconsistent with the right of inoncent passage, that issue plainly has nothing to do with Crown ownership of the subsea resources of the marginal seas. Such ownership could not be said to be in any way inconsistent with the right of innocent passage.

Q. Are you familiar with the Australian case of *Bonser v. La Macchia,* 43 Austl.L. J. Rep. 411 (1969), and the Canadian case, *Re Off-Shore Mineral Rights of British Columbia,* (1967) Canada L. Rep. 792, 65 D.L.R.2d 353? U.S. Exhibits 18, 34. A. Yes, I am.

Q. In your opinion, are these cases inconsistent with the opinion you have stated as to the English law of the 17th and 18th centuries? A. No, it is my opinion that they are not. Both cases are similar to the present case to the extent that they involve, in the Canadian case, a dispute between state and national governments over which government owns off-shore mineral rights and, in the
203 Australian case, a dispute over the power to regulate off-shore fisheries. Both cases do deny the claims of the states. Yet clearly the Australian case, and perhaps the Canadian case, were ultimately decided on a theory of the special juridical relationship between the individual states there involved and the Crown before these states became part of a sovereign national government. The essential ratio decidendi of neither case turns on a rejection of a conception of Crown rights in the marginal sea.

Of the five judges of the Australian High Court who decided the case of *Bonser v. La Macchia,* two, McTiernan, J., and Owen, J., never mentioned *Queen v. Keyn* in their opinions. A third, Kitto, J., believed it was not good authority. "(T)he view for which *Reg. v. Keyn* is cited," he declared, "cannot be regarded as established." 43 Austl. L.J. Rep. at p. 285.

The two remaining judges, Barwick, C.J., and Windeyer, J., referred favorably to *Queen v. Keyn,* but neither, I hope to show in a moment, ultimately based his decision on the view that English or Australian territory stops at the water's edge or that the English Crown had no property rights in the seabed.

Although Barwick does appear to agree with *Queen v. Keyn,* it is clear from his very superficial treatment of that
04 case that he did not rest his decision on its holding. For immediately after his short reference to the English case, he stated:

"But whatever the correct view as to the dominion of the bed of the sea under territorial waters, the question remains whether that area, whether of water or subjacent land, was vested in a colony as part of the territory of the colony." *Id.* at p. 278.

And Barwick proceeded to hold that the Crown never vested ownership of the seabed in the Australian states before Australia itself became sovereign.

That Barwick did not follow *Queen v. Keyn* can be seen also in his ambiguous treatment of the effect of the Territorial Waters Jurisdiction Act on the question. While he suggested that Parliament "was intending in passing (the Act) to take advantage of international comity, rather than to assert and implement a territorial claim to the bed of the sea," *Id.* at p. 279 – a spurious interpretation of the words of the Act, I believe, as I have indicated

above – he conspicuously refused to rest his decision on that interpretation. Barwick wrote:

"But, if contrary to my own impression, the Territorial Waters Jurisdiction Act (*supra*) was based upon a
205 claim to territorial ownership of the seabed below the territorial waters the claim was one made by and for the benefit of the Imperial Crown." *Id.* at p. 279.

Barwick made clear that his decision turned on the particular experience of the Australian colonies, which were not granted territorial rights over the territorial sea or seabed:

"The instruments setting up the (Australian) colonies did not in terms include as territory and subject to colonial governorship any part of the bed of the sea or the superincumbent waters." *Id.* at 278.

Barwick further pointed out that the Australian colonies were never sovereign. *Id.*

In short, Barwick returned to the *ratio decidendi* of the Australian High Court's decision that I suggested earlier: that the Crown never granted its territorial sovereignty or proprietary rights to the individual Australian states.

A similar process of reasoning is evident in the opinion of Windeyer, J. Though he appears to agree with the views of Sir Alexander Cockburn in *Queen v. Keyn*, Windeyer candidly recognized that the Territorial Waters Jurisdiction Act reversed that decision. "It was a case," he observed,
206 "in which . . . 'the voices of infallibility by a narrow majority' stated the law of England in a way which Parliament very promptly corrected." *Id.* at p. 292.

Ultimately, Windeyer's opinion turns on his view that the Territorial Waters Jurisdiction Act did not confer the Crown's sovereignty over territorial waters, or proprietary rights in the seabed, upon individual Australian states. He wrote:

"I reject altogether the proposition that the Colony or State of New South Wales has or ever had in any strict sense dominion over the adjacent sea which was, within the statutory description in the *Territorial Waters Jurisdiction Act*, territorial waters of Her Majesty's dominions. Sovereign rights in respect of these waters resided in the Imperial Crown." 43 Austl. L.J. Rep. at p. 294.

Windeyer made it clear that the decision in *Bonser v. La Macchia* did not present the issue of proprietary rights and interests in the bed of the sea:

"Now, notwithstanding the obvious physical relationship, and the generally assumed legal relationship, between ocean waters and the earth beneath them, I think that what are Australian waters for the purpose of the Commonwealth power over fisheries can be decided without any final pronouncement concerning proprietary rights and interests in any part of the bed of the ocean, whether the continental shelf or some narrower belt from the land." *Id.* at p. 291.

I note also that Windeyer warned that there should not be a false analogy between the experience of the American and Australian States:

". . . nothing is added to political stature by a false description, which is perhaps the result of a supposed analogy, obviously fallacious in law and in historical fact, with the States of the United States of America." *Id.* at p. 294.

In sum, I believe all of the opinions in *Bonser v. La Macchia* are consistent with the classical common law conception of crown proprietary rights in the seabed.

The Canadian opinion, *Re Off-Shore Mineral Rights of British Columbia*, does contain the statement that "the majority opinion" in *Keyn* held that "the territory of England ends at low-water mark." 65 D.L.R.2d at p. 364. The Court so stated in spite of the facts that there was

no single "majority opinion" in *Keyn*, and of the 13 judgments rendered a clear majority – the 6 dissenters plus Lush – expressly rejected the view that the territory of England ends at low-water mark. Only Cockburn and the two judges who concurred in his opinion expressed
208 that view, and as has been seen, even they recognized some Crown rights in the marginal sea. The Canadian court's remark quoted above follows immediately after the court set out the opinion of Lush, J., in full, including Lush's statement that territorial waters are "British territory, as being under the exclusive dominion of Great Britain," but that they were "out of the realm" for purposes of criminal jurisdiction. Since the Court singled out Lush's opinion for approbation, it appears that either the Court failed to grasp the distinction Lush was making, or else its own opinion was not intended to be inconsistent with the Crown's "dominion" which Lush recognized.

Taken as a whole, the Canadian opinion is unclear as to whether it represents a misreading of *Queen v. Keyn* as holding that the Crown had no property rights in the marginal sea – which *Keyn* certainly did not hold – or whether the fundamental reason for the decision was that, even though the Crown may have had such rights, it had never transferred them to British Columbia. There is much in the opinion to support the view that the Court's conclusion was based on the particular history of British Columbia. The Court pointed out that it was not until 1849 that a civil Government was established by the Queen for the Colony of Vancouver Island, the predeces-
209 sor of British Columbia. 65 D.L.R.2d at p. 357. The Act of August 2, 1858, "to provide for the Government of British Columbia" defined the Western boundary of the mainland Colony of British Columbia as "the Pacific Ocean." *Id.* Parliament in an 1863 Act "to define the

boundaries of the Colony of British Columbia" defined the western boundary of the Colony as "the Pacific Ocean." *Id.* at pp. 357-58. The Act of 1866 for the union of Vancouver Island with the Colony of British Columbia defined the western boundary of British Columbia in the same way. *Id.* at p. 358. No changes in the boundaries took place at the time of Confederation. *Id.*

It is my understanding that evidence will be presented relating to the American colonies which will show specific delegations of power over the marginal sea and seabed in charters to the civil governments of those colonies. If so, then this history is materially different from the historical record of British Columbia relied on by the Canadian Court – which history, it said, did not reveal any grant to British Columbia of "rights to which the British crown was entitled under international law." *Id.* at p. 367.

The Canadian Court supported its conclusion by noting legislation which is inconsistent with a theory that in 1878 British Columbia possessed as part of its territory the solum of the marginal sea, *e.g.*, the Territorial Waters
210 Jurisdiction Act, which would have applied the law of England, not Canada, to a crime committed within a league of the coast of British Columbia; and early Canadian legislation such as "An Act respecting the Customs" (1867) which deals with vessels "hovering (in British waters) within one league of the coasts or shores of Canada," and "An Act respecting fishing by foreign vessels" (1868) which empowers the Governor to grant licenses to foreign vessels to fish "in British waters, within three marine miles of any of the coasts, bays, creeks or harbours whatever, of Canada." *Id.* at p. 365. This evidence, of course, has no application to the experience of the American colonies.

The Court acknowledged that the Territorial Waters Jurisdiction Act recognized a territorial sea. "(I)ts effect," the Court stated, "was that the United Kingdom clearly claimed jurisdiction over a territorial sea in respect of the Dominion of Canada." 65 D.L.R.2d at p. 374. Nevertheless, the Court held:

". . . we are of the opinion that the territorial sea lay outside the limits of the Colony of British Columbia in 1871 and did not become part of British Columbia following union with Canada. We are also of the opinion that British Columbia did not acquire jurisdiction over
211 the territorial sea following union with Canada. *Id.* at p. 373.

Finally, the Court remarked:

"We are not disputing the proposition that while British Columbia was a Crown Colony the British Crown might have conferred upon the Governor or Legislature of the Colony rights to which the British crown was entitled under international law but the historical record of the Colony does not disclose such action." *Id.* at p. 367.

In short, neither the Australian nor the Canadian case is necessarily inconsistent with the view that there was a marginal sea in which the Crown was vested with both sovereign and proprietary rights. Both cases, however, held that such rights never passed to the individual states but only to Canada and Australia when they themselves became sovereign.

The last aspect of the question is beyond the scope of my research and hence I do not have an opinion on whether there are differences between America on the one hand, and Australia and Canada, on the other, that would justify a different conclusion.

I understand that at a later point there will be expert testimony addressed precisely to this issue of whether

there is historical evidence for the proposition that the Crown's ownership of the seabed passed from the Crown to the respective American colonies or states.

I note that, just as *Keyn* was a decision establishing the law in the nineteenth century, so too the relevant period under discussion in the Canadian and Australian decisions was the nineteenth century. They do not, therefore, have application to the period of American history relevant to the case at bar.

* * * * *

Q. Let us now return once again to the original question concerning English law and practice in the 17th and 18th centuries. Apart from the treatise literature, is there other evidence in this period to show that the Crown exercised ownership over the seabed? A. I referred earlier to the great controversy over fishing rights during the 17th century. In passing, I tried to show the extent to which English kings well before the 17th century claimed ownership over fisheries and the right to license foreigners in the King's seas. Now, let me refer in a more systematic fashion to the most important of the numerous documents during the 17th century that firmly established the conception of a territorial sea in English law.

The single most important and influential official pronouncement during the 17th century asserting the English Crown's sovereignty over the sea is the Proclamation of James I on May 6, 1609. Maine et al., Ex. No. 221.

The Proclamation recited that no foreigners "be permitted to fish upon any of our Coasts and Seas of Great Britaine, Ireland, and the rest of the Isles adiacent, where most usually heretofore any fishing hath bene . . ." unless they first received a license from the English authorities.

It is not too much to say, I think, that this Proclamation formed the foundation of English legal policy towards the sovereignty of the seas during the 17th and 18th centuries. And as I indicated previously, foreign nations – even the Dutch, at whom it was principally aimed – largely acquiesced in the licensing scheme enunciated in the Proclamation.

The next important royal pronouncement is that of
214 Charles I in 1636, "A Proclamation for restraint of Fishing upon His Maiesties Seas and Coasts without Licence." Maine et al., Ex. No. 222.

The Proclamation recited the earlier statement of James I, noting that the Crown had "expected a voluntary conformity" to James' licensing provisions. But since under that voluntary scheme, "all the inconveniences which occasioned that (1609) proclamation, are rather increased than abated," it was necessary

"to renew the aforesaid restraint of fishing upon our aforesaid Coasts and Seas, without licence first obtained from us. . . ."

Moreover, the King resolved

"to keepe such a competent strength of Shipping upon Our Seas, as may (By Gods blessing) be sufficient . . . to hinder such further encroachments upon Our Regalities. . . ."

There is considerable evidence that the two Proclamations became the basis of English law and practice during the 17th and 18th centuries. For example, in a 1635-36 Report by the Lords of Admiralty to the King on the question of whether the Crown could license Dutch fishermen, it was stated:

". . . they were all of opinion that the right and royalty of fishing upon his Majesty's coasts belongs to him by in-
215 heritance, so that he may justly prohibit or license strangers. . . . Are of the opinion that it should be intimated

to the Minister of the United Provinces residing here that the King is resolved to defend those fishings in the same manner as the hereditary right of any other of his dominions. . . . " S.P. Dom., Car. I., CCCXIII, 210 (1635-36), Maine et al., Ex. No. 223.

Another important document [–here, again, the manuscript is the source–] "Propositions for Fishing" (1633), by Secretary of State Sir John Coke begins:
"The greatnesse & glorie of this Kingdom of great Brittaine consisteth not so much in the extent of his Mte. (Majesty's) territories by Land as in the soveraintie and command of the seas." S.P. Dom., Car. I., CCXXIX (1633) (original manuscript). Maine et al., Ex. No. 184.
The document assumes the Crown's undisputed right to exclude foreigners from fishing, urging the King that the Dutch "be brought to pay his Majesty his ancient rights; and to acknowledge his Majesty's sovereignty. . . . "

Let me again emphasize that there are dozens more documents in the period after the Charles I Proclamation of 1636 which base Crown rights to exclude fishermen on a theory of Crown ownership of the territorial sea.

It is interesting that later during the Civil War, Commonwealth and Protectorate period (1642-1660), there were many official warnings to preserve "the ancient and indubitable" dominion of the sea. S.P. Dom. Commonwealth, 1649-50, pp. 484-85, Maine et al., Ex. No. 224. At the end of the English Civil War, Professor Elder tells us, "Cromwell . . . had scarcely commenced to rule before . . . he gave . . . orders (to naval officers) 'to guard the North Sea and mackarel fisheries,' and 'to maintain the sovereignty of the commonwealth in the seas.' " Elder, *The Royal Fishery Companies of the Seventeenth Century*, p. 85.

Between 1667 and 1684, Charles II delivered a series

of neutrality proclamations. The preamble to the Proclamation of March 12, 1683/4, begins:

"Whereas the safeguard and protection We owe to such of Our own Subjects, and to all others in League and Amity with Us, as pass and repass the Seas belonging to these Our Kingdome, have been always a principal part of Our Royal care and concern. . . ." Maine et al., Ex. No. 225.

The Charter of the Royal Fishery of England, Patent Rolls, 29 Car. II., pt. X (1688), printed in Carr, *Select Charters of Trading Companies* at pp. 196, 201, Maine et al., Ex. No. 179, also acknowledged the royal ownership of fisheries. The charter granted not only the right to fish in rivers, creeks, and arms of the sea, but also "in
217 and upon the main seas or any part thereof. . . ." The Charter also granted the power

"to build and make wharves and stocks for the use of the said Company and their successors in and upon and out of any of the wastes commons or waste grounds of Us our heirs and successors adjoining unto or upon any public rivers or seas within any of our Dominions. . . ."

Q. Besides fishing, is there any evidence that there was a conception in the 17th and 18th centuries of actual exploitation of the seabed? In other words, apart from international claims, do you have evidence that the legal pronouncements concerning ownership of the seabed had actual domestic consequences in the 17th and 18th centuries? A. First, let me add another word about fishing. These legal rules also affected rights in disputes solely involving English nationals. For example, here is the full report of the King's Bench Division case of *Johnson v. Barret*, Aleyn 10, 82 Engl. Rep. 887 (1646):

"In an action of trespass for carrying away soil and timber, &c. Upon trial at the Bar the question arose upon a key that was erected in Yarmouth, and destroyed by the

bailiffs and burgesses of the town; and Rolle said, that if it were erected between the high-water mark and low-water mark then it belonged to him that had the land adjoyning. But Hale did earnestly affirm the contrary, viz: that it belonged to the King of common right. *But it was clearly agreed, that if it were erected beneath the low-water mark, then it belonged to the King.* It was likewise agreed that an intruder upon the King's possession might have an action of trespass against a stranger: but he could not make a lease, whereupon the lessee might maintain an *ejectione firma*."

In *The Case of the Royal Fishery of the Banne*, Dav. Rep. 149, 80 Eng. Rep. 540 (1610), translated in Angell, *The Right of Property in Tide Waters* appendix pp. 35, 38 (1826), Maine et al., Ex. No. 157, the Privy Council determined the King's ownership of a fishery in a tidal river by relying on the Crown's ownership of the bed of the sea. The Council concluded that "the sea is of the ligeance of the king as of his Crown of England . . . and therefore the king shall have the land which is gained out of the sea. . . ."

The fact that domestic fishing rights were derived from the King also can be illustrated by two grants from Charles II. In 1674, we find a Royal Warrant to prepare a grant from the King to James Herbert and his heirs "of the sole and several fishing and dredging as well for oysters as other fishes of what nature or kind soever within the great waters, river or branch or arm of the sea called the East Grounds. . . ." 4 *Cal. Treas.* Books p. 633, Maine et al., Ex. No. 226. The next year Charles II issued a "Warrant for a lease [(for sixty-one years)] to Edward Villiers and Richard Brett of all channels, creeks, banks or beds of sand ouse, oyster layings or beds of oysters, and marshes belonging to the Lord High Admiral or the

Lord Warden of the Cinque Ports on the coasts of Essex and Kent. . . . " S.P. Dom., Car. II., p. 541 (1675). Maine et al., Ex. No. 227.

In short, fishing rights, especially rights to oysters and pearls on the sea-bed, were constantly thought of as entailing ownership of the seabed, and, indeed, were often spoken of in terms of "mining" undersea "treasures."

Apart from fishing rights, the most important domestic consequence of these legal doctrines concerned the right to the ownership of derelict lands, as I indicated previously. A vast number of titles to land were determined in the 17th century on the basis of the doctrine that the Crown owned the bed of the sea.

But there are still other important areas of English domestic law that were affected by the doctrine of Crown ownership of the seabed. For example, in 1619, Sir Henry Marten, Judge of the Admiralty Court, reported that "A committee was appointed in the late Lord Admiral's time, to decide whether the right to some bars of silver, taken up from a wreck off the coast of Cornwall, belonged to the Lord Admiral or the Prince. Two out of the three judges decided in favour of the Admiral. . . . " S.P. Dom. Jac. I., CXI, p. 97, Maine et al., Ex. No. 228. The Prince is the Duke of Cornwall, who evidently was claiming the silver as a right of wreck by virtue of his ownership of the adjoining land. The Admiral was asserting rights in the Crown.

In 1626, the Lord Warden of the Cinque Ports allows a diver "for iron ordnance taken out of the sea a fourth part, and a third for brass." S.P. Dom., Car. I, XXV, p. 313, Maine et al., Ex. No. 229. Two years later, the King grants to two persons the privilege of "finding ambergris, and recovering gold, silver, ordnance, and other things belonging to his Majesty now sunk in the sea, for

the term of 31 years, reserving a tenth to the Crown." S.P. Dom., Car. I., XCI, p. 536 (1628), Maine et al., Ex. No. 230. In 1638, the King granted to Robert Earl of Ancram "power to find out ambergis within his Majesty's dominions, and to recover things out of the sea, which belong to his Majesty, for 31 years, reserving to his Majesty a tenth part." S.P. Dom., Car. I., CCCXXCIII, p. 527, Maine et al., Ex. No. 231.

All of these grants were based on the legal rule that ownership of the seabed was vested in the Crown. There are many more such grants in the 17th and 18th centuries.

Q. Is there any evidence of actual undersea mining in the 17th and 18th centuries? A. Yes, I have found two clear examples and perhaps a third. By and large, however, undersea mining was not economically or technologically feasible until the 19th century, and the Cornwall Submarine Mines Act, 21 & 22 Vict. c. 109 (1858), to which I referred previously, is the first legal recognition of the beginning of widespread undersea mining.

The importance of the examples I have of undersea mining in the 17th and 18th centuries is in demonstrating, first, that undersea mining was known when royal charters granting rights to mines in the sea were drafted in the 17th century, and, second, that exploitation of land under the sea had begun before American independence.

The earliest undersea coal mining I have been able to discover was commenced around 1588 at Culross, Perthshire, in Scotland by Sir George Bruce. The mine had two "pits" or entrance shafts, one on the shore and one on a small island near the low-water mark. In the course of thirty years the mine was worked to a distance of over a mile under the seabed, but the works were brought to

222 an end in March, 1625, when a great storm flooded the mine. Galloway, *A History of Coal Mining in Great Britain*, pp. 55-56 (London, 1882); Maine et al., Ex. No. 190; Beveridge, *Culross and Tulliallan*, p. 140 et seq. (Edinburgh, 1885). A contemporary account by John Taylor, who visited the mine in 1618, described the situation of the mine:

"They following the veine of the mine, did dig forward still; so that in the space of eight-and-twenty or nine-and-twenty yeeres, they have digged more than an English mile under the sea, that when men are at worke belowe, an hundred of the greatest shipees in Britaine may sail over their heads." Beveridge, *Culross and Tulliallan* at pp. 157-60.

In 1729, we find a similar undertaking in a coal mine begun at Whitehaven in Cumberland, England, by Sir James Lowther. Lowther was one of the founders of "The Governor and Company for Making Iron with Pit Coal," chartered by the Crown in 1692. Patent Rolls, 5 Wm. & M. pt. vii. The lands about Whitehaven had originally belonged to the priory of St. Bees, and from the earliest times coal had been worked along the seashore. Hay, Whitehaven, pp. 16-17, 21, 49 (Whitehaven, 1966). Maine et al., Ex. No. 195.

Lowther's mine was begun at Salton within twenty yards of the high-water mark, and when the shaft had been sunk to forty-two fathoms a blower of gas was
223 pricked. The gas was piped to the surface by a two-inch square wooden pipe and was used for various laboratory experiments. There is no indication, however, that the pipe was extended below the low-water mark. Hay, supra, at pp. 49-50; Galloway, *supra*, at pp. 94-97; Hull, *The Coal Fields of Great Britain*, pp. 34-35 (London, 1881). Maine et al., Ex. No. 196.

The coal mine, however, was dug out to sea. Hull tells us:

"Sir John Clerk, in a letter to a friend, written in 1739, gives an interesting account of the collieries of Whitehaven. The coal-beds, even at that time, were worked far under the sea, so that, as the writer observes, Sir James' riches in part swim over his head, for ships pass daily above the very ground where his colliers work." Hull, *supra,* at p. 34.

By 1765 some of the shafts were a mile and a half long and three-quarters of a mile under the sea. Hay, *supra,* at p. 49.

There is also some inconclusive evidence that there was undersea mining of saltpeter in Virginia and in England during the 17th century. In 1686-87 the Crown authorized a 51-year grant to Christopher, Duke of Albermarle, of

"all mines of gold and silver and royal mines whatsoever and of all mines of lead, tin, copper, and other mines of
224 what nature or kind soever; and of all mines, minerals or veins of saltpeter and of all earths, soils or ground for the making of saltpeter; and all mineral earths, stones and salts whatsoever, whether already opened or discovered or not, 'within all and every our Plantations or Colonies in America (Our Colonies of New England, Virginia and all parts northward of our Colony of Carolina only excepted): with free liberty etc. to him, his agents or nominees to search for, dig, open etc., and to take the gold, silver, lead, tin ore, saltpetre etc.: and to make mouths, drains levels etc; as largely as is in our power to grant such license or authority'. . . . " 8 *Cal. Treas. Books* pp. 1231-32. Maine et al., Ex. No. 232.

The grant of rights to saltpeter is especially interesting for as early as 1630 the Virginia Governor Sir John Harvey

informed crown officials that he "hopes to discover a saltpetre mine in the Bay." S.P. Col., 1629-30, #83. Maine et al., Ex. No. 233. Similarly, in England, overflowed lands were being granted by the King for extracting salt. In 1636-37, the King granted letters patent of incorporation for making salt with the "understanding that the success of this design depends chiefly upon the choice of marshes which are or have been overflowed with the salt water of the sea. . . ." S.P. Dom., Car. I, CCCXLIV, p. 371. Maine et al., Ex. No. 234. Earlier the King had commanded the Governor and Council of Virginia
225 "to take especial care" in the making of, *inter alia*, "bay salt." S.P. Col., 1626-28, #32, p. 86 Maine et al., Ex. No. 235.

Q. Now that we have established that in the 17th and 18th centuries there was a conception of ownership of the marginal sea, can you state whether it was also understood that the seabed was capable of being granted by the Crown? A. Yes, it was universally acknowledged that the Crown could grant aways its property rights to the seabed in the same way as it made any other grant of territory.

Sir Mathew Hale not only expressed the prevailing view, but his clear statement on the subject around the year 1676 is especially important in confirming the legal basis of those Crown grants of territory made during the 17th century. Hale wrote that although the Crown had a *prima facie* right in the seabed, a subject might gain such a right in two ways, by grant or by long usage:

"1st. By the King's charter or grant; and this is without question. The King may grant fishing within a creek of the sea, or in some known precinct that hath known bounds, though within the main sea. He may also grant that very interest itself, viz. a navigable river that is

an arm of the sea, the water and soil thereof." 1 Hargrave, *Law Tracts*, p. 17. Maine et al., Ex. No. 194.

26 We have already seen that in the 17th century the King made numerous grants of so-called derelict lands from which the sea had receded. Similarly, in many 17th century charters, we find evidence of royal grants of territory in both land and sea.

Q. So, there was no notion of the seabed as being an inalienable part of the nation's sovereignty? A. No, in the 17th and 18th centuries the King's dominions were thought of in essentially feudal terms. The King's sovereignty was not an abstract notion, but rather based on ownership and possession of property. Writing in 1670, Sir Leoline Jenkins put it most vividly. The King's seas, he declared, "are, as much as that watery Element is capable of being so in its Nature, no less a Domain of the Crown, than the Honour of *Greenwich*, or Manor of *Eltham*." 2 Wynne, *supra*, at p. 698. This, of course, was the theory underlying royal grants of territory in the New World to individuals or groups of individuals.

Q. Can you describe some of these grants? A. I understand that later expert testimony will systematically discuss these charters, but in my opinion it is clear that these grants reflected the prevailing view that the Crown could alienate portions of the marginal sea.

227 As early as 1578, Queen Elizabeth granted to Sir Humfrey Gilbert letters patent "for the inhabiting and planting of our people in America." These patents conveyed "All the soyle of all such lands, countries, & territories so to be discovered or possessed . . . with the rites, royalties and jurisdictions, as well marine as other, within the sayd lands or countreys of the seas thereunto adjoying, to be had or used with ful power to dispose thereof, & of every part thereof in fee simple or otherwise. . . ."

Patent Rolls, 21 Eliz., pt. iv, printed in 8 Richard Hakluyt, *The Principal Navigations, Voyages, Traffiques and Discoveries of the English Nation,* pp. 17, 18. Marine et al., Ex. No. 193.

The Gilbert patent granted the power to govern "in causes capitall or criminall, as civill, both marine and other" [and to rule all those who] "shall at any time hereafter inhabite any such lands, countreys or territories. . . or that shall abide within two hundred leagues of any the sayd place or places, where the sayd sir Humfrey . . . shall inhabite within sixe yeeres. . . . " *Id.* at pp. 20-21.

In 1583, Gilbert granted Sir Philip Sydney rights to discovery of "anything not before discovered or inhabited by said Sir Humphrey," reserving to himself "two-fifths of
228 gold, silver, pearl, and precious stones" that might be discovered. S.P. Col., Add. 1574-1674 (America & W. Indies) #28. Maine et al., Ex. No. 236. In that same month, Sydney conveyed similar rights "with all commodities . . . both by sea and land" to Sir George Peckham. S.P. Col., Add. 1574-1674 (America & W. Indies) #29, Maine et al., Ex. No. 236. Upon Sir Humphrey's death, his brother Adrian and other individuals in 1584 received a patent of discovery which included "all manner of privileges, prerogatives, jurisdictions and royalties both by sea and land." *Patent Rolls,* 26 Eliz., pt. viii, printed in 7 Hakluyt, *supra,* at 375, 377, Maine et al., Ex. No. 192. In the first Gilbert patent, the queen reserved "the fift part of all the oare of gold and silver . . . there gotten." 8 Hakluyt, *supra,* at p. 18. In the second, she reserved only a tenth part of all "golde and silver oare, pearles, jewels, and precious stones, or the value thereof." 7 Hakluyt, *supra,* at p. 377.

Again in her 1584 patent to Sir Walter Raleigh, the Queen granted all the land that he might discover "with the right, royalties, franchises, and *jurisdictions, as well*

marine as other within the saide landes, or Countreis, *or the seas thereunto* adioyning. . . . " Like the grant to Sir Humphrey Gilbert, Raleigh was given the power to govern "within . . . two hundredth leagues" of any place of settlement. 2 Poore, *Federal and State Constitutions of*
229 *the United States,* pp. 1379-80. Maine et al., Ex. No. 205.

The grant to the Newfoundland Company in 1610 conveyed various capes and bays on the Atlantic Coast "together with the seas and islands lying within ten leagues of any part of the sea coast of the country aforesaid . . . And also all the lands soil grounds havens ports rivers mines, as well royal mines of gold and silver as other mines, minerals pearls and precious stones woods quarries marshes waters fishings huntings hawkings fowlings commodities and hereditaments whatsoever, together with all prerogatives jurisdictions royalties privileges franchises and preeminences within any the said territories and the precincts thereof whatsoever and thereto or thereabouts both by sea and land. . . . " The Company also received the power "to dig and to search for all manner of mines of gold silver copper iron lead tin and other minerals as well within the precincts aforesaid as within any part of the main land not formerly granted to any other. . . . " *Patent Rolls,* 8 Jac. I., pt. viii, printed in Cecil T. Carr, *Select Charters of Trading Companies,* pp. 51, 53, 57. Maine et al., Ex. No. 179.

Charter grants, however, did not always contemplate conveyances of the sea. On the other hand, those grants that included portions of the sea were regarded as conveyances of territory. In one of the earliest colonial dis-
230 putes over fishing rights, the Privy Council noted in 1621 that "it was thought fitt, that the said Colonies should fish att Sea within the limitts and bounds of each other reciprocally. . . . " 1 *Acts of Privy Council* (Col.), #65, pp. 40-41, Maine et al., Ex. No. 237.

I shall make only passing reference to the Virginia Charter of 1606 and 1609. The 1606 patent gave the first Virginia Company rights to

"enjoy all lands, havens, rivers, mines, minerals, waters, fishings, commodities, and hereditaments whatsoever, for fifty English statute miles along said coast of Virginia and America towards the West and South-west, and for fifty like miles towards the East and North-east, with all islands within one hundred miles, directly over against the same Sea Coast, and, directly into the main land for one hundred like miles. . . ." S.P. Col., Add. 1574-1674 (America & W. Indies) #48, p. 32. Maine et al., Ex. No. 238.

The 1609 grant included

"those lands in Virginia, from Cape or Point Comfort along the coast to the northward 200 miles, and southward 200 miles, and into the land from sea to sea, also all the islands within the 100 miles along the coasts of both seas (as well as) all the soils, havens, minerals, waters, privileges, &c. whatsoever, is (in?) as ample manner as his
231 Majesty has granted to any Company or Adventurer into foreign parts. . . ." S.P. Col., Add. 1574-1674 (American & W. Indies) #49, Maine et al., Ex. No. 238.

Q. And what do you conclude from this partial survey of Crown grants of territory in the New World?

A. There is no question in my mind that the law and practice of 17th century England conceived of the marginal seas as being Crown property that could be granted away. Most of the grants of territory that I have seen included the adjoining marginal sea within the scope of the grant. Nor is this surprising, since fishing as well as the search for pearls and valuable minerals were a very important reason for making these grants in the first place.

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CROSS-EXAMINATION OF
MORTON J. HORWITZ

332 BY MR. RASHKOW:

Q. In the conduct of relations with other countries, did Queen Elizabeth make any assertions of sovereignty over the sea? A. I believe there are a number of cases, again, in Elder where there is evidence that Queen Elizabeth, in line with her predecessors and her successors, did insist that she had the right to license and to restrict entry by fishermen into the Queen's seas.

Q. Can you refer to any of those cases? A. One of the important indications, I think, of English policy during the time of Elizabeth is a tract, treatise by Dr. John Dee, which Fulton cites on pages 99 and following. The book was published in 1577. It was entitled General and Rare Memorials Pertaining to the Perfect Art of Navigation.

Q. This was Dee's book? A. That's right. Its better known title, Professor Fulton tells us, is The British
333 Monarchy. Dee argued that the rights of fishing were enjoyed as securely and freely from us by strangers as if they were within their own King's peculiar sea limits. Professor Fulton says that Dee was the first English writer who claimed sovereignty of the seas and the fisheries for England. I think on the basis of those other authors I have mentioned that that is not true. What is significant about Dee's publication in 1577 during the Elizabethan period is that it is very unlikely that such a work would have been published without the active consent of the Crown. It seems very clearly to me to indicate that Dee's work was solicited by and encouraged and approved by the Crown.

Q. I presume you have Fulton's book before you and you are reading from that? A. Yes.

Q. Would you read the last sentence on page 104 through the top of 105? A. You mean beginning with "within"?

Q. Page 104 of Fulton, "Dee's work," bottom of page 104. A. Fulton said, "Dee's work was premature. His proposals that Elizabeth should tax foreigners for Fishing in the British seas and exercise jurisdiction over
334 foreign vessels passing through them remained as much a dream as the scheme of Hitchcock." Now, let me comment on my evaluation of Professor Fulton. The first point that I think that needs to be made is that Fulton's work clearly acknowledges that from the time of James I's proclamation in 1609 the Crown claimed sovereignty of the territorial, the marginal sea. At most Professor Fulton's argument comes down to the fact that from 1609 there was such an assertion of Crown sovereignty. But I think Professor Fulton does not fully state the entire picture. His work is a frankly revisionist book. He does attempt to deal in his first two chapters with arguments that others have made asserting the sovereignty over the British seas. His attempt to is emphasize discontinuity between 1609 and before, rather than the continuity that other authors have seen in the development of English law.

Q. Excuse me for a moment. I am wondering how relevant the discussion generally on Fulton's treatment of the law of the sea is to the question that I asked you wherein you cited Fulton, and I asked you to refer to another statement, about a specific proposition. A. The reason I cited Fulton was that the book is available. The Dee book is not available. Therefore, we have to rely on
335 on Fulton's statement of the book. I would not have otherwise referred to Fulton at all. I referred to Fulton only to find the quotation from Dee. Next, you asked me

to read a passage from Fulton wherein he evaluates that book. To the extent that that leaves a misconception I must then go on to explain Fulton's attitude towards the Elizabethan period and that was what I was proceeding to do.

Q. All right. A. I think it has to be understood that Professor Fulton wrote this revisionist work in 1911. His argument was that starting in 1609 the Crown made much greater claims to sovereignty than before. And for this purpose he seeks to show that in the pre-1609 period there was no assertion of sovereignty. As I stated, he attempts to show perhaps 50 instances wherein other authors have assumed that there was evidence of sovereignty, that in these 50 instances there was in fact no evidence of sovereignty. He has a very difficult burden to meet, and it seems to me we must evaluate each of these specific items one by one, which is rather time consuming. But I should say that there are three books that have appeared since Fulton wrote his work in 1911. There is Elder in 1912. There is Potter in 1924. And there is Fenn in 1926. And all of these works do go back to the pre-Fulton opinion that there were assertions of sovereignty by the
336 Crown before James I ascended the throne. It seems to me scholars who have evaluated this evidence have come to the conclusion that Fulton's revisionist work has not held up. Now, I should add finally that it is true that after 1609 the Crown made greater claims to dominion over the sea than before. That for reason of prudence and self interest the Crown often didn't make its maximum assertion in the pre-James I period. But I think it is wrong to evaluate the evidence as Professor Fulton does, and to try to conclude that there is no evidence that the claim of sovereignty over the seas before James I ascended the throne.

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DIRECT EXAMINATION OF PHILIP C. JESSUP

469 BY MR. CLAGETT:

Q. Would you please state your name, background and professional qualifications and experience? A. My name is Philip C. Jessup. I completed my nine-year term as a Judge of the International Court of Justice at The Hague on February 5, 1970. From October 1, 1970 to September 30, 1971, I was Whitney Shepardson Senior Visiting Research Fellow at the Council on Foreign Relations in New York City. I live in Norfolk, Connecticut.

470 I was born in New York City on January 5, 1897. I received my A.B. degree from Hamilton College in 1919 after having spent one year in the United States Army with service during World War I in Belgium and France. In 1924 I received the LL.B. degree from Yale and an M.A. from Columbia University. In 1927 I received the Ph.D. degree from Columbia. I have thirteen honorary doctorates from American colleges and universities and four from universities in other countries.

In 1924 I was appointed an Assistant to the Solicitor of the United States Department of State. I resigned in 1925 to begin teaching international law at Columbia University and I remained there on the Faculties of Law and of Political Science, being Hamilton Fish Professor of International Law and Diplomacy from 1946 to 1960. I also taught the course on Admiralty for several years. On leaves of absence from the University, I was assistant to Elibu Root at the Conference of Jurists on the Permanent Court of International Justice in Geneva in 1929; personal Legal Adviser to the United States Ambassador to Cuba in 1930; Chief of Division, Office of Foreign Relief, Department of State, 1943; Assistant Secretary-General of

the first Council Session of UNRRA, 1943 and of the Bretton Woods Conference, 1944; Assistant on Judicial Organization to the United States Delegation at the UN Conference in San Francisco, 1945; United States Represen-
471 tative on the United Nations Committee on the Progressive Development of International Law and its Codification, 1947; United States representative at various sessions of the UN Security Council and General Assembly, 1948-1953. I was United States Ambassador at Large, 1949-1953. I have been Chairman of the Chile-Norway Permanent Conciliation Commission since 1958.

I was admitted to the Bar of the District of Columbia in 1925 and to the New York Bar in 1927. I was a member of a New York law firm from 1927 to 1943. I am a former President of the American Society of International Law and am now Honorary President of that Society and of the Americian Branch of the International Law Association. I am a member of the Institut de Droit International and was a Vice-President from 1959 to 1961. I was a member of the Curatorium of the Hague Academy of International Law from 1957 to 1968. I am a member of the American Academy of Arts and Sciences and of the American Philosophical Society.

The list of my publications which is Maine et al. Exhibit No. 368, is taken from Vol. 62 of the *Columbia Law Review*, No. 7, pp. 1124-1131 (1962), an edition which was dedicated to me. Since then, the Columbia University Press has published (1971) a book entitled *The Price of International Justice.* My *A Modern Law of Nations,* first published
472 in 1947, was reprinted by Archon Books with a new Preface in 1968. Translations of books I have written have appeared in German, Spanish, Portuguese, Arabic and Korean.

My first specialization in the international law field was in international maritime law, and in 1927 my *The Law of*

Territorial Waters and Maritime Jurisdiction was published. In 1929 I delivered a series of lectures at The Hague Academy of International Law under the title *L'Exploitation des Richesses de La Mer.* (All lectures at the Academy at that time had to be in French.) I have written various articles on particular aspects of the subject since that time. A related specialty has been the law of neutral rights and duties, especially at sea. Beginning in 1935, I edited for the Columbia University Council for Research in the Social Sciences, four volumes on *Neutrality, Its History, Economics and Law.* Vol. I, entitled "The Origins," I wrote jointly with Professor Francis Deak; I was the author of Volume IV, entitled "Today and Tomorrow." I was also Rapporteur for the Harvard Research in International Law in preparing the Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, published in 1939. My researches in the origins of the law of neutrality included
473 studies in the French Bibliotheque National, the Archives de La Marine and the British Public Record Office, all with special reference to neutral rights and duties at sea from the 17th century onward. I have lectured at the Naval War College and the National War College and during World War II was Associate Director of the Naval School of Military Government at Columbia University and Consultant to the Navy Department.

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BY MR. CLAGETT:

Q. Judge Jessup, the defendant states in this action claim that each of them, as a matter of English and colonial law, in the 17th and 18th centuries acquired rights in the seabed and subsoil of the Atlantic continental shelf ad-
474 jacent to their land territories. If the states are correct in

that contention as a matter of English and colonial law, is it your opinion that international law in the 17th and 18th centuries permitted the assertion and ownership of such rights by coastal states? A. Yes, my opinion is that it did.

Q. Would you please explain your reasons for that answer? A. Let me begin by putting the matter negatively: international law in the period under discussion contained no principle prohibiting the assertion and exercise of such rights. International law has developed around the central theme of the sovereignty of States. There is a classic statement of the Permanent Court of International Justice in the *Lotus* case:

"International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot
75 therefore be presumed." (Case of the *S.S. "Lotus"*, 1927 P.C.I.J., ser. A, No. 10, at p. 18, 2 Hudson, *World Court Reports* 23, 35 (1935).)

It is irrelevant to the juridical position to which your question was addressed that scholars have regretted the dominant role of state sovereignty as tending to inhibit the development of a system of international law which would limit the use of armed force by states and thus contribute to a more peaceful world. The fact is that in the 17th and 18th centuries, ideals such as those expressed in this century since the establishment of the United Nations were not accepted as part of the international legal system. A state's freedom to act or to claim legal

rights or privileges in the 17th and 18th centuries could be denied only when it could be shown that some established rule of international law, whether customary or conventional, limited the state's freedom.

The standard expression of the sources of international law is now found in Article 38 of the Statute of the International Court of Justice. The Statute of the Court, according to Article 92 of the Charter of the United Nations, "forms an integral part of the present Charter." The Charter, having been duly ratified as a treaty by the United States, is under the Constitution part of the supreme
476 law of the land and its provisions are therefore to be accorded due importance in the courts of the United States. Article 38 of the Statute, in paragraph 1 thereof, reads as follows:

"The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

Although general multipartite conventions of a "law-making" character have become increasingly utilized especially in the 20th century – as for example the Geneva Conventions of 1958 on the law of the sea, to which reference will be made later – no such general treaty or convention (the terms are interchangeable) bearing on the

rights of states to the seabed of their continental shelves
477 was in existence in the 17th or 18th century. What Article 38 of the Statute of the International Court of Justice calls "particular" conventions are agreements to which two or perhaps more individual states are parties. I know of no treaty binding any of the states involved in the Atlantic area (*e.g.*, England, France, Spain or others) which had been concluded and was in force in the 17th or 18th century which limited or purported to limit the rights of littoral states in their adjacent seabeds. I shall explain later about the Anglo-French treaties regarding the enjoyment of oyster fisheries off European and British coasts, but I do not consider that those treaties qualify the statement just made.

So far as international custom is concerned, the fact that resources of the continental shelf, such as are known today, were in large part not familiar to states in the centuries in question is not evidence that a restrictive customary rule had developed. I shall call attention shortly to examples which, on the contrary, show that states did claim and exercise rights to exploit known resources of the adjacent seabeds in the period under consideration.

My use of these examples will be similar to the purpose stated by Professor Carl M. Franklin in his volume of the International Law Studies of the Naval War College 1959-1960 on "The Law of the Sea: Some Recent
478 Developments" (Naval War College Blue Book Series Vol. 53, pp. 31-32, 33):

". . . the purpose is to underscore the fact that for centuries man has been concerned to a modest extent – meaning within the limits of his existing technology and consonant with his needs – with the exploitation and control of some of the resources of the sea bed, both within and without territorial waters. Further, it has been

our purpose to emphasize the fact that historically states have generally recognized the priority of the coastal state to exclusive rights over the sedentary fisheries resources of the sea bed beyond the limit of territorial waters, particularly where there has been effective and continued use. Continued recognition of this priority of the coastal state to the sedentary fish on the continental shelf is articulated in the Geneva Convention on the Continental Shelf.

". . . Other underseas mines, principally coal, which represented 19th century claims by states to subsoil resources of the continental shelves, although often not extending beyond the limit of territorial waters, were those of Australia, Canada, Chile and Japan, as well as many others in England besides the Cornwall mines. These claims were based upon the recognized right of a coastal state to occupy the subsoil under the high seas by the extension of mining installations whose entrance was
479 located on the coastal state or in the territorial waters thereof.

"Were these 19th century claims to the submarine subsoil resources, and the earlier claims of states to resources of the sea bed (*i.e.*, sedentary fisheries), precursors of the present day continental shelf proclamations? It is submitted that they were, despite obvious differences between the early claims to the resources of the sea bed and subsoil and those of the mid-twentieth century."

It is true that there was established in international law, as early as the 17th century, a general principle of freedom of the seas. Attempts by some states, in the 15th and 16th centuries particularly, to claim sovereignty over vast expanses of ocean had been definitely rejected by the international community by the17th century.

It would be quite misleading to intimate that unanimity on the law of the sea can be found in the writings of learned scholars through the centuries, even though the International Court of Justice is instructed by its Statute (*supra*) to apply "the teachings of the most highly qualified publicists of the various nations" – albeit *"as subsidiary means* for the determination of rules of law." (Emphasis added.) Many modern writers fail to emphasize that some of the widely quoted views of eminent jurists
480 were written as part of the supporting arguments in briefs for positions of their governments in disputes with other states. Notably, it is familiar, but not always mentioned, that the *Mare Liberum* of Grotius was in essence a brief for the Dutch East India Company and that Selden's *Mare Clausum* was a reply brief on behalf of the King of England. This is not to say that such juridical and professorial opinion is valueless, but it may require evaluation. The Supreme Court has said that the works of writers on international law "are resorted to by judicial tribunals, not for speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." *The Paquete Habana,* 175 U.S. 677, 700 (1900).

Q. You have written rather extensively on subjects closely related to that now under consideration. Would you please summarize the evolution of your own thinking and writings so far as they concern rights in the marginal sea? A. In 1927 I published my first detailed study of the law of territorial waters under the title *The Law of Territorial Waters and Maritime Jurisdiction* (G.A. Jennings Co., New York 1927). The work was begun in 1923 and was completed in partial fulfillment of the requirements for the degree on Ph.D. in international law at Columbia University, where I was then a lecturer in

481 International Law. As a result of my investigations and studies over these four years I reached certain conclusions about then existing rules of international law. Among these conclusions were the following:

"The subject of Territorial Waters has by no means been neglected by writers on international law. In fact, few topics have provoked more controversy or elicited more divergent views and opinions. The practice of nations viewed over a period of two hundred years ranges from one extreme to the other. It is possible to take several positions relative to the extent of the territorial sea or relative to the nature of the jurisdiction therein, and to support them all by fairly numerous illustrations drawn from international events, ancient or modern and by the authority of text writers. One might be led to the conclusion that this is evidence that there is no rule of law upon the subject, but it is believed such a conclusion is unjustified and is the result of a limited perspective of a very wide field. . . .

"It is the writer's opinion that the greater part of the disagreement as to the extent of territorial waters is due to a failure to analyze various national claims, and still more basically, the concept of jurisdiction. . . .

482 "There is a vital distinction between that maritime belt which is claimed as a part of the territory of the state and the limited rights of control or jurisdiction claimed upon the high seas. . . . If one starts with the proposition that the littoral state has only a 'bundle of servitudes' over the territorial waters, one is naturally unable to see much distinction between claims to a three-mile and to a twelve-mile zone. Similarly if one posits merely certain rights of control or jurisdiction therein. But if, on the other hand, one maintains that each maritime state may rightly claim as a part of its territory

a certain maritime belt, then the distinction becomes clear. It is this latter hypothesis which is believed to be sound, historically, theoretically and according to international practice. It will be pointed out that within three miles of the coast, a state may under international law, exercise any jurisdiction and do any act which it may lawfully do upon its own land territory. Exception must be made to this general statement only in favor of the servitude known as the right of innocent passage." (Jessup, *supra*, pp. xxxi, xxxii and xxxiii-xxxiv.)

I noted that on its land territory, a state's freedom to act is similarly limited by the international law establishing
483 diplomatic immunities.

I pointed out that opposition to the propositions just set forth could be traced to the feeling that any admission of a right to perform acts on the high seas seemed to smack of the ancient historic and discredited claims to sovereignty over vast expansions of ocean, in other words, to run counter to the hallowed tradition of "the freedom of the seas." But this is not the case. The law of territorial waters came into existence at least as early as the 17th century to strike a balance between the exaggerated claims to great stretches of high seas and the need to afford some protection to the shore and littoral interests.

In the lecture which I gave at The Hague Academy of International Law in the summer of 1929, under the title "L'Exploitation des Richesses de la Mer" ("Exploitation of the Riches of the Sea"), 29 *Recueil des Cours* 401, 419, I referred to and reiterated the distinction which I made in 1927 in my *Law of Territorial Waters*; the context at The Hague was the discussion of fisheries and I stated:

". . . on peut établir ceci: le droit international accorde à chaque Etat un privilége d'exclusivité sur toutes

les pecheries dans un rayon de trois milles de ses côtes... on admette que certains actes de caractère juridique puissent être accomplis par un Etat maritime dans les hautes
484 mers adjacentes . . . "

(". . . this point can be established: international law grants to each State an exclusive privilege over all fisheries in a zone of three miles from its coasts. . . . it is admitted that certain acts of a juridical character can be performed by a maritime State in the adjacent high seas . . . ")

The exclusive control of fisheries, in this context, was the symbol of sovereignty and three miles was the declared limit. At the same time, it was admitted that certain types of acts could be legally performed on the high seas adjacent to the coasts.

In 1947, in *A Modern Law of Nations* (The MacMillan Co., New York, Seventh Printing 1959), although the book did not include any detailed treatment of martime law, I recalled at p. 46 n. 13 the liquor-smuggling treaties concluded by the United States. I described these treaties in my book on *Territorial Waters* (*supra*). Five of them contain the provision:

"The High Contracting Parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coast-line outwards and measured from low-water mark constitute the proper limits of territorial waters." (U.S. Tr. Series No. 685).

I cited these treaties as examples of "statements embodied
485 in treaties which continue to have evidential value quite irrespective of the continued validity of the treaties in which they were originally embodied." I distinguished such treaties from those which, as William E. Hall pointed out (in his *International Law*, 7th Ed. 1917, Introductory Chapter pp. 7-12), "are often concluded for the purpose

485 of enabling the contracting parties *inter sese* to share advantages not bestowed, or to escape restrictions imposed, by customary international law." (As quoted from my *Law of Territorial Waters* p. xxxii. The liquor treaties and their negotiation are analyzed in that book *Id.*, Chapter V.)

In 1959, in "The United Nations Conference on the Law of the Sea." 59 *Columbia Law Review* 234, 241-243, I wrote:

"The territorial sea represents the historic balance between the needs of the coastal State and the international community's rights and interests in the freedom of the high seas. The ILC proposed and, subject to a minor drafting change, the Conference adopted. . . . the sound principle that the sovereignty of the State extends over the territorial sea, its bed and subsoil, and the airspace above. The controversy continues to range over the breadth of the territorial sea. . . .

"The present writer continues to adhere to a long-held conviction that much of the controversy over the
486 breadth of territorial waters has been due to a failure to distinguish among the various rights which a coastal state has or may exercise on the waters adjacent to its shores." (citing my book on *The Law of Territorial Waters* xxxi-112).

In 1961, in an editorial comment entitled "The Law of the Sea Around Us" (55 *Am. J. Int'l L.* 104, 106-107), I cited admiringly (although with certain points of disagreement) the articles by Arthur Dean, the Chairman of the United States Delegation to the Second Geneva Conference on the Law of the Sea, entitled "The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas" (54 *Am. J. Int'l L.* 751 (1960). I ventured to take issue with certain statements of the Supreme

Court of the United States in *United States v. Louisiana, Texas, Mississippi, Alabama and Florida* (363 U.S. 1 (1960)) and I wrote

". . . the court could not wholly ignore the law of nations. If the Court had had the advantage of reading Mr. Dean's article, or a few of the sources which he cites, it would scarcely have made the statement that 'the concept of the territorial sea did not arise in international law until after this country achieved its independence'.[5] The Court might have found of particular interest the
487 earlier insistence of neutral states on their 'territorial right' in the marginal sea.[6] The Court, it may be noted, did make use of some of that extraordinarily competent documentation prepared for the International Law Commission and the Conference by the United Nations Secretariat.[7] It is submitted that the Supreme Court also revealed its lack of understanding of the law of territorial waters on a point which was of importance to its decision. The Court said:

" 'Early in this country's history, the modern notion had begun to develop that a country is entitled to full territorial jurisdiction over a belt of waters adjoining its coast. However, even this jurisdiction is limited by the

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"5 363 U.S. 1 at 74, 80 Sup. Ct. 961 at 1002.

"6 See, for instance, footnotes 28-31 of Mr. Dean's article.

"7 Among the latest items prepared and furnished to the conference were the "Synoptical table concerning the breadth and juridical status of the territorial sea and adjacent zones," A/CONF. 19/4, Feb. 8, 1960, "Supplement to Laws and Regulations on the Regime of the Territorial Sea," A/CONF. 19/5, Feb. 10, 1960, and addenda thereto; and Supplement to the Bibliographical Guide to the Law of the Sea, A/CONF. 19/6, Feb. 1, 1960, and addendum thereto."

right of foreign vessels to innocent passage. The extent to which a nation can extend its power into the sea for any purpose is subject to the consent of other nations, and
488 assertions of jurisdiction to different distances may be recognized for different purposes. In a manner of speaking, a nation which purports to exercise any rights to a given distance in the sea may be said to have a maritime boundary at that distance. But such a boundary, even if it delimits territorial waters, confers rights more limited than a land boundary. It is only in a very special sense, therefore, that the foreign policy of this country respecting the limit of territorial waters results in the establishment of a "national boundary." "[8]

"The Supreme Court itself has clearly recognized that territorial waters are part of the territory of the United States, *e.g.*, for the application of the 18th Amendment and the Volstead Act.[9] The restriction on the exercise of jurisdiction which is imposed by the right of innocent passage does not mean that the rights in territorial waters are any more limited than those on the land territory, where the exercise of jurisdiction is limited by such rights as those of foreign embassies. So far as appears, the Supreme Court does not deny that inland waters are within the 'national boundary' and it seems to recognize that the line marking the seaward limit of inland waters
489 may be drawn across the mouth of a bay.

"Similarly, at the Conference on the Law of the Sea many delegations blurred the distinction between the coastal state's national boundary on the seaward edge of the territorial sea and the various jurisdictional rights which

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"[8] 363 U.S. 1 at 34, 80 Sup. Ct. 961 at 981.

"[9] *Cunard Steamship Co. v. Mellon*, 262 U.S. 100 (1923) reprinted in 17 A.J.I.L. 563 (1923).

may be exercised upon the high seas. The final compromise proposals advanced jointly by the United States and Canada, in which the distinction is clearly made between the six-mile territorial sea and the additional belt of six miles in which special fishery rights may be exercised, are based upon the distinction. So is much of the United States argumentation such as that concerning rights in the airspace above territorial waters. It is unfortunate that the majority of the Supreme Court did not in this respect share the view of Mr. Justice Black, who said: 'We may agree with the Government that the term "boundary" was used here in its usual sense to mean the limit of territory, which in the case of a coastal boundary, would mean the outer limit of the territorial sea'."[10]

The Harvard Research in International Law is the prime example of a cooperative effort of international lawyers in the United States to contribute to the effective codification of international law as initiated under the League
490 of Nations and now continued effectively by the International Law Commission of the United Nations. The Harvard Research in International Law was organized in 1927 by Professor Manley O. Hudson of the Harvard Law School, later a judge on the bench of the Permanent Court of International Justice and subsequently a member of the International Law Commission. The Research (to use a short label) was modeled on the procedures of the American Law Institute. There was a general Advisory Committee of 44 jurists and scholars of which the first Chairman was George W. Wickersham. After 1936, Charles C. Burlingham became chairman. The reports of the Research took the form of Draft Conventions with elaborate Commentaries and bibliographies; they were published separately

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"[10] 363 U.S. 1 at 89, 80 Sup. Ct. 961 at 1010."

and as Supplements to *The American Journal of International Law*. For each topic there was a Reporter, at times with an Assistant Reporter, and a special Committee of Advisers. I was from the outset a member of the General Advisory Committee, was Reporter for three different projects and served on the Advisory Committee of other projects. I wish to comment here on two of the projects.

One of the first three Draft Conventions published in 1929 concerned the Law of Territorial Waters (*Am. J. Int'l L.* (Spec. Supp. 1929), p. 241). Professor George Grafton Wilson of Harvard and of the Naval War College at Newport was Reporter; I was a member of the group of Advisers. I call attention to four articles on the Draft Convention.

Article 1

"The territorial waters of a state consist of its marginal sea and its inland waters."

Article 2

"The marginal sea of a state is that part of the sea within three miles (60 to the degree of longitude at the equator) of its shore measured outward from the mean low water mark or from the seaward limit of a bay or river mouth."

Article 13

"The sovereignty of a state extends to the outer limit of its marginal seas."

Article 20

"The navigation of the high sea is free to all states. On the high sea adjacent to the marginal sea, however, a state may take such measures as may be necessary for the enforcement within its territory or territorial waters of its customs, navigation, sanitary or police laws or regulations, or for its immediate protection."

The Comment under Article 2 contains the following passage (p. 250):

492 "There has been dispute as to whether the three mile limit for the marginal sea is established in international law . . . The practice of states reveals no general acquiescence in the inclusion of a belt of more than three miles in width. No state claims less than three miles. This difference of opinion is due to the uncertainty in the past with reference to two matters – first, the nature of the power of the littoral state over the marginal sea; second, the possibility of action to be taken on the high sea at greater distance from the land with respect to certain matters.

"The definition in Article 2 must be read in connection with Articles 13 and 20. By Article 13 of this convention, it is definitely provided that the sovereignty of the littoral state extends over the marginal sea, and by Article 20 it is provided that states may for their security take measures on the high sea adjacent to marginal sea." (*Id.* at 250-51).

In the Comment under Article 13 it is stated:

"The enjoyment of sovereignty over the marginal sea is so dependent upon a state's sovereignty over its land territory that perhaps the conception of marginal sea should not be treated as an independent conception." (*Id.* at 289; *see* U.S. Reports at 293-94).

The American Law Institute preferred to use the term
493 "Foreign Relations Law" instead of "International Law." I was a member of the Advisory Committee on its Restatement on this subject, *Restatement (Second) Foreign Relations Law of the United States* (1965), which defines "territory":

"§11 . . .

"The territory of a state consists of:

(a) its land areas;
(b) its internal waters and their beds;
(c) its territorial sea and the bed of the territorial sea; and
(d) the subsoil under, and (subject to the limitation indicated in Section 16) the air space above, (a), (b), and (c)."

In Section 15, the Restatement avoids commitment on the three-mile rule by stating:

"(2) A state does not violate the rights of another state under international law by setting the breadth of its territorial sea at three nautical miles."

But the Comment reveals that this wording was taken from the Geneva Convention of 1958 and the Comment continues:

"b. *Three-mile limit.* The Convention defines the outer limit of the territorial sea in terms of its 'breadth.' . . . The Convention does not purport to state what the breadth of the territorial sea is. It is universally recognized
94 that the breadth of the territorial sea may extend to three nautical miles. No claim to a greater breadth has received sufficient acceptance internationally to be a rule of international law."

Under Section 21, the Restatement recognizes the right of a state to prescribe and enforce necessary rules of law on the high seas contiguous to its territorial sea.

Section 23 makes the following provisions regarding the Continental Shelf:

"§23. Continental Shelf

(1) A state has jurisdiction to prescribe and to enforce rules of law concerning the exploration and exploitation of the continental shelf off its coast and beyond the outer limit of its territorial sea.

(2) This jurisdiction does not affect the legal

status of the superjacent waters as high seas or that of the airspace above the waters.

(3) The exercise of this jurisdiction must be consistent with the requirements of international law stated in the Convention on the Continental Shelf of April 29, 1958.

"Comment:

a. *Nature of jurisdiction in continental shelf.*

The rule stated in this Section gives to a state jurisdiction
495 in the continental shelf off its coast only for the purpose of exploring and exploiting its natural resources. This jurisdiction is exclusive in the sense that the state may preclude others from exploring or exploiting the resources of the continental shelf. Jurisdiction over the continental shelf does not depend on occupation or express proclamation."

The subject of the continental shelf will be dealt with later in this testimony.

I was the Reporter for the Harvard Research Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, published in 1939 (33 *Am. J. Int'l. L.* 167 (Supp. 1939)). That draft clarifies a legal point which I believe has caused much confusion in some writings about territorial waters. Article 15 lays down one of the basic rules of the law of neutrality – a rule which has been acknowledged and widely respected since at least the 17th century:

"A belligerent shall not commit within neutral territory any act the tolaration of which by a neutral State would constitute a nonfulfillment of its neutral duty." (*Id.* at 178).

And the Comment notes that "This article states from the standpoint of belligerent duty a proposition reciprocal to that contained in Article 6." (*Id.* at 335). Article 6 reads:

"A neutral State shall use the means at its disposal to
496 prevent within its territory the commission of any act the toleration of which would constitute a nonfulfillment of its neutral duty . . . . " (*Id.* at 176).

It was this principle which was invoked by the United States against Great Britain in the famous *Alabama Claims Arbitration*, as a result of which Great Britain paid the United States $15,500,000 damages for the losses inflicted by Confederate cruiser *Alabama* which the British had allowed to be outfitted in a British port. (See Jessup, *The Price of International Justice*, Columbia University Press, New York 1971, pp. 2-5. See also Article 7 of the Harvard Research Draft.)

Finally, as a member of the International Court of Justice I joined in its judgment of 1969 in the *North Sea Continental Shelf Cases*, [1969] I.C.J. 1, which I shall discuss later in this testimony.

Q. You have mentioned international law relating to ports and other coastal waters, and to neutrality. Is there other learning in this area which bears on the rights of coastal states in the adjacent seas? A. Yes. The principle to which I referred a moment ago is the one involved in the very many incidents which are often noted
497 in writings on territorial waters, namely, the question of hostile acts or the capture of a ship as a prize in neutral territorial waters – that is, in the neutral territory. Although the following statement is addressed specifically to a capture within a "port or harbour," the prize cases in many countries from the 17th century on show that it was recognized to be applicable to any capture within neutral territorial waters, although at particular times and in particular places there may have been disagreement as to the outer limits of those territorial waters. The statement is by Paul writing from Doctors' Commons in 1740:

"By the laws of nations, the Princes and States noways engaged in the present war ought to preserve the neutrality of their several ports and harbours. To that end care must be taken that no prize should be attached, seized, or taken within the harbours of Princes and States in amity with the King of Great Britain or the Spanish King, or within shot of their cannon. (The cannon-shot rule as the measure of the breadth of territorial waters was then in vogue.) If any ship be taken within the limits of a port or harbour, it is a violation of the neutrality of the place, and upon complaint and proper proof, the party grieved ought to have restitution by the authority of the Prince
498 or State where such violence was committed." (Burrell, Reports of Cases Determined by the High Court of Admiralty (1758-1774), ed. by R.G. Marsden (1885) pp. 355, 356, as quoted in Jessup and Deak, *Neutrality, Its History, Economics and Law*, Vol. I *The Origins*, New York, Col. Univ. Press 1935, p. 255, citing also other cases from the British law reports and MSS in the British Record Office.)

It should be noted that the terms "port," "harbour" and "haven" were used in the 18th and 19th centuries to indicate sea areas much more extensive seaward than we are accustomed to associate with those labels. Thus under a warrant of 1848, the "Port of Dover" extended three miles out to sea. (See *infra*, p. 41, comment on *The Franconia.*)

An old English law dictionary (*A New Law Dictionary and Institute of the Whole Law*, by Archibald Brown, London, 1880, Second edition) defines "PORT" as follows: "PORT. A port is a haven, and somewhat more. 1st. It is a place for the arriving and unlading of ships or vessels. 2nd. It hath a superinduction of a civil signature upon it, somewhat of franchise and privilege. 3rd. It hath a ville, or city, or borough, that is, the *caput portus*, for the receipt

of mariners and merchants, and the securing and vending of their goods, and the victualling of their ships. So that a port is *quid aggregatum*, consisting of somewhat that is
499 natural, viz., an access of the sea, whereby ships may conveniently come; safe situation against winds, where they may lie, and a good shore where they may well unlade; something that is artificial, viz., quays, and wharves, and cranes, and warehouses, and houses of common receipt; and something that is civil, viz., privileges and franchises, viz., *jus applicandi, jus mercati*, and divers other additaments given to it by civil authority. A port of the sea includes more than the bare place where the ships unlade, and sometimes extends many miles; as the port of London, in the time of King Edward I., extended to Greenwich; and Gravesend is also within the port of London; so the port of Newcastle takes in all the river from Sparhawk to the sea (Hale, *de Portibus Maris*, para., sec. c.2; Hall on the Seashore, 2nd ed., by Loveland)."

In 1614, Raleigh, in his *History of the World*, referred to "a Harborow of great capacitie, being in former times but an open bay." (*A New English Dictionary*, 1909, Vol. V. under "Harbour".)

This point of terminology is important because it gives significance to the provisions of various treaties of the late 18th and early 19th centuries which reveal an appreciation of the fact that states had rights and interests in sea areas
500 off their shores, which rights and interests they could, in treaties, bargain off to other states. I cannot define the exact mileage which may have been in mind when the treaty terms were employed, but I submit that the drafters had in mind something less than the earlier claims to vast oceans but something definitely more than inland waters and, it is reasonable to assume, more than territorial waters *stricto sensu*. I give the following examples from United States treaties alone:

Treaty of Amity and Commerce with France, Feb. 6, 1778, 8 Stat. 12. By Article VI the King of France agrees to protect and defend American vessels "being in his ports, havens, or roads, or on the seas near to his countries, islands, cities or towns." In Article VII the United States undertake the same obligation. In Article IX each party agrees to refrain from fishing "in the havens, bays, creeks, roads, coasts or places" which the other holds or shall hereafter hold. By Article X the United States agree not to disturb French subjects "in the enjoyment and exercise of the right of fishing on the banks of Newfoundland, nor in the indefinite and exclusive right which belongs to them on that part of the coast of that island which is designed by the treaty of Utrecht, nor in the rights relative to all, and each of the isles which belong to his Most Christian Majesty, the whole conformable
501 to the true sense of the treaties of Utrecht and Paris."

Treaty of Amity and Commerce with the Netherlands, Oct. 8, 1972, 8 Stat. 32. Article V provides that each party shall defend and protect vessels of the other "in their ports, roads, havens, internal seas, passes, rivers, and as far as their jurisdiction extends at sea."

Treaty of Amity and Commerce with Sweden, April 13, 1783, 8 Stat. 60. Article XX provides for assistance in case any vessel of either party shall be distressed, "on the coasts or under the dominion of either of the parties." Article XXIV deals with vessels of either party "coming upon any coast belonging to the other, but not willing to enter into port."

In Article I of "Separate Articles" to this treaty, Sweden is bound to protect vessels belonging to citizens of the United States "which shall be in the ports, havens, roads, or on the seas near the countries, islands, cities, and towns of His said Majesty. . . ." Hunter Miller, 2 *Treaties and*

Other International Acts of the United States of America (1931), p. 145.

Definitive Treaty of Peace with Great Britain, Sept. 3, 1783, 8 Stat. 80. By Article I his Britannic Majesty acknowledges the United States, which are enumerated, as "free, sovereign and independent States." Article II pro-
502 vides that the boundaries of the United States are to include "all islands within twenty leagues of any part of the shores of the United States." Article III confirms to citizens of the United States "the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the gulph of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used at any time heretofore to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use . . .; and also on the coasts, bays and creeks of all other of his Britannic Majesty's dominions in America."

Treaty of Amity and Commerce with Prussia, July & August 1785, 8 Stat. 84. Article VII provides that each party shall endeavour to protect and defend vessels of the other "which shall be within the extent of their jurisdiction, by sea or by land." Article IX deals with vessels in distress "on the coasts or within the dominion of the other." Article XII provides that vessels of each party "may navigate freely to and from the ports and on the coasts" of the other.

Treaty of Amity, Commerce and Nagivation with Great Britain, Nov. 19, 1794, 8 Stat. 116. Article III pro-
503 vides that citizens of each party may "navigate all the lakes, rivers, and waters" of the other. Article XXV provides that neither party shall permit ships or goods of the other "to be taken within cannon-shot of the coast."

Letter from Thomas Jefferson to George Hammond, Sep. 5, 1793, 8 Stat. 132 (annexed to the Treaty with Great Britain of 1794). "We are bound by our treaties with three of the belligerent nations, by all the means in our power, to protect and defend their vessels and effects in our ports, or waters, or on the seas near our shores. . . ." Subsequently reference is made to prizes which "are in our ports or waters."

Treaty of Friendship, Limits and Navigation with Spain, Oct. 27, 1795, 8 Stat. 138. By Article VI each party undertakes to protect and defend vessels of the other "which shall be within the extent of their jurisdiction by sea or by land." Article X deals with vessels of either party in distress "on the coasts or within the dominion of the other." Article XVIII deals with vessels "either sailing along the coasts or on the high seas," implying that coastal waters are not part of the high seas.

Convention with France, Sept. 30, 1800, 8 Stat. 178. Article XVIII refers to ships "either sailing along the coasts, or on the high seas." Article XXVII provides that "neither
504 party will intermeddle in the fisheries of the other on its coasts, nor disturb the other in the exercise of the rights which it now holds or may acquire on the coast of Newfoundland, in the Gulph of St. Lawrence, or elsewhere, on the American coast, northward of the United States. But the whale and seal fisheries shall be free to both in every quarter of the world."

Convention to regulate Commerce between the Territories of the United States and of his Britannick Majesty, July 3, 1815, 8 Stat. 228. Article 3 provides that freedom of commerce "is not to extend to allow the vessels of the United States to carry on any part of the coasting trade of the said British territories."

Convention with Great Britain of Oct. 20, 1818, 8 Stat. 248 (1848). Article I confirms and defines the rights of United States citizens to take fish off the coasts of Newfoundland and Labrador. "And the United States hereby renounce, forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbours, of his Britannic Majesty's dominions in America, not included within the above-mentioned limits."

I add a further example of insistence upon the sanctity of neutral waters.

504-A In 1656, the States General resolved to restore a ship which had been captured "within the Vlie and in the mean time word shall be carried to the Ambassador of Spain, that this state doth not desire such fights or prises should be made within the Vlie." (Jessup and Deak, *supra*, p. 253, citing Thurloe, *A Collection of State Papers* (1742), Vol. 5 p. 549). It is difficult to tell the exact geographical nature of the Vlie and the spot at which the capture was made due to the numerous shiftings in the Dutch coast over the centuries; see *Encyclopedia Britannica*, 11th ed. Vol. 28 p. 1049.

* * * * *

Q. Would you please state your opinion concerning the existence, in the 17th and 18th centuries, of exclusive rights to the continental shelf in favor of the adjacent coastal sovereign as a matter of international law? A. Throughout modern history there has been a consistent awareness – perhaps to a surprising degree, given the limited means of exploitation until very recently – of the importance of sovereign states of the sea and seabed

adjacent to their coasts. Through the 16th century many states, of which England was perhaps the most conspicuous, did not confine their claims to the adjacent seas but
505 asserted sovereignty over vast stretches of the high seas. In the 17th and 18th centuries the principle of freedom of the seas triumphed, and the earlier claims to sovereignty became appreciably more modest.

But it would be a great error to conclude that, when the doctrine of a territorial sea, limited to a narrow belt which eventually became fixed at three miles, crystallized in the 18th and 19th centuries, that development represented an *expansion* of state jurisdiction. To the contrary, it represented a *curtailment* of it. In the 17th and 18th centuries the general view was that a coastal state possessed sovereignty, ownership or jurisdiction in the waters adjacent to its coast, out to a distance which was not wholly fixed but which was in many instances more than three miles. Obviously, how far such claims could lawfully extend depended in large part on the geography and history of the area in question. In the English Channel, for example, English rights could not extend more than half way, and even to that extent were considered limited by the doctrine of freedom of the seas and the right of passage through straits or other waterways connecting high seas, so that England could not lawfully have prohibited all foreign ships even from half of the Channel. But on a coast such as the Atlantic coast of North America,
506 claims to 50 or 100 miles of sea or even more – which were in fact made – would not have been, and were not, considered unlawful in the 17th and 18th centuries, so long as the right of free navigation was not interfered with and any established fishing rights were respected. Certainly there was no recognized doctrine of international law at that time which prohibited claims to such a

distance of a limited sort which did not interfere with acknowledged rights of other states. To repeat, the 19th and early 20th century concept of a rather narrow belt of territorial waters – as narrow as three miles – represented not an expansion but a curtailment of sovereign rights as they were conceived in the preceding centuries. The curtailment occurred because of insistance by powerful maritime states, including Britain and the United States, on the principle of freedom of navigation and of fishing. For that reason the 19th century doctrine did not deny that states possessed jurisdictional or property rights beyond territorial waters so long as the rights of other states to navigate and to fish were not precluded. The exclusive right to exploit, or to regulate the exploitation of, seabed resources does not, generally speaking, even now interfere with the rights of other states on the surface or in the waters where swimming fish are customarily taken, and the type of such exploitation as was practical and practiced up through the 19th century – and which I shall describe later – involved even less interference. Hence there was nothing in the 19th or early 20th century international law which prohibited exploitation of the seabed, and it may be fairly said that this right survived the curtailment of the ancient claims to vast expanses of ocean which were no longer supportable under the international law of that period. As we shall see shortly, where there were seabed resources beyond territorial waters which were capable of exploitation, the coastal state invariably asserted and exercised the right to regulate and profit from such exploitation. Even in the period which took the most restrictive view of sovereign rights in the sea – the 19th and early 20th centuries – I am unaware of any significant challenge to the assertion of such rights as contrary to international law. I can

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say with considerable confidence that at no time has international law prohibited such assertion and exercise.

In the period 1940-60, the technological possibilities for exploitation of the resources of the continental shelf had become so great that it was felt desirable to make
508 more formal, systematic and explicit the nature and extent of the rights to those resources of the adjacent states. I do not regard that development as new international law springing out of nothing, and contradicting what had been the international law theretofore. Quite the contrary, and I shall explain that this view of mine is also the view expounded by the International Court of Justice in the *North Sea Continental Shelf Cases*, [1969] I.C.J. 1.

These conclusions are reinforced, I think, as to the Atlantic continental shelf of the United States by evidence concerning the negotiation of the Peace of Paris of 1783, by which Britain recognized and confirmed the independence of the thirteen United States. As I have already mentioned, Article II provides that the boundaries of the United States are to include "all islands within 20 leagues of any part of the shores of the United States." Read *in vacuo* these words are doubtless ambiguous as to whether the "boundaries" were also to encompass the intervening sea and seabed, but there is extrinsic evidence which makes it clear that they were. The whole matter of the status of "Mitchell's Map" of 1755 in the treaty negotiations is extensively dealt with by Hunter-Miller in 3 *Treaties and Other International Acts of the United States of America*
509 (1933), pp. 319-56 (Maine et al. Exhibit No. 355). (See also Moore, *International Adjudications* (1929), Vol. 1, pp. 6-10, 63-67, 144-59, 241-51, 266-67, 289-90, 373-81, 387-97, 436-41, 491; Vol. 2 (1930), pp. 7, 13-20, 329.) When the northeastern boundary question arose between Great Britain and the United States, their agreement of 1827 to

submit the question for arbitration included a provision (Article IV) that "the Map called Mitchell's Map, by which the Framers of the Treaty of 1783 are acknowledged to have regulated their joint and official Proceedings, . . . shall be annexed to the Statements of the Contracting Parties. . . ." (*Id.* at 321). Rarely in the history of international law has a map not annexed to a treaty received such explicit recognition in a subsequent treaty as having "regulated" the negotiations. Miller and Moore give ample additional evidence showing that the drafters of 1827 were quite correct in their judgment of the importance of Mitchell's Map.

The fact of crucial importance is that there have survived, and today exist, copies of Mitchell's Map used by both the American and the British negotiators at the 1782 Peace Conference, and that on both these copies there were drawn the boundary lines established by the Peace of Paris, including lines in the sea eastwards of
510 the coast of the United States and running all along its length. These lines are obviously rought attempts to mark a boundary 20 leagues from the coast of the United States. The British copy of the map, called the "King George Map" since it was the personal property of the king, has written along the boundaries, including the boundary in the sea, the words "boundary as described by Mr. Oswald," who was the chief British negotiator in 1782. (*Id.* at 337-38; a copy of the King George Map is Maine et al. Exhibit No. 327.) The American copy of the map (see 3 Miller at 341-42) has the words "Mr. Oswald's Line" written by the sea boundary in the handwriting of John Jay. (This "Jay copy" of Mitchell's Map is Maine et al. Exhibit No. 339.)

These maps make it clear that, as between Great Britain and the United States, the Peace of Paris fixed boundary

lines off the American coast 20 leagues into the sea. Whether or not these were regarded as boundaries for *all* purposes, whether or not the drafters of the Treaty would have regarded the United States as having full territorial sovereignty within these boundaries, and whether or not they could be regarded as implying that the United States had no seabed or subsoil rights extending *beyond*
511 20 leagues (all these points could be disputed at length), I have no doubt that the boundary lines were understood, at least, as confirming the exclusive rights of the 13 United States in the seabed and subsoil within 20 leagues of the coast.

Q. Are the developments in international law relative to the continental shelf, or the seabed outside territorial waters, unique, or have there been comparable developments in regard to the law applicable to other areas?
A. There are certain parallels between the development of the international law relating to airspace and the development of the rights of states over their continental shelves.

"Before the day when controlled movement above the earth's surface became a practical reality, there was a widespread belief that airspace, at least that above what was needed for common activities on the ground, was free for the peaceful use of all. This hypothesis was advanced by Grotius, for example, and, despite recognition by some scholars and statesmen of the potential danger of the use of aircraft in warfare, it was still urged by Fauchille and others in the early years of the twentieth century." (Jessup and Taubenfeld, *Controls for Outer Space and the Antarctic Analogy*, p. 201 (1959)).

In the earlier discussions of air law there was much reliance on doctrines of Roman law, just as there was in
512 the treatment of territorial waters. Much reliance is placed on analyses of Roman law in the scholarly book of Percy

Thomas Fenn, Jr., *The Origin of the Right of Fishery in Territorial Waters* (1926). (Fenn published an article on the same subject that same year in the *American Journal of International Law;* it is not always easy to tell which was written first or to what extent one actually duplicates the other. Both writings have since been cited almost at random.) In early studies of air law, much was made of the Roman law maxim *cujus est solum est usque ad coelum et ad inferos,* although the height of the sky and the depth of hell were not capable of precise identification. The actual legal problems at first, in private law, dealt with overhanging caves, branches and the like (cf. Lauterpacht). *Private Law Sources and Analogies of International Law,* Sect. 48 (1927)). Eventually the Supreme Court of the United States had to determine whether the flight of shells on a naval artillery range, when over private land, constituted an invasion of private property rights. *Portsmouth Co. v. United States,* 260 U.S. 327 (1922). The international law problem was rapidly settled in favor of the principle of national sovereignty over the superjacent airspace, as soon as military aircraft became active in
3 World War I. The principle of respect for neutral territory came into play. "The Netherlands, Switzerland, Denmark, Norway, Sweden, Spain and Italy, Roumania, Bulgaria, and China, while still neutral, showed by words or acts or both that they adhered to the principle of prohibition of belligerent air entry, coupled with the obligation of the neutral State to intern any aircraft and airmen effecting entry in face of such prohibition." Spaight, *Air Power and War Rights* (1933), p. 421, quoted in Harvard Research, *Neutrality, supra,* p. 766, where further citations are given. (For the evolution of the international air law see in general Mateesco, *Droit Aerien Aeronautique* (Evolution-Nouvelle Orientation) (1954), *passim.* See also McDougal, Lasswell & Vlasic, *Law and Public Order in Space* (1963).)

It is notable that the British Air Navigation Act, 1920, asserts that "the full and absolute sovereignty and rightful jurisdiction of His Majesty extends, *and has always extended*, over the air superincumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto." (1 *Oppenheim's International Law* 518 (8th ed. Lauterpacht 1955).) The words I have underscored recall that the same retrospective assertion – that sovereignty has always extended over territorial waters as well as the
514 land – was made in the Territorial Waters Jurisdiction Act of 1878 by which Parliament overruled the narrow majority of the Court in *The Franconia, Queen v. Keyn*, (1876) 2 Exch. Div. 63 (Maine et al. Exhibit No. 160).

Q. The *Franconia* decision, and the arbitral award in the *Abu Dhabi* arbitration, have been relied on by the United States in support of the proposition that the concept of continental shelf rights is a new one. Would you comment? A. It is unnecessary here to review the *Franconia* case in detail since it has already been explained fully in previous testimony in this case. But it will serve to emphasize the retrospective national British assertion in the Act of 1878 if one recalls the comment by Judge John Bassett Moore in his dissenting opinion in the case of *The Lotus* in the Permanent Court of International Justice in 1927:

"The sense of surprise, and indeed of apprehension, with which the judgment was received by the bar and the public, was expressed by Lord Cairns, then holding the high office of Lord Chancellor, who, in presenting in the House of Lords the bill by the enactment of which, under the title of the 'Territorial Waters Jurisdiction Act, 1878', the law as previously understood was reestablished, declared that, while the question 'at first sight' appeared to be and no doubt was a question of law, 'he rather

thought that it was a question of that which had been described as the first law of nature – the law of self-preservation'; and, while remarking that, but for the case of the *Franconia*, it would 'hardly have been necessary to detain their lordships by offering any observations', said that it would have been 'fortunate for the vindication of the law' if the fact had been brought to the attention of the Court that by a warrant published in 1848, under the Customs Regulations Act of that year, the limits of the Port of Dover were declared to extend three miles out to sea, thus covering the waters in which the *Strathclyde* was sunk. Lord Selborne, a former Lord Chancellor, supporting the view of Lord Cairns, stated that, until he read the judgment in question, 'he had not supposed that there was any doubt among lawyers' as to the existence of the right of sovereignty over territorial waters (Hansard, Parl. Debates, Vol. 237, 3rd series, pp. 1601-1616). Indeed, on a careful study of the case, it is difficult to avoid the conclusion that the vote of the majority was in no small measure determined by a powerful, but composite and somewhat torrential opinion of eighty pages delivered by Sir Alexander Cockburn, then Chief Justice of the King's Bench, the disturbing effects of which it was necessary to remove in order that the majestic stream of the common law, united with international law, might resume its even and accustomed flow. This was done by the Act of Parliament above mentioned which declared that the 'rightful jurisdiction' of Her Majesty not only extended *but had 'always extended'* over her coastal waters, and made British criminal law applicable to all offenses committed on the open sea within a marine league of the coast measured from low-water mark." (*The Lotus, supra,* at pp. 74-75, 2 Hudson, *supra* at pp. 71-72; Emphasis added.)

In summary, one may merely add the accurate analysis of Smith:

"Technically the opinion of the majority amounted to no more than a decision that the jurisdiction asserted by the Crown was not conferred by any existing English statute, and therefore it is not strictly a decision upon the broader question of international law. Of the seven judges composing the majority five were of opinion that it was competent for Parliament, without violating the law of nations, to confer such jurisdiction, if it saw fit to do so. In other words, eleven out of the thirteen judges were agreed that territorial waters were within the sovereignty of the riparian state, and of these eleven six held that the existing provisions of the English criminal law conferred sufficient jurisdiction to punish the offence in question." (2 Smith, *Great Britain and the Law of Na-*
517 *tions* 138 (1935)).

I refrain from any detailed analysis of the recent Australian and Canadian cases *Bonser v. La Macchia* (1969) 43 A.L.J.R. 275; *In Re Ownership of Off-Shore Mineral Rights* (1968) 65 D.L.R. (2d) 353, discussed by O'Connell, "The Australian Maritime Domain," 44 *Australian Law Journal* 192 (1970) and in articles he cites, because they, like *The Franconia,* hinge on questions of constitutional law rather than international law, despite some dicta to be found in the opinions. In contrast to the international status of the thirteen American colonies, which will be noted, O'Connell points out that the provinces and colonies of Australia and Canada "were never nations" (*supra,* p. 196).

As for the well-known award in the *Abu Dhabi* case, *In the Matter of an Arbitration between the Petroleum Development (Trucial Coast) Limited and His Excellency Sheikh Skakhbut Bin Sultan Bin Za'id, Ruler of Abu Dhabi*

and Its Dependencies, Aug. 28, 1951, 1 Int'l & Comp. L.Q. (1952) 247, Lord Asquith of Bishopstone, the arbitrator, held that a concession agreement of 1939, by which the ruler granted the company an exclusive right in "the whole of the lands which belong to the rule of the Ruler of Abu Dhabi and its dependencies and all the islands and the sea waters which belong to that area," was not intended to grant rights in the continental shelf outside territorial waters. In the course of his opinion Lord Asquith indicated his belief that no concept of continental shelf rights existed in 1939. I believe that he did not adequately appreciate the rules and principles of international law or the background of relevant international practice. He may have been too much absorbed in a semantic issue, namely the use of the term "continental shelf," which, to be sure, was not in common use in 1939. But the history of the pearl fisheries in the Persian Gulf which I shall describe shortly proves that the Arabian sheiks, chieftains and other rulers had asserted and maintained claims to the exploitation of the riches of the seabed, irrespective of the limits of territorial waters, for centuries before the conclusion of the contract involved in the arbitral award. No distinction in the legal principle applicable can be made between exploitation of pearl fisheries and drilling for oil. In any case, Lord Asquith's comments on the shelf "are *dicta* unnecessary to his decision." (Richard Young, Editorial Comment in 46 *Am. J. Int. L.* 512, 514 (1952).) Friedmann, Lissitzyn and Pugh suggest that Lord Asquith's view be compared with that of the International Court of Justice in the *North Sea Continental Shelf Cases,* where The Court said these rights of the coastal state "exist *ipso facto* and *ab initio.*" (Friedmann, Lissitzyn and Pugh, *International Law, American Casebook Series,* 562 (1969).)

Q. Would you please continue with your analysis of the nature and development of the doctrine of continental shelf rights? A. To return for a moment to the development of the rule of international law under which a state has sovereignty over the superjacent airspace, the situation is one in which the law followed possibilities of use or exploitability. At one stage, a learned assemblage of international lawyers supported the position that a state was sovereign up to a height equal to the top of the Eiffel Tower since that was the highest point which man had utilized. There developed, with the increase of air power, a considerable discussion in the literature as to the dividing line between the air-space, which admittedly was under the sovereignty of the subjacent state, and "outer space" which was alleged to be *res communis* or *res nullius*. As man's capacity to "exploit" outer space increased, attempts to limit the reach of national sovereignty diminished and were superseded by agreements such as the multilateral Treaty on Principles Governing the
520 Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies, done at London, Moscow and Washington Jan. 27, 1967 (18 U.S.T. 2410, T.I.A.S. No. 6347. Text and annotations in Friedmann, Lissitzyn and Pugh, *supra*, at pp. 637 ff.)

Although the use of air-space has been subjected to various regulations by treaties, there has been no abandonment of, or legal limitation upon, the basic concept that the state is sovereign over its air space. The same development has been witnessed in regard to the continental shelf in the sense that with the expansion of facilities for exploitation there have been extensions, within the provisions of the Geneva Convention of 1958, of the area over which the state is recognized to have sovereign rights. But as one passes beyond the continental shelf to the deep

seabed there are at present international negotiations – in which the United States is taking a leading part – looking toward the possible conclusion of international conventions which can be likened to the Treaty of Outer Space in the sense that it is contemplated that there shall be no national appropriation in that outer area. At this time, however, no final result of these discussions has been achieved and the outer limits of the shelf have not yet received final legal definition in precise measure.

521 The fact that international law limited the breadth of territorial waters to three miles, but never established an upper limit to the state sovereignty over the air space, is due to the fact that as state exercises of power and authority spread out from the shore, they began to come into conflict with the rights of other states to the freedom of the high seas, whereas even the uppermost flights of aircraft did not run counter to any comparable established international right in outer space. As will be pointed out later in this testimony, when international attention was directed to regulating the extent and use of the continental shelf, it was agreed that the resources of the continental shelf could be exploited beyond the three mile limit of territorial waters, since such exploitation involved no unjustifiable interference with the free use of the surface of the high seas for navigation and fishing. It will also be pointed out that from ancient times, before the term "continental shelf" came into general usage, international law recognized the right of littoral states to exploit and to control the exploitation of riches on and in the bed of the sea, such as pearl oysters, coral, sponges, as well as coal, tin and other mines dug out from the shore. This recognition was also due to the fact that such sub-surface exploitation did not interfere with acknowledged rights of other states to navigate or to fish upon
522 the high seas outside territorial waters. Whether the

international community will come to agree that mutual interest suggests setting a further outer limit for the exploitation of the continental shelf, while conceding general rights and interests in the deep seabed, has still not been revealed; and speculation on that subject is outside the range of this testimony. I merely note at this point that the general agreement that the exploitation of the resources of the shelf may, without a violation of law, involve some slight interference with navigation on the high seas, is comparable to that rule which permits the enforcement of anti-smuggling laws, for example, beyond the limits of territorial waters.

The classic statement of the criterion to be applied to such actions on the high seas is that of Chief Justice Marshall:

"If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

"In different seas and on different coasts a wider or more contracted range in which to exercise the vigilance of the government will be assented to." (*Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 235 (1804).)
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The applicability of the general reasoning behind this much-quoted statement will be apparent when I later discuss the general international acquiescence in the exercises of state authority outside of territorial waters to protect the exploitation of resources of the seabed such as pearls, sponge, coral, etc. The same can be said about the provision in Article 5 of the 1958 Geneva Convention on the Continental Shelf, which stipulates that "The exploration of the continental shelf and the exploitation of its natural resources must not result in any *unjustifiable* interference with navigation, fishing . . . " etc. (Emphasis added).

Q. It has sometimes been argued that the continental shelf was incapable of ownership before 1945, and that only between then and 1958 did a new doctrine of international law arise which for the first time recognized or permitted exclusive rights in the shelf on the part of the coastal sovereign. It is also sometimes said that, even if international law before that time permitted certain appropriations of the shelf, it required actual physical occupation. Would you comment? A. It is scarcely surprising that much writing about the continental shelf takes the Truman Proclamation of September 28, 1945 as a point
524 of departure. That Proclamation did not, however, "make" the law on the continental shelf, nor was it the first evidence that states claimed the right to exploit the resources of the shelf. The International Court of Justice in the *North Sea Continental Shelf Cases,* [1969] I.C.J. 1, 32-33, made the following statement regarding the Truman Proclamation:

"A review of the genesis and development of the equidistance method of delimitation . . . may appropriately start with the instrument, generally known as the 'Truman Proclamation', issued by the Government of the United States on 28 September 1945."

(It must be noted that this passage from the Judgment is introduced (in Para. 47) by a reference to the actual issue before the Court, which was the lateral delimitation between adjacent continental shelves; the Court was not called upon to consider, and did not pronounce on, the question of the date at which international law recognized the right of coastal states to utilize the resources of the continental shelf.) The Court then continued to pronounce as follows:

"Although *this instrument was not the first or only one to have appeared,* it has in the opinion of the Court

a special status. Previously, various theories as to the nature and extent of the rights relative to or exercisable
525 over the continental shelf had been advanced by jurists, publicists and technicians. The Truman Proclamation however, soon came to be regarded as the starting point of the positive law on the subject, and *the chief doctrine* it enunciated, namely that of *the coastal State as having an original, natural, and exclusive (in short a vested)* right to the continental shelf off its shores, came to prevail over all others, being now reflected in Article 2 of the 1958 Geneva Convention on the Continental Shelf." (Emphasis added).

If the right had been "created" in 1945, it would hardly have been described as already "vested." The Court then continued to refer specifically to the question of delimitation of lateral boundaries.

Throughout the judgment, the Court's reasoning is consistent with and, indeed, built upon the concept that rights in the continental shelf are inherent and therefore have always existed and cannot be assumed to have been newly created after 1945. The following extracts reveal this fact: "19. More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, – namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right.

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In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is 'exclusive' in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent . . ." (*Id.* at p. 22.)

"39. The *a priori* argument starts from the position described in paragraph 19, according to which the right of the coastal State to its continental shelf areas is based on its sovereignty over the land domain, of which the shelf area is the natural prolongation into and under the sea. From this notion of appurtenance is derived the view
527 which, as has already been indicated, the Court accepts, that the coastal State's rights exist *ipso facto* and *ab initio* without there being any question of having to make good a claim to the areas concerned, or of any apportionment of the continental shelf between different States. . . ." (*Id.* at p. 29.)

"41. As regards the notion of proximity, the idea of absolute proximity is certainly not implied by the rather vague and general terminology employed in the literature of the subject, and in most State proclamations and international conventions and other instruments – terms such as 'near', 'close to its shores', 'off its coast', 'opposite', 'in front of the coast', 'in the vicinity of', 'neighboring the coast', 'adjacent to', 'contiguous', etc., – all of them terms of a somewhat imprecise character which, although they convey a reasonably clear general idea, are capable of a considerable fluidity of meaning. . . ." (*Id.* at p. 30.)

"43. More fundamental than the notion of proximity appears to be the principle – constantly relied upon by all

the Parties – of the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State. There are various ways of formulating
528 this principle, but the underlying idea, namely of an extension of something already possessed, is the same, and it is this idea of extension which is, in the Court's opinion, determinant. Submarine areas do not really appertain to the coastal State because – or not only because – they are near it. They are near it of course; but this would not suffice to confer title, any more than, according to a well-established principle of law recognized by both sides in the present case, mere proximity confers *per se* title to land territory. What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion, – in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea. . . ." (*Id.* at p. 31.)

"95. The institution of the continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal regime. The continental shelf is, by definition, an area physically extending the territory of most coastal States into a species of plat-
529 form which has attracted the attention first of geographers and hydrographers and then of jurists. The importance of the geological aspect is emphasized by the care which, at the beginning of its investigation, the International Law Commission took to acquire exact information as to its characteristics, as can be seen in particular from the

definitions to be found on page 131 of Volume I of the Yearbook of the *International Law Commission* for 1956. The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact prolong."

"96. The doctrine of the continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no one. The contiguous zone and the continental shelf are in this respect concepts of the same kind. In both instances the principle is applied that the land dominates the sea; it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries whose
530 continental shelves are to be delimited. This is one of the reasons why the Court does not consider that markedly pronounced configurations can be ingored; for, since the land is the legal source of the power which a State may exercise over territorial extensions to seaward, it must first be clearly established what features do in fact constitute such extensions. Above all is this the case when what is involved is no longer areas of sea, such as the contiguous zone, but stretches of submerged land; for the legal regime of the continental shelf is that of a soil and a subsoil; two words evocative of the land and not of the sea." (*Id.* at p. 51.)

The two opening sentences of Section 96, just quoted, may be misunderstood. The Court says "the contiguous zone and the continental shelf are . . . concepts of the same kind" in the sense that both are instances "of

encroachment on maritime expanses which, during the greater part of history, appertained to no one."

The interpretation of this statement requires an explanation of the "contiguous zone," to which I have not previously referred *eo nomine.*

Article 66 of the Geneva Convention on the High Seas reads as follows:

"THE HIGH SEAS

531 "SECTION II. CONTIGUOUS ZONE – Article 66

1. In a zone of the high sea contiguous to its territorial sea, the coastal State may exercise the control necessary to:

(a) Prevent infringement of its customs, fiscal or sanitary regulations within its territory or territorial sea;

(b) Punish infringement of the above regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured."

It will be noted that a limit of 12 miles is given as the maximum extent of this "contiguous zone." In my opinion, it would have been more in accordance with customary international law had the Conference adopted Chief Justice Marshall's criterion in *Church v. Hubbart,* of what is "reasonable and necessary." (See p. 522, *supra.*) But the "contiguous zone" as a defined geographical area is part of the Geneva "doctrine" and as an area or "zone" might be considered as an "encroachment", even though the right to exercise a certain protective jurisdiction on the adjacent high seas, can well be considered "inherent" in the coastal State.

I have pointed out (*e.g.*, pp. 480 ff.) that in my writings since 1927 I have emphasized what I believe is the correct distinction between the belt of territorial waters which is properly considered part of the territory of the coastal State, and the various rights which the State may exercise on or under the high seas outside territorial waters. Those rights include the enforcement of anti-smuggling laws on the surface of the seas, and the exploitation of sea-bed resources. I quoted (at pp. 486-489) from my article in the 1961 Volume of the *American Journal of International Law* a passage which concluded that at the 1958 Geneva Conference on the Law of the Sea, the distinction between the territorial sea and the rights in the adjacent high seas, was blurred.

I quoted, at p. 522, the classic statement of Chief Justice Marshall in *Church v. Hubbart* that the exercise of rights seaward of the limits of the territorial sea, varied in "different seas add on different coasts." I shall point out later in some detail how the exercise of rights to exploit resources of the seabed and subsoil varies from coast to coast around the world. Thus pearl fisheries have been and are exploited near Ceylon and India, but not near Norway and Sweden. Sponges have been and are fished off Mediterranean coasts, but not off the coasts of the North Sea. Mines were dug out under the sea from the coast of Cornwall but not of Provence.

Although the Court, as has been noted, was far from suggesting that rights to the continental shelf did not exist before the Truman Proclamation of 1945, it did take into account the fact that the Geneva Conventions generalized the recognition of coastal states' rights outside the edge of the territorial sea, both in regard to the seabed and in regard to the contiguous zone which is measured on the surface of the sea. It is in this sense that I understand the reference to "a recent instance of encroachment."

The dominant principle underlying the judgment is that the rights to the continental shelf "exist *ipso facto* and *ab initio*," and are "an inherent right." In the light of this controlling concept, the opening sentence of Section 96 of the Judgment must be construed to read so that the "which" clause qualifies 'maritime expanses" and not "the continental shelf." The sentence might be rewritten as follows:

"There are maritime expanses which, during the greater part of history, appertained to no State and the doctrine of the continental shelf is a recent instance of encroachment on those maritime expanses."

Although the English text of the Judgment is authori-
534 tative (see p. 54 of the Report), the official French text, in my opinion, reinforces my reading of this passage.

I cannot read the Judgment as intimating that over a long historical period the continental shelf or adjacent seabed and subsoil was *res nullius* open to "occupation" by any state. All the evidence refutes such a concept.

Any right to state jurisdiction or control outside territorial waters could be described as an "encroachment" on the high seas, in the sense that it is a limitation on the rights of all states to universal and unrestricted use. The "doctrine of the continental shelf," as a *doctrine* under that name, is "recent", but the rights to that adjacent seabed and subsoil are "inherent" and existed *"ab initio."*

In speaking of an "encroachment" on the high seas, the Court necessarily had in mind the provisions of the Convention on the Continental Shelf which permit the construction of necessary installations so long as they do not "result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea." The authorization of such constructions was not explicit in the customary international law which recognized the right of the coastal state to exploit the resources of the

seabed, but it is a part of the "doctrine of the continental shelf" as elaborated in Geneva in 1958.

Throughout its decision in the *North Sea* case, the International Court paid close attention to the work of the International Law Commission and to the Geneva Conference on the Law of the Sea of 1958, which took the work of the ILC as the basis for its deliberations.

The International Law Commission began to study the law of the continental shelf in 1950. (See its Report for its Third Session, 2 *Yearbook of the International Law Commission 1951,* Documents of the Third Session, pp. 141 ff.) In its first draft of Article 1 of a Convention on this subject, it provided:

"As here used, the term 'continental shelf' refers to the seabed and subsoil of the submarine areas contiguous to the coast, but outside the area of territorial waters, where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and the subsoil."

It is to be noted that two principles stand out in this draft:

i) the draft refers to an area "outside the area of territorial waters"; and

ii) it uses the test of exploitability.

The reason for the limitation under i) is explained in the comment (p. 141):

"9. The continental shelf referred to in this article is limited to submarine areas outside territorial waters. Submarine areas beneath territorial waters are, like the waters above them, subject to the sovereignty of the coastal State." This is a point of prime importance. The ILC, like the Truman Proclamation, carefully avoided claiming sovereignty over the high seas above the continental shelf but outside the territorial waters. We have here, therefore,

a principle that there is a right of exploitation of the seabed which does not come into conflict with the principle of the freedom of the seas, but, like the established claims to customs and similar protective measures on the surface of the high seas outside the three mile limit, there is here posited a right to take measures outside the three mile limit *underneath* the high seas.

In its comment on its Article 2, which asserts the right of "control and jurisdiction" (the terminology adopted in this first stage), the ILC comment states at p. 142:

"5. The exercise of the right of control and jurisdiction is independent of the concept of occupation. Effective occupation of the submarine area in question would be practically impossible; nor should recourse be had to a fictional occupation. The right of the coastal State under article 2 is also independent of any formal assertion of
537 that right by the State."

This point concerning the absence of need for occupation is, as will be seen, strongly emphasized by the International Court in its Judgment.

In its definitive 1956 Report, the ILC embodied in Article 68 (which had been Article 2 in the earlier drafts) the following conclusion:

"The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources."

Paragraph (7) of the Commentary to this article provides:

"The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation."

(UNGA OR: Eleventh Session Supplement No. 9 (A/3159), p. 42.)

At the 1958 Geneva Conference on The Law of the Sea, the Fourth Committee dealt with the continental shelf. Its deliberations are in Vol. VI of the Official Records of the Conference. The Cuban Delegation proposed that the above text of paragraph (7) of the Commentary be included as an additional article (*op. cit.* p. 139). The Representative of Cuba who sponsored this proposal was Dr. F.V. Garcia Amador, Chairman of the ILC in 1956 and author of *The Exploitation and Conservation of the Resources of the Sea* (2nd enlarged ed. 1959, but first published in Spanish in 1956). As this proposal was debated in the Fourth Committee of the 1958 Conference, the discussion turned on the issue whether this should be a separate article or should be included by the Drafting Committee as a paragraph of Article 68. The latter course was followed. The Cuban proposal was adopted in the Committee by 41 votes to 7 with 12 abstentions. There was practically no support for the idea that occupation was or should be necessary.

The rationale of this provision, which is retained as paragraph 3 of Article 2 of the Convention on the Continental Shelf signed at Geneva on April 29, 1958 and ratified by the United States on March 24, 1961, is fully set forth by Professor Hersch Lauterpacht, who had been a member of the ILC and who became a member of the bench of the International Court of Justice. The following extracts are from his article "Sovereignty Over Submarine Areas," *supra.*

"VII. *'Occupation' of submarine areas*

"It has been suggested that, regardless of the form of words used, the rights of exclusive control and jurisdiction claimed in the submarine areas are rights indistinguishable from sovereignty. It has also been submitted

that such rights are not inconsistent with the reasonably
539 interpreted conception of the freedom of the seas. We may not inquire what, in addition to the decisive text of reasonableness and the fact of its having become part of the practice of states, is the legal basis of the asserted title, conceived as a territorial title, to submarine areas. The main argument, other than that based on the freedom of the seas, which has been raised against the acquisition of title over submarine area is that international law requires effective occupation as a condition of valid acquisition of territorial title and that no such effective occupation is possible with regard to submarine areas. That argument is based on two assumptions. The first is that the principles applicable with regard to acquisition of title over territory apply, automatically and without modification, to the novel case of the submarine areas. The second is that effective occupation is, according to international law, invariably and rigidly a condition of acquisition of territorial sovereignty. Both these assumptions are unwarranted.

"Any attempt to base the title to submarine areas on the accepted notion of effective occupation must result either in a denial of the legality of the title thus claimed or in depriving the notion of effective occupation of its natural meaning. For it is clear that in all cases in which the title to submarine areas has been proclaimed there has
540 been no approximation to effective occupation. There has been only a proclamation and, in some cases, a conferment of concessions in respect of the areas in question. This absence of effective occupation is in no way fatal to acquisition of territorial title over submarine areas. For modern international practice does not invariably consider effective occupation to be a condition of acquisition of

title. As it is occasionally put in a more circuitous fashion, the requirement of effectiveness of occupation is a matter of degree. Even that attenuated condition of effectiveness represents an over-simplification of the true legal position. What is true is that, *all other things being equal,* effective occupation constitutes, except as against the lawful sovereign, a title superior to any competing title. To that extent – but to that extent only – is it possible to consider as accurate the statement that international law has discarded discovery, purely symbolic occupation (which does not differ in nature from pretensions based on mere discovery) and similar claims, including that of contiguity, as a valid source of territorial title. Thus in modern international judicial practice the border-line between the attenuated conditions of effectiveness of occupation and the total relinquishment of the requirement of effectiveness has become shadowy to the point of obliteration. In
541 the judgment given in 1933 in the case between Denmark and Norway concerning the *Legal Status of Eastern Greenland* the Permanent Court of International Justice, after laying down the general principle that a claim to territorial title based upon continued display of authority must show 'the intention and will to act as sovereign, and some actual exercise or display of such sovereignty'. proceeded to qualify very substantially the requirement of 'some actual exercise or display' of authority. It said:

'It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.'

The principle that the requirement of 'some display of authority' may be reduced to the bare existence of a claim was shown clearly in the way in which the Court dealt with the title of Norwegian Kings in the sixteenth century, from which the Danish title was subsequently derived:

'That the King's claims amounted merely to pretensions is clear, for he had no permanent contact with
542 the country, he was exercising no authority there. The claims, however, were not disputed. No other Power was putting forward any claim to territorial sovereignty in Greenland, and in the absence of any competing claim the King's pretensions to be the sovereign of Greenland subsisted.'

Moreover, the Court held, with regard to the much later period between 1721 and 1814, that as there had been no claim to sovereignty by any other Power, and in view of the arctic and inaccessible character of the uncolonized part of the country, mere acts of legislation were sufficient evidence of effectiveness. Neither was the Court prepared to exact a substantially higher degree of effectiveness with regard to the modern period covering the nineteenth and twentieth centuries and immediately preceding the dispute. It considered as sufficient such manifestations of display of sovereignty as acts of legislation concerning navigation in the seas around Greenland and the conclusion of commercial agreements referring to Greenland.

"Even less exacting, if possible, in the matter of the requirement of effectiveness, was the award by the King of Italy, acting as Sole Arbitrator, in the *Clipperton Island* case between France and Mexico in 1931. That case is occasionally referred to as an example of the elasticity
543 of the notion of occupation. Upon analysis, it is an instance of a situation in which international law dispenses

altogether with the requirement of effectiveness. In that case the actual display of state activity by France consisted in the drawing up, by a Lieutenant of the French Navy, acting upon instructions of the French Minister of Marine, of a proclamation of French sovereignty over the islands; in taking geographical notes; in an unsuccessful attempt to reach the shore; and, in 1897, in an inquiry addressed to the Government of the United States as to the activities of certain American citizens in connexion with the island. The Arbitrator decided that the island belonged to France. After holding that 'the actual' and not the nominal, taking of possession is a necessary condition of occupation', he proceeded to base his decision on the rule that 'if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby established'. Yet it is clear that there was in this case nothing in the nature of an initial taking of possession in the ordinary sense of the word. There was a symbolic
544 act, a proclamation. Such symbolic act cannot, without doing violence to language, be regarded as occupation. The *Clipperton Island* case shows that the notion of occupation, as traditionally understood, may be valueless, in relation to some areas, for the purpose of acquiring title. Such areas are not only those which are uninhabited, but also those which are normally uninhabitable.

"The judicial and arbitral decisions referred to above demonstrate the advisability of viewing the principle of effectiveness against the background of the historic circumstances which gave rise to it. It was conceived as a check upon the fanciful arbitrariness of pretensions inimical

to a reasonable apportionment of the normally inhabitable territorial domain of the world and productive, by their very excess, of uncertainty and friction. But it is not a magic formula applicable to all situations. If so applied it can be maintained only by dint of being used, in the end, in a sense contrary to its natural connotation. The futility of the mechanical application of the notion of effectiveness was demonstrated in an instructive manner in the discussions preceding the general recognition of the sovereignty of states over the air. It was argued by international lawyers of distinction that as the air is incapable of effective occupation it was incapable of appropriation. To speak of occupation of submarine areas
545 is to use language even more unreal than that referring to occupation, as a basis of territorial title, of arctic and antarctic regions. States have indeed put forward claims – not altogether uncontroverted – to the latter, but they have not based them on any principle germane to occupation, effective or fictitious. In doing so they have by implication rejected the notion of occupation as an invariable basis of title. The same applies to the various proclamations relating to submarine areas. There is no element of occupation, in a sense consistent with the ordinary meaning of the word, in the British proclamations concerning the continental shelf in the Bahamas, Honduras, Jamaica, and the Falkland Islands. To say that a proclamation amounts to occupation, or that it constitutes the first step to occupation giving an 'inchoate title' is, in fact, to deny that occupation is necessary. A proclamation is a means by which a title, claimed or acquired, is announced. It is not a *source* of a title or a means of acquiring it. That does not mean that it is meaningless or unnecessary. When the Rulers of various Sheikdoms in the Persian Gulf were advised in 1949 by the British authorities that the issue of a proclamation is a pre-requisite of their effective assertion of rights over the adjacent

submarine areas, the advice was given in deference to an
546 obvious proposition of order and orderliness which requires that a person – or a state – asserting a claim, however inherently valid, must make his claim known by a formal pronouncement or notification. This is so especially if the subject of the claim in question is novel in character, undefined in extent, and likely to require determination in relation to similar claims by other persons or states. Accordingly, the issue of the proclamations of the continental shelf in no way militates against the view that they were of declaratory character in relation to what was considered to be a title claimed or acquired by or belonging to the state by reference to a legal basis other than occupation.

"The International Law Commission not only put on record, in its Report to the General Assembly in 1950, its view that the exercise of control and jurisdiction over the continental shelf 'was independent of the concept of occupation'. It had previously adopted a text stating that 'the submarine area (sea-bed and subsoil) of the Continental Shelf off the coast of a littoral State and outside the area of its territorial waters is subject *ipso jure* [(*sc.* without a proclamation)] to the control and jurisdiction of the littoral State'. The Commission had no difficulty in thus disposing of the idea of 'notional occupation' which in effect amounts to a denial of the necessity of
547 occupation. In the long run little purpose is served by adhering to words deprived of their content. Those who, apprehensive of the seemingly limitless comprehensiveness of the rival doctrine of contiguity, are inclined to see in occupation the only legitimate mode of acquiring title to submarine areas, find themselves in a dilemma which can be solved only by dint of a verbal nicety. As no effective acts of occupation (in the ordinary sense of the word),

concurrently with the act of proclamation of title or at any ascertainable period in the foreseeable future, are possible in relation to contiguous submarine areas, it is found necessary to fall back upon the barest minimum of occupation which reduces occupation to a shadow of its natural meaning, namely, to a proclamation and, possibly, the granting of concessions. But this is the very question which is at issue, namely, whether the state is in the position to rely on a valid legal basis and title for issuing the proclamation and the granting of concessions. There is little persuasive force in an attempt at juridical analysis which proceeds, in effect, as follows: 'The State is entitled to issue the proclamation annexing the continental shelf and to grant concessions over it if it occupies it to the extent of issuing the proclamation and granting concessions.' The tautologous nature of the solution emphasizes its essential unhelpfulness. For the same reason it seems unhelpful to answer the question whether a state is entitled to exercise sovereignty, *i.e.*, display state activities, by explaining that it is entitled to do so if it displays state activities, by legislating, granting concessions, and concluding treaties. There would be an element of consistency – though, it is believed, of misguided consistency – in the view that as the occupation of submarine areas is impossible there can be no title over them. But there is probably no more than dialectics in the attempt to combine the requirement of occupation with a denial of it by reducing it to a formal claim in the form of a proclamation.

548

"However, the defect of the attempt to base the title to submarine areas on occupation is not only one of logic. If 'occupation' thus conceived were the true basis of the legal claim to the adjacent submarine areas then there would be nothing – save the extra-legal remedies of intervention or

self-preservation on the part of the coastal state – to prevent distant and strategically and economically powerful states from 'occupying' the adjacent submarine areas of other states by proclaiming their annexation and by emphasizing the 'effectiveness' of the title thus claimed to have been acquired by granting concessions, by legislating in respect of them, by concluding treaties – with states
549 willing to do so – relating to the submarine areas thus acquired, and, eventually and after a long period of uncertainty, to proceed to the actual exploitation, possibly in active competition with other states, of the submarine areas in question. Wide and disturbing possibilities of friction would thus be opened not only as between the coastal state and its more or less distant neighbours but also between the neighbours themselves. These possibilities are probably present to the minds of the adherents of the 'occupation doctrine'; for eventually they fall back upon contiguity. However, there may be an element of artificiality in an argument which starts from the proposition that 'contiguity is a dangerous doctrine unless confined within the principle of effective occupation' and ends by reducing the 'effective occupation' to a proclamation which, however, can be issued only by the coastal, the contiguous state. It may be essentially unhelpful to rely, as a check upon exorbitant claims of contiguity, on the doctrine of occupation – of effective occupation – and to proceed to argue that the effectiveness required is the effectiveness of a 'symbolic act of appropriation in the form of a proclamation' which can issue only from the coastal state. It may be tempting, in that predicament to invoke the authority of the Permanent Court of Interna-
550 tional Justice in the case of the *Legal Status of Eastern Greenland*, as well as the award in the case of the *Clipperton Island* case, as supporting the proposition that full

effectiveness of occupation is not essential. Actually these decisions demonstrate more than that. They show that there are situations in which occupation, in the normal meaning of the words, is not required at all and in which the conception of occupation is a more or less deceptive figure of speech. If this is so with regard to inhabited or sparsely inhabited territory, it is particularly true in relation to uninhabitable areas such as the sea-bed and its subsoil.

"Neither can the difficulty be obviated by relying on the somewhat nebulous notion of 'inchoate title' as applied to claims based on discovery. The latter, it has often been said, gives an 'inchoate title' which must be confirmed by use and settlement and which is lost if not thus confirmed. The doctrine of 'inchoate title' has often been invoked in diplomatic correspondence and arbitral proceedings and has been the subject of an occasional judicial *dictum*. In the only arbitral decision in which it was directly applied – namely, in the *Island of Palmas* arbitration – it was applied in the sense that the 'inchoate title' was held to have lapsed in view of the proved adverse claim based on effective occupation. In the nature of things there can be no
551 question, in the matter of submarine areas, of any loss of the 'inchoate title' by adverse occupation by another state. The very object of the proclamation is to make such adverse occupation impossible. Can it be said that the 'inchoate title' over the submarine areas will be lost if it is not followed by actual exploitation or exploration? To whom will it be lost? What is the reasonable period within which such exploitation or exploration must materialize? With regard to 'inchoate title' generally, writers have discussed the question whether some such period as twenty-five years is sufficient. Hall, in a careful treatment of the subject, suggested that an 'inchoate title' is good, as against

another occupying state, for such time as 'allowing for accidental circumstances or moderate negligence', might elapse before a force or a colony are sent out to some part of the land intended to be occupied; and that 'in the course of a few years the presumption of permanent intention afforded by such act dies away'. The quotation shows the degree of the applicability of the doctrine of inchoate title to submarine areas. Will the granting of concessions – a measure easy of accomplishment – suffice to perfect or keep alive the title? If not, within what period must the concession be followed by operations which are not purely nominal? That question can be put
52 even more pertinently in relation to 'exploration' conceived as a manifestation of an effective exercise of the right of occupation. What international or national authority will exercise the power of exacting the penalty for inefficiency of failure? These questions could be multiplied. They are sufficient to show the inadequacy of the notion of 'inchoate title', conceived for entirely different circumstances, to a situation in which international law, if it is to be of assistance, must supply the necessary element of precision and stability as distinguished from an infusion of uncertainty and potentialities for conflict.

"On the other hand, it is possible to use in this connexion the term 'inchoate title' in a specific connotation different from that with which it is usually associated. It is possible to say that the littoral state is entitled *ipso jure* to the adjacent submarine areas, but that so long as it has not perfected its title by claiming it formally through the issue of a proclamation, declaratory of an existing right, the title is merely 'inchoate'. The language thus used may not be wholly devoid of artificiality inasmuch as it identified the dividing line between a full and an 'inchoate' title with a purely formal act which can be accomplished with a stroke of the pen. However, there

is room for the argument that there is no compelling
553 necessity in relation to an entirely novel situation to use terms in full conformity with their accepted meaning. Moreover, the formula may be useful inasmuch as it emphasizes the importance of and necessity for an express declaration even if conceived as a purely formal act.

"The theory of occupation as the legal basis of the claim to submarine areas has been favoured largely for the reason that it supplies an alternative to exorbitant and altogether undefinable claims based on contiguity and continuity. However, it may be a mistake to attempt to provide a legal basis for new problems in international law in such a way as to eliminate all possibility of abuse. No legal doctrine can by itself do away with that possibility. There is no compelling necessity to conjure dangerous vistas of unchecked nationalistic expansion following in the wake of the principle of contiguity. Such expansion – which, in terms of law, must remain a *brutum fulmen* – can equally well take place on the purported basis of fictitious and nominal, or 'notional', occupation. The claim to sovereignty or to exclusive rights over the high seas is unlawful whether it is put forward under the colour of contiguity or occupation accomplished by an act of appropriation in the form of a proclamation or enactment. The claim to territories already occupied or administered by another state is as groundless when put forward by reference to contiguity as it is when advanced
554 by reference to notional occupation in the form of a proclamation or a prior title based on discovery. In so far as occupation means effective occupation – and that is its only natural meaning – it is not applicable to the continental shelf and to submarine areas generally. In so far as it is used in a figurative sense, *i.e.*, as a mere claim to be substantiated by no more than a proclamation or

a similarly nominal act such as the granting of concessions it is so elastic and as open to abuse as the doctrine of the contiguity of the coastal state. The latter, at least, has the merit of using terms in their ordinary connotation. It will now be considered to what extent that doctrine has in actual practice been made the basis of the assumption of title to submarine areas and to what extent such practice can find support in the notion of contiguity and continuity as reasonably adopted to the circumstances of the case." (Lauterpacht, "Sovereignty Over Submarine Areas," *supra*, pp. 415-23, footnotes omitted.)

Much the same point regarding the absence of need for occupation is made by Waldock in "The Legal Basis of Claims to the Continental Shelf," 36 Grotius Society, *Transactions for the Year 1950* (1951), 115, 116-18, 141, quoted in 4 Whiteman, *Digest of International Law* 742-43 (1965).

Lauterpacht was no longer on the bench when the Court handed down its 1969 judgment in the *North Sea Continental Shelf Cases*, but the Court took the same view, finding no need for occupation as a basis for a claim to the continental shelf. The Court said (in section 19 of the Judgment):

"In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised." (*North Sea Continental Shelf*, [1969], I.C.J. 1, 22.)

To return to the 1950 Report of the ILC, it is also important to note Point 6 of its Commentary:

"6. The Commission has not attempted to base on customary law the right of a coastal State to exercise control

and jurisdiction for the limited purposes stated in Article 2. Though numerous proclamation have been issued over the past decade, it can hardly be said that such unilateral action has already established a new customary law. It is sufficient to say that the principle of the continental shelf is based upon general principles of law which serve the present-day needs of the international community."

556 One reason why the ILC avoided reliance on the "numerous proclamations . . . issued over the past decade" undoubtedly was that many of these proclamations, departing from a fundamental thesis of the Truman Proclamation, implied or actually asserted sovereignty over the high seas above the continental shelf – a thesis which the ILC stoutly rejected. Indeed, at this stage, the ILC even avoided describing the right of the coastal state in the continental shelf as a "sovereign" right; changes were made in this approach later.

At the eighth plenary meeting of the United Nations Conference on the Law of the Sea, 22 April 1958, there was a discussion of the report of the Fourth Committee (U.N. Doc. A/CONF 13/38 p. 11). The principal discussion turned on the terminology in Article 68 of the draft convention as reported by the Fourth Committee. The draft had used the expression "exclusive rights" to describe the rights in the continental shelf. The representative of India proposed that the expression "sovereign rights" should replace the expression "exclusive rights," thus restoring terminology which had been adopted by the International Law Commission. After the debate the Indian proposal was adopted by 51 votes to 14 with 6 abstensions. This outcome of the debate apparently was influenced by the view expressed by the representative of the United States (altering the position it supported in

557 the Fourth Committee), namely that Article 69 of the

draft clarified the problem of the legal status of the waters and air space above the continental shelf and that therefore the word "sovereign" could be used to describe the rights in the continental shelf without the risk of impairing the legal status of the superjacent waters and air space. (Para. 51, p. 13-14. The text of Articles 68 and 69 as adopted by the Fourth Committee will be found at page 91 of the same volume. In the text of the Convention on the Continental Shelf, as adopted by the conference at its eighteenth plenary meeting, the Articles are re-numbered and the statement about "sovereign rights" is found in Article 2, Para. 1 and the statement about the legal status of the superjacent waters is in Article 3; *id.* p. 142.)

The ILC's denial of any effect upon rights on the surface of the high seas is affirmed in Articles 4, 5 and 6 of this first draft and in the comments on these articles. It should be noted, however, that the ILC did not commit itself to the position that in dealing with the law of the continental shelf it was exercising its powers to envisage "the progressive development of international law" rather than its "codification." According to the leading book about the ILC:

558 ". . . at its 236th meeting on 10 August 1953, the Commission debated the questions whether its draft articles on the continental shelf were more in the category of progressive development than codification. . . . In his draft report, as Rapporteur of the Commission, Professor Lauterpacht had drawn attention to the dual nature of the articles on the *Continental Shelf* as codification and progressive development, while perhaps emphasizing their character as codification. . . . Mr. Sandstrom, recalling that the Commission had regarded the draft articles on the *Continental Shelf* as progressive development . . .

proposed that the Commission's Report should recognize their character as progressive development. . . . The Commission first accepted Mr. Sandstrom's proposal by a vote of 4-3-3 and then reversed itself to adopt, by a vote of 7-2-1, a recommendation that the General Assembly adopt the Commission's Report on the subject by resolution (without specifying whether it was acting under Article 16 [progressive development] or Article 23 [codification])." Briggs, *The International Law Commission*, 294-295 (1965).

As I analyze the debates in the ILC and at the Geneva Conference, I reach the conclusion that the difference of opinion on this point is to be explained as follows:

The draft convention on the continental shelf and the final convention contain a mixture of provisions, some of
559 which were clearly statements of existing law (and therefore within the ILC's task of "codification"), while others were contractual arrangements to be applied by the parties in the future ("progressive development"). This point is clearly brought out in the judgment of the International Court of Justice in the *North Sea Continental Shelf Cases, supra.* The Court had to decide whether Article 6 of the Convention, which includes the equidistance rule for demarcating the limits between the continental shelves of adjacent states, was a statement of existing customary law or merely a conventional rule to be adopted by parties to the Convention. The Court attached importance to the fact that Article 12 of the Convention specifies the articles of the Convention to which states, in ratifying, may, if they choose, attach reservations. The Court pointed out that Article 6 is one of the articles to which reservations may be made and continued:

"speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain

limits, be admitted; – whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot
560 therefore be the subject of any right to unilateral exclusion exercisable at will by any one of them in its own favour. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded. This expectation is, in principle, fulfilled by Article 12 of the Geneva Continental Shelf Convention, which permits reservations to be made to all the articles of the Convention 'other than to Articles 1 to 3 inclusive' – these three Articles being the ones which, it is clear, were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf, amongst them the question of the seaward extent of the shelf; the juridical character of the coastal State's entitlement; the nature of the rights exercisable; the kind of natural resources to which these relate; and the preservation intact of the legal status as high seas of the waters over the shelf, and the legal status of the superjacent airspace." (*North Sea Continental Shelf*, [1969] I.C.J., 38-39 §63.)

The Court did not seek to specify which of the customary rules indicated dealt with "received" customary
561 international law and which dealt with "emergent" rules, but I believe it to be true, and to be clear from other passages of the judgment which have been quoted, that the basic proposition that states have rights of exploitation in the continental shelf outside territorial waters was

accepted by the Court as an established rule of customary international law.

For the sake of completeness, I should mention one other development at the 1958 Geneva Conference on the Law of the Sea. I have been discussing the Convention on the Continental Shelf which was debated in the Fourth Committee of the Conference. The Third Committee, which dealt with Fishing and the Conservation of Living Resources, considered an article proposed by the International Law Commission as Article 60 of its draft, entitled "Fisheries Conducted by Means of Equipment Embedded in the Fl Floor of the Sea". (*Official Records of the Conference*, Vol. V, p. 134. The debate on this article is in the same volume at pp. 95ff. The text as adopted by the Committee is at p. 161.)

The topic was a special one on which the Indian delegation took a leading role in the discussion, explaining that "for centuries" their fishermen had used permanent equipment consisting of stakes and other items on the bottom of the sea coast near shore, where the waters were shallow. Other delegations expressed a comparable
562 interest. The text adopted shows the special character of this type of fishing and need not be confused with the discussion of the exploitation of shells, coral, sponges, etc. attached to the seabed. Article 60 of the draft adopted by the Third Committee of the Conference reads as follows:

"Article 60

1. The regulation of fisheries conducted by means of equipment embedded in the floor of the sea in areas of the high seas adjacent to the territorial sea of a State may be undertaken by that State where such fisheries have long been maintained and conducted by its nationals, provided

that non-nationals are permitted to participate in such activities on an equal footing with nationals except in areas where such fisheries have by long usage been exclusively enjoyed by such nationals. Such regulations will not, however, affect the general status of the areas as high seas.

2. Fisheries conducted by means of equipment embedded in the floor of the sea in this article means those using gear with supporting members embedded in the sea floor, constructed on a site and left there to operate permanently, or if removed, restored each season on the same site."

563 It will be noted that the right safeguarded here is one based exclusively on long usage. While it is true that a similar type of argument has been used in connection with the exploitation of the riches of the sea on the sea-bottom, Article 2 of the Convention on the Continental Shelf, is based, as the International Court stressed, on inherent right and does not depend on occupation, actual or notional. Article 60, above cited, assumes an actual occupation through fixtures on the bottom.

* * * * *

564 Q. You have referred several times to a long-established and generally acknowledged right of coastal sovereigns to the exclusive right to exploit (or to regulate the exploitation of) resources of the bed of the marginal sea, extending beyond territorial waters. Can you supply more detailed information as to specific cases where such rights have been asserted and recognized? A. The distinction between on the one hand, the rights of a state in the belt of territorial waters, both with respect to navigation and to fisheries therein, and on the other hand, the rights of a state to exploit any accessible resources of the seabed

adjacent to its coast, whether within or without territorial waters, has been recognized in international law over the centuries. Writer after writer has quoted with approval the statement of Vattel: "Who can doubt that the pearl fisheries of Bahrein and Ceylon may lawfully become
565 property?" (Vattel's *The Law of Nations* was published in 1758. The standard edition is Fenwick's translation in *Classics of International Law* (1916). The quoted passage from sec. 287 of that edition is reprinted in Crocker, *The Extent of the Marginal Sea* 457 (1919).) Vattel was extensively relied on by the Founding Fathers in the United States and by the Supreme Court. See Nussbaum, *A Concise History of the Law of Nations,* 160-162 (rev. ed. 1954). In relation to Vattel's authority during the early years of the United States, and in general in relation to that period's respect for international law, I call attention to Professor Edwin D. Dickinson's tabulation of the citation of the great classic writers on international law. Dickinson reports:

"While influences of this kind cannot be measured statistically, the following tabulation is at least a suggestion of the use made of classical treatises, and of the relative influence of the different publicists, in cases before the Supreme Court of the United States at the end of the 18th and the beginning of the 19th century. The figures are compiled from the first seventeen volumes of the court's reports, covering the years from 1789 to 1820. Eighty-two cases were found in these volumes involving more or less important questions of international law. The figures in parentheses indicate the number of instances in which the
566 publicist named was . . . quoted, or paraphrased . . . *Quoted or paraphrased* in opinion: Grotius (2), Bynkershoek (8), Burlamaqui (2), Ruthersforth (2), Vattel (22)." Dickinson, "Changing Concepts and the Doctrine of Incorporation"

26 *Am. J. Int. L.* (1932) p. 239 at 259, note 132. Other studies of a comparable character are cited by Nussbaum, *supra.*

The statement of Vattel is quoted, *inter alia,* in one of the most frequently cited modern articles on the subject of rights in the seabed, namely the article by Sir Cecil Hurst entitled"Whose is the Bed of the Sea?" 1923-24 *Brit. Y.B. Int'l. L.* 34. This was published long before the discussions which have been inspired by the Truman Proclamation of 1945. Sir Cecil Hurst, whose "Services to International Law" are described by Sir Eric Beckett, in XXVI *Brit. Y.B. Int'l. L.* 1 (1949), was elected a judge of the Permanent Court of International Justice in 1929. He served for fifteen years and was President of the Court from 1934 to 1936. At page 40 of his article, *supra,* he said that Vattel's statement:

"ceases to cause any dificulty to even the stoutest upholders of the principle that the limits of the territorial belt are not more than three miles if it is realized that the exclusive right to the pearls to be obtained from the banks flowed from the ownership of the bed of the sea
567 where the banks were situated, and not from any claim to maritime jurisdiction over the waters.

"The instances where ancient usage justifies a claim to sedentary fisheries outside the three-mile limit do not seem to be numerous, and of those which are known some appear to be situated in bays or gulfs which are claimed as part of the national territory by the State contiguous to whose shore they lie. For instance, the chank fisheries and the pearl fisheries in the Gulf of Manaar have been the subject of regulation by local ordinances, etc. throughout the nineteenth century. The pearl and chank fisheries in the Gulf of Manaar were claimed from early times by the successive Portuguese, Dutch and British

masters of the neighbouring territory, and there can be little doubt but that a good title to the ownership of these beds can be made out, based on long-continued occupation. Both the Gulf of Manaar and Palk's Bay, the two great bays which divide India from Ceylon and are separated from each other by the long stretch of islets known as Adam's Bridge, would probably be claimed as part of the national territory, and not part of the high seas at all. Palk's Bay at any rate has now been held by the Madras Courts to be an integral portion of the British Dominions and if the question arose a similar decision might possibly be given as to the Gulf of Manaar. Even
568 if it were not, however, the claim to the ownership of the pearl and chank beds in that gulf could be based on long usage and uncontested enjoyment; and the right to legislate with regard to these beds could be rested on the ground of their ownership.

"Another instance which can be cited, and one where there is no doubt that the site forms part of the high seas, is that of the oyster beds off the east coast of Ireland. By the Sea Fisheries Act of 1868 power was taken to issue an Order in Council enabling the Irish Commissioners to regulate the dredging for oysters on any oyster beds within a distance of twenty miles seawards from a straight line between Lambay Island and Carnsore Point. Some of these banks were between ten and twenty miles beyond the three-mile limit.

"The above are instances where the State interested formed part of the British Empire. The same principle must of necessity apply also to sedentary fisheries on banks claimed by foreign Governments. The Bay of Tunis has, for instance, claimed the exclusive right to the sponges on a bank outside the three-mile limit off the coast of Tunis by the continuous and unquestioned enjoyment of

the *fructus* of these banks. Such enjoyment would constitute a title to the bank which foreign States would no doubt recognise and would oblige their nationals to recog-
569 nise. Similarly, Mexico is said to have legislated for regulating pearl fisheries off the Mexican coast though outside the three-mile limit." (1923-24 *Brit. Yr. Bk. of Int'l. L.* 34, 40-41.) (Footnotes omitted.)

I have quoted Sir Cecil Hurst because his article is so widely known and because the passage quoted furnishes a ready reference to some of the more important evidence of international practice. However, Hurst's language may be read to imply, though it is not the only possible reading, that he regarded the continental shelf as *terra nullius* except for isolated instances where actual occupation had been established. For reasons I have already stated, I would disagree with such an implication.

I would observe that the type of example mentioned by Sir Cecil Hurst, and which I intend now to expand upon, all falls into the category of "international custom, as evidence of a general practice accepted as law," which Article 38 of the Statute of the International Court of Justice recognizes as a principle source of rules of international law. Given the absence, until very modern times, of a system of international adjudication, it has always been recognized that in the absence of treaty there is no better way of establishing an international right then to show a widespread practice by states of asserting and
570 exercising such a right, especially when coupled with an absence of protest by other states.

The British claim to oyster fisheries is not wholly clear. There were long disputes with the French over the oyster fisheries lying off Jersey and other channel islands. The early history of these disputes involved to a large extent the general problem of the extent of territorial waters; it

is thoroughly described in 2 Smith, *Great Britain and the Law of Nations* 144 ff. (1935). To some extent oyster fisheries were involved in the dispute between those two countries over the Minquiers and Ecrehos islets, upon which the International Court of Justice issued a Judgment on November 17th, 1953. This dispute involved a sifting of claims going back to feudal times. It touches on the Anglo-British Treaty of 1839 concerning the oyster fishery between Jersey and the neighboring French coast. The Court remarked: "The Parties had for a considerable time been in disagreement with regard to the exclusive right to fish oysters, but they did not link that question to the question of sovereignty over the Ecrehos and the Minquiers." ([1953] I.C.J. 47, 59.)

Sir Cecil Hurst's statement about the oyster fishery is supported by expert testimony given to a British Parliamentary Select Committee on Oyster Fisheries in 1876. The expert witness, John A. Blake, was then Inspector of
571 Irish Fisheries and had been Chairman of an 1868 Commission to study oyster culture in England and France. He testified:

"[W]hen I was a Member of this House, [House of Commons] I was to some extent instrumental, with the assistance of others, in getting a clause inserted in the Convention Act, which enables us to have a close season off the coast of Wicklow for 20 miles out, and that was subsequently confirmed by an Order in Council . . . so that those deep-sea beds extending from 12 to 15 or 18 miles are under the operation of a statutory close season." (Report from the Select Committee on Oyster Fisheries, etc. in *Reports from Committees,* Session 8 February-15 August 1876, Vol. XII, p. 166, 167.) (Maine et al. Exhibit No. 336).

The Sea Fisheries (Ireland) Act, 1868, authorized the Irish Commissioners to regulate the dredging for oysters on oyster beds seawards from a straight line between Lambay Island and Carnsore Point. The Act is 31&32 Vict. c.45. (Maine et al. Exhibit No. 337.) The British Argument in the Bering Sea Arbitration contends that the regulation of the Irish oyster fisheries was not applied to other than British boats, but admits that the Order in Council, mentioned by Blake, authorized application to foreign boats. If no other boats were specified it must have been that foreign fishermen respected the British close season; the
572 cooperative arrangements with the French at the time suggest this to be the case. (The British Argument is reprinted in 2 Smith, *supra*, at p. 410.)

Despite the ready acceptance of Vattel's dictum and reiterated references, particularly to the pearl fisheries of Ceylon and the sponge and coral fisheries of the Mediterranean, most of the many references to the justifiability of such claims to seabed resources outside territorial waters, such as Sir Cecil Hurst's language which I have quoted, fail to indicate how numerous and how varied were these seabed "fisheries." One need not give an encyclopedic account to demonstrate the acceptance of the international law respecting the coastal state's right to such resources. However, it should be noted that national claims have been established to such resources as edible oysters, pearl oysters, mother of pearl, chanks, amber, sponge and coral. I am not discussing so-called bottom fish or crustacea, like crabs which move about on the ocean bed, although their status was also discussed at the 1958 Geneva Conference on the Law of the Sea. But wherever a substance of value was attached to or growing out of the seabed, its exclusive utilization by the coastal inhabitants or authorities seems to have met with no international protest. This

statement is not invalidated by the fact that bargained
573 agreements between states for the use of fisheries, especially when the limits of territorial waters were controverted, at times included the edible oyster fisheries.

Although I do not attempt to collect and balance off all or even a great number of international law writers, I do call attention to the French jurist, Professor Gilbert-Charles Gidel, who many at the Geneva Conference on the Law of the Sea considered to have very great authority. Professor Gidel distinguishes between the bed of the sea and the subsoil beneath the bed, although it seems obvious that if one recognizes legal rights to the exploitation of the bed, as Gidel does, one would recognize rights to the subsoil *a fortiori*. Such recognition, indeed,is accorded by the history of the mines dug out under the seabed, as I will point out later. In a passage I have already quoted from the *North Sea Continental Shelf Cases,* the International Court of Justice said "the legal regime of the continental shelf is that of a soil and a subsoil. . . ." ([1969] I.C.J. 1, 51).

Gidel, as just stated, distinguishes between the bed of the sea and the subsoil beneath the bed (*le fond et le tréfonds*). (1 Gidel, *Le Droit International Public de la Mer* 507 ff. (1932).) He states that work on the bed of the sea necessarily causes some impact, however small, on the utilization of the high seas. However, he says this ob-
574 servation does not apply to the subsoil. He concludes that all state activities regarding the subsoil of the high seas are legal under international law if they do not involve any appreciable repercussion, actual or probable, on the bed of the sea. (*Id.* at p. 508.) He advances one other limitation, namely that they must not impinge upon comparable activities of other coastal states on some opposite shore. Apparently he holds that such subsoil operations of

state A should stop at the opposite border of the territorial waters of state B. In this connection he discusses various undersea coal mines (*Id.* pp. 510-511).

Gidel says that sedentary fisheries have not given rise to many difficulties in international practice and that such difficulties as have existed have been easily adjusted (*Id.* at pp. 488 ff.) He refers to the oyster fisheries off the coast of Ireland which extend beyond the three mile limit. As an exception to the fishery treaties between the United Kingdom and France, especially those of 1843 and 1867, provision was made to prohibit French participation in those fisheries. (*Id.* at p. 490-91.)

He discusses the fisheries off the coast of Tunisia, particularly the sponge banks and the coral, describing how they have been regulated by the Tunisian government without
375 serious international difficulties. (*Id.* at pp. 491-93.)

He also discusses the Ceylon fisheries, quoting liberally from Sir Cecil Hurst's familiar article, *supra*. He also cites Fulton, *The Sovereignty of the Sea* 697 (1911) (Maine et al. Exhibit No. 338) and Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 16 (1927), on the Australian fisheries. He is inclined to minimize the importance of the famous statement by Vattel, *supra*, (Gidel, *supra*, at pp. 496-7) and concludes that sedentary fisheries constitute an exception to the principle of the freedom of the sea. (Gidel, *supra*, at p. 500.) However, he does emphasize the importance of long use without objection.

I quoted Vattel's famous statement in my *The Law of Territorial Waters and Maritime Jurisdiction*, p. 14. (The translation I used has an unimportant variation from that quoted by Sir Cecil Hurst.) I discussed the Irish oyster fisheries, relying on the account in Fulton, *supra*, pp. 619-621. Fulton mentions at page 620 that "on the coast of

France a large area, extending much beyond the three-mile limit, was reserved to French fishermen on account of the valuable oyster-grounds it contained."

It is true that British claims to the pearl fisheries of Ceylon were bolstered in the 20th century by assertions
576 of a prescriptive right and by arguing that their locations in Palk's Bay or the Gulf of Manaar placed them in so-called territorial bays or "historic bays" where states have specially acknowledged rights. Hackworth quotes parliamentary materials to demonstrate this:

"With respect to the extent of jurisdiction claimed by Great Britain for pearl and chank fisheries the following extracts from the proceedings in the House of Commons, on May 2, 1923, are pertinent:

Mr. Trevelyan asked the Under-Secretary of State for the Colonies how far out to sea at the furthest point the prohibition of chank fishing reaches from the coast of Ceylon; and to what vessels the prohibition applies?

Mr. Ormsby-Gore: It is estimated by rough measurement that the line in the Gulf of Manaar mentioned in my reply to the hon. Member's previous question on this subject is at its furthest point 25 miles from the coast of Ceylon. The prohibition applies to all vessels of all nationalities and is imposed for the protection of the pearl banks which, as the hon. Member is aware, are located on the bed of the sea. Chanks are not strictly fish, but their shells are collected for ornament. The justification for this prohibition is based on rights over the fisheries enjoyed in uninterrupted and undisputed proprietorship by succes-
577 sive rulers, native, Portuguese, Dutch and British, since period prior to the development of the doctrine of the 3-mile limit.

Parliamentary Debates, H.C., 5th Ser., vol. 163, cols. 1417-1418. In an oral answer in the House of Commons

on May 30, 1923, the British Under Secretary of State for Foreign Affairs (McNeill) stated:

". . . . As regards the last part of the question, pearl fisheries stand on a different footing to the ordinary kind of fishing in the waters of the sea, because the banks where the pearl oysters lie must be treated as part of the bed of the sea. For many centuries the pearl banks off the coast of Ceylon have been claimed as subject to the sovereignty of the rules of the neighbouring territory and subject therefore also to their control. Some of these banks are more than three miles from the shore, but where they are situated under the high seas the claim to sovereignty and control is limited in extent to the area of the banks, and does not affect the rights of navigation or of ordinary fishing in the waters over the banks. (*Parliamentary Debates,* H.C. 5th ser., vol. 164, cols. 1261-1262." II Hackworth, *Digest of International Law,* 679 (1941).

But it appears that exclusive claims to the exploitation of
678 the pearl and chank fisheries were never challenged internationally, even when asserted by the Portuguese and the Dutch from about the sixteenth century, when the law on the territoriality of bays was by no means well defined. The earliest conflicts were over the adjacent lands, wrested, for example, by the Dutch from the Portuguese, and not over the pearl beds and banks themselves which had been claimed also by the native kings and princes of Ceylon and India. All the accounts indicate that from earliest times the pearl fisheries were a source of Government revenue, usually rented out by government for a stated fee or percentage of the take. At certain periods, governmental rights were exercised by the East India Company.

An old account of Ceylon tells how the Dutch specified their acquisition of rights to the pearl fisheries in a treaty

with the King of Candy. (Percival, *An Account of the Island of Ceylon,* (1803) p. 22; Maine et al. Exhibit No. 340, p. 22.) On the established usages regarding agreements with native Governments in Asia, see Keller, Lissitzyn and Mann, *Creation of Rights of Sovereignty Through Symbolic Acts 1400-1800* pp. 6 ff. (1938).

The criterion of exclusivity was essentially that of exploitability. The early accounts are concerned largely with the depth of the water and the diving capacities of the native divers, rather than with the distance of the pearl
579 banks from shore. But the Ceylon pearl fishery's principal bank is said to have lain "out at sea about twenty miles." (Maine et al. Exhibit No. 340, p. 60.) Others are described as "on the bottom of the sea from ten to twelve miles or more from the shore." Steuart, *An Account of the Pearl Fisheries of Ceylon* (1843) (Maine et al. Exhibit No. 341, p. 7).

In a "Report on the Pearl Banks . . . to His Excellency Jan Schreuder, Governor and Director of the Island of Ceylon," 20th June 1757 (Appendix to Steuart, *supra*, p. 37 ff.), it is stated that "the exact situation of the Manaar banks is known only to the Master Attendant of Jaffna . . . and that with the exception of that person there are none here who could point out the Reef." (S.A. Hemme, "Report on the Pearl Banks of Ceylon," 20 June 1757, in Appendix to Steuart, *supra*, pp. 37, 39, Maine et al. Exhibit No. 341, p. 39.) It is further stated that certain banks are "farther out in the sea . . . by 12 or 13 and 14 fathoms." (*Id.*) At another place it is said that a certain bank was situated "to the depth of 6, 7, 8 and 9 fathoms" and was "9 miles in circumference". (*Id.* at pp. 39-40.) The report further states that certain "reefs . . . lie too far from the Company's [Dutch East India Company's] nearest shore, insomuch that a whole day is required for

the purpose of going to and from this spot, consequently
580 I think it advisable, in order to avoid all unnecessary broils with the Court of Kandy, to dispense in future with the inspection" of the banks in question. (*Id.* at p. 40). The earlier rights of the "Court of Kandy" were unquestioned. (*Id.*).

Steuart's Appendix also includes an "Extract from Mr. McCulloch's Commercial Dictionary. Article 'Pearls'," (*Id.* at p. 76), which describes the pearl fisheries of the Persian Gulf. The main banks are said to be "not far distant from the Island of Bahrein, on the West side of the Persian Gulf, in lat. 26 50' N. lon. 51 10' E. . . ." (*Id.* at p. 77). Other oysters "are fished in the sea near the islands of Karrak and Corgo . . ." but there "the water is too deep to make fishing for them either very profitable or easy. Besides, the entire monopoly of the fishery is in the hands of the Sheik of Bushire, who seems to consider these islands as his immediate property." (*Id.*) There is a description of the diving in water "about 7 fathoms deep." (*Id.*) The same article refers to valuable pearl fisheries on "the Coast of Columbia" (*sic.*) as well as off Panama, and says that "the best fishery ground is said to be in from 6 to 8 fathoms water." (*Id.* at p. 78).

An extract from Robertson's Report on Ceylon Affairs
581 to the English Secretary of State for the Colonies in August 1799 is included in the Appendix. (*Id.* at pp. 83-91). Here it is said that there are fourteen banks from which pearl oysters are taken and that they are "in a space extending from North to South forty miles, and from East to West about 24 miles in the part that is the broadest, and in a depth of water that varies from three to fifteen fathoms." (*Id.* at p. 83). Reference is made to the fact that "ever since the conquest of Ceylon" by the British there had been arrangements designed "to draw as

great a revenue as possible from" the oyster fishery. (*Id.*). Figures are given for the revenue thus derived by the British Government from 1796 through 1798. (*Id.* at p. 88). There is further reference to an historic claim to a share in the fisheries by "the Nabob of the Carnatic of one sixth, as Lord Paramount." (*Id.* at p. 90). It is recommended that some small vessels "well manned and armed with a few guns" be stationed permanently to keep the banks from being plundered and disturbed "and to guard the fishery from being interrupted or molested by any French cruizers that might run up the Gulf of Manaar." (*Id.* at p. 91). This last point does not suggest that France disputed the British right to claim the pearl fisheries; England and France were at war at the time of this report.

582 Lee's report to the Colonial Secretary in 1838 (*Id.* at pp. 99-103) gives some of the background history of the pearl fisheries of Ceylon. It refers to the origin of the Portuguese establishment in the area in the 17th century, and indicates evidence that the Portuguese "kept for themselves the *pearl fisheries*". (*Id.* at p. 99). It then recites that in 1658 the Dutch took the territories from the Portuguese: "By this success the Dutch Company [The Dutch East India Company] succeeded to the rights, previously possessed by the Portuguese, 'over the Coast, as well as to their authority over the seaports, the Christinas, the *Pearl fisheries* and all thereunto appertaining . . .'" (*Id.* at p. 100). The Dutch held their first pearl fishery in 1667-8, a second in 1669 and a third in 1691, etc. (*Id.*) It thus appears that the only disputes over rights to share in the pearl fisheries were those between the European conquerors and certain native rules and religious orders which claimed traditional rights to some form of tribute.

In *Ceylon Marine Biological Reports*, Part V—March 1911 (Maine et al. Exhibit No. 342), conducted by the

Ceylon Company of Pearl Fishers Limited, apparently for the British Government of Ceylon, it is said that "the Ceylon pearl banks cover an area of over 700 square miles . . ." (*Id.* at p. 191). ". . . In Ceylon the oyster thrives best
583 in the open sea, in about 6 fathoms." (*Id.*) "[T]he Ceylon banks lie scattered about on a shallow water plateau, bound on the east by the mainland and on the west by the overfalls (100-1,200 fathoms) . . . The Distance between a point midway between Tuticorin [on the Madras coast of the mainland] and Cape Comorin and the pearl banks is approximately 100 miles." (*Id.* at p. 192). Another bank is described as "about 11 miles long by 1½ miles broad, situated on the very edge of the overfalls, 18 miles from land. . . ." (*Id.* at p. 201).

Various pearl fisheries are described in Tressler and Lemon, *Marine Products of Commerce* (2d ed. rev. and enlarged, 1951). (Maine et al. Exhibit No. 343). The pearl fisheries of the Persian Gulf, which were then (1951) regulated by the British, are said to have been fished for some 2,000 years. "Only 35 per cent of the genuine pearls of the Persian Gulf come from the waters around Bahrein. Kuwait to the north and the Trucial Oman Coast to the south supply the remainder." (*Id.* at p. 108). The distance from shore is not stated but it is said the divers descend to depths of 60 feet. (*Id.*). The Ceylon fisheries are described as being in the Gulf of Manaar, "a 65 to 150 mile-wide arm of the Indian Ocean, separating the island of Ceylon from the southermost part of India." (*Id.*).
584 These fisheries "are almost an ancient as those of the Persian Gulf; they are alluded to in Singhalese records as early as 550 B.C. and Pliny wrote of them" (*Id.*).

Another scientific account entitled "The Tinnevelly Pearl Fishery" was given by Clements R. Markham to the Society of Arts (15 *Proceedings of the Society*, 256 (1867))

(Maine et al. Exhibit No. 344). Markham describes in some detail ancient records of the pearl fisheries between India and Ceylon, indicating that these pearl fisheries had been worked from time immemorial. He describes the Portuguese, Dutch and English successive controls of this fishery, and he reports that the various government realized very substantial profits. (*Id.* at p. 256). He says: "The pearl oyster banks, which are very numerous, lie off Tuticorin and Trichendoor; and are about six to eight miles from the shore, and from five-and-half to eight-and-half fathoms from the surface." (*Id.* at p. 257).

Markham reports an 1865 communication from a Col. Pelly, who was the political resident in the Persian Gulf, concerning the Bahrein pearl fishery, which states that the Persian Gulf pearl banks "are the property of the Arabs in common, but no foreigner is allowed to fish them. The richest are those of the island of Bahrein, which are
585 found at all depths, from a little below high-water mark to eighteen fathoms." (*Id.* at p. 259). It is reported that these fisheries have been worked "from the most remote times." (*Id.*).

In the discussions which followed Markham's lecture, another participant described the mother-of-pearl fisheries in the Persian Gulf, the Red Sea, the Gulf of Panama and the Gulf of Mexico. These were also said to be of considerable value. (*Id.* at pp. 261-62).

Tressler and Lemon describe other pearl fisheries; those in the Red Sea have been exploited since centuries before the Christian era. (Maine et al. Exhibit No. 343, p. 109). Pearl fisheries off Venezuela date back to 1500 A.D. (*Id.*). The Spanish became aware in 1526 of the richness of the Panama pearl fisheries on the Pacific Coast. "The principal reefs and headquarters of the fishery are at Archipelago de las Perlas, or Pearl Islands, situated from 30 to 60

miles southeast of the Pacific terminus of the Panama Canal." (*Id.*). The pearl fisheries off the Paficic coast of Mexico, which were very rich, were reported to the Spaniards by Cortes. (*Id.*).

Tressler and Lemon also mention the Australian fisheries but I will deal with them later, using other sources.

586 Tressler and Lemon also describe other sub-sea resources, namely coral and sponge. (*Id.* at pp. 141-46, 733, 746-51). Coral, which was used "for personal adornment" at least as early as the third century B.C. was described by Greek writers and was much used by the Romans, who took coral near the present Hyeres and Lipari Islands and off the coast of Trapani in Sicily. (*Id.* at p. 141). Coral is also found in Japanese waters and around Formosa and the Pescadores. (*Id.* at p. 143). In the Mediterranean, important coral banks are located on the Algerian and Tunisian coasts. They extend: "eastward from Cape Ferro (Cap de Fer) toward Cape Bon, and in a southerly direction to the Gulf of Gabes in the region of Sfax. The coral fisheries are carried on at 6 or even 8 miles from shore and at depths between 90 and 900 feet . . . In those regions the fisheries have been carried on for centuries." (*Id.* at pp. 142-43).

Off Sicily the coral banks are said to be at an average depth of 650 feet. (*Id.* at p. 143). In the Red Sea "there is a black coral fishery extending for 50 miles north and south." (*Id.*). There are also Japanese coral fisheries 30 to 100 fathoms under the surface (*Id.* at p. 144), and some in deep water off the coast of Southern California. (*Id.* at p. 143).

587 Although the right to exploit coral, like other sub-sea riches, was internationally acknowledged as a right which states could acquire and hold, there were international conflicts over coral fishery ownership similar to those through

which the ownership of the Ceylon pearl fisheries passed from native princes to Portugal, to the Netherlands to England. The *Encyclopedia Britannica* describes the disputes as follows:

"From the middle ages downwards the securing of the right to coral fisheries on the African coasts was an object of considerable rivalry among the Mediterranean communities of Europe. Previous to the 16th century they were controlled by the Italian republics. For a short period the Tunisian fisheries were secured by Charles V. to Spain; but the monopoly soon fell into the hands of the French, who held the right till the Revolutionary Government in 1793 threw the trade open. For a short period (about 1806) the British Government controlled the fisheries, and now they are again in the hands of the French authorities. Previous to the French Revolution much of the coral trade centered in Marseilles; but since that period, both the procuring of the raw material and the working of it up into the various forms in which it is used have become peculiarly Italian industries, centering largely in Naples, Rome and Genoa. On the Algerian coast, however, boats not flying the French flag have to
588 pay heavy dues for the right to fish, and in the early years of the 20th century the once flourishing fisheries at La Calle were almost entirely neglected." 7 *Encyclopedia Britannica,* 131 (11th ed. 1911).

The same historical account is given in Italian in Bini and Maldura, *Ptccola Bibltoteca di Pesca: La Pesca Della Spunge E Del Corallo* 77 (1938).

With further reference to the modern tendency to support the British claim to the Ceylon pearl fisheries by asserting that the Gulf of Manaar and Palk's Bay are "territorial bays," it must be noted that pearl fisheries, although not as rich as those of Ceylon, are also found

along the west coast of India, south of Bombay and up as far as Karachi (now Pakistan). No such justification is adduced as to these fisheries, but a quite abundant literature seems to make no reference to any international challenge to the exclusive exploitation of those fisheries by the coastal populations. (Kuns and Stevenson, *The Book of the Pearl* 128-136 (1908); Maine et al. Exhibit No. 345, pp. 128-136). I think this is significant even though exact data as to these fisheries' distance from shore are not available to me. The same remark – *i.e.*, the lack of central importance of the existence of a territorial bay – may be made about many of the other seabed fisheries
589 to which I refer. As to the argument based on immemorial usage without objection, most of the scholarly accounts do not suggest the date at which the usage commenced or whether there was acquiescence from the outset before there had been a significant lapse of time. As already suggested, the attitude of the European powers regarding their "inheritance" of rights of native princes was highly ambivalent and reliance on the native practices was invoked when helpful and not otherwise. The most rational explanation is that coastal exploitation of seabed resources was from the outset considered to be reasonable and this practice crystalized into law.

In the Mergui Archipelago, off the southwestern tip of Burma, administered by the British after 1826 as part of India, valuable pearl fisheries are "scattered over an area roughly computed at 11,000 square miles . . . " (*Id.* at p. 133). These were originally fished by the primitive peoples who inhabited the shores. The British divided the area into blocks, which were leased to fishing companies or groups. "Rights to catch trochus, green snail shells, and sea-slugs, were included in the lease." (*Id.* at p. 136). Extensive pearl fisheries in the Red Sea and

Arabian Gulf are conducted under the dominance of Hindu traders. Exact data concerning location and distance from shore are not available to me. We do know
590 that the divers operate in terrible danger from sharks, devil-fish, sawfish and giant clams. (*Id.* at pp. 144, 153-55).

The pearl fisheries off the American coasts were a great source of riches for the Spaniards in the 17th century. In later times they have been controlled by the governments of Colombia, Venezuela, Panama and Mexico. Foreign companies and expeditions were apparently allowed to operate upon payment of a fee to the local government. In 1857, the Mexican Government, for example, divided the Gulf of California into four pearling districts, which were leased to the highest bidders. In 1884 the Mexican Government started granting exclusive concessions in consideration of a royalty and an export duty. (*The Book of the Pearl, supra,* pp. 230 ff., deals with the American pearl fisheries.) (Maine et al. Exhibit No. 344, pp. 230 ff.)

In 1927, the Chairman of the International Fisheries Commission, United States and Mexico, asked the Department of State "as to what would be considered the high seas in the Gulf of California." The Department replied that "the width of the Gulf leaves little doubt that it should be regarded as part of the open sea, with exception, of course, of the inside, marginal belts of territorial water." (1 Hackworth, *Digest of International Law* 708 (1940).)

It seems desirable to present a multiplicity of evidence
591 concerning the unchallenged right of coastal states to exploit the riches of the ocean beds off their shores, including those outside territorial waters, which are therefore under the high seas. I do this in order to dispel the impression which some writings might create that such rights

to the seabed and subsoil depend upon the location in bays, or upon "occupation" or even on immemorial usage. In regard to this concept of immemorial usage as an alleged source of rights under international law I have already noted the European powers seemed to acknowledge that East Asian native rulers had something recognizable as sovereignty which they could transfer. Thus, perhaps the Portuguese, Dutch and English acquired prescriptive rights in Ceylon and India from the native authorities. However, this is not true of other Asian seabed fisheries nor of others in the Americas and elsewhere.

In numerous areas of the Pacific, pearl fisheries including mother-of-pearl, were considered an exclusive proprietary right of the inhabitants of the coast. There is a graphic account of such fisheries off the Sulu Archipelago in the Philippines which were claimed by the Sultan of Sulu. These fisheries were known to the rest of the world 400 years ago. Magellan "reported them to be among the prized possessions of the natives. The pearl-oyster reefs
592 extend from Sibutu Pass to Basilan Strait and roughly cover an area of 15,000 square miles." (Maine et al. Exhibit No. 343, p. 110). After the Spanish-American War, the United States authorities interdicted all pearl fishing within three marine leagues of land except by licensed vessels. Licenses could be issued only to vessels owned by citizens of the United States or natives of the Philippine Islands, although foreign vessels which had fished there in the year immediately preceding could be licensed for five years. (See Maine et al. Exhibit No. 345, pp. 213-17.)

There has been considerable discussion of the pearl fisheries off Australia and New Guinea, but the actual nature of the British claims over the fisheries is not wholly clear. I reached this conclusion in my 1927 book *Territorial Waters, supra,* and I find that later and more detailed

accounts have not cleared away all the uncertainties. The pearl fishery off the coast of Australia originated about 1861 with pioneering activities of an American sailor; it does not seem, like the fisheries of Ceylon and the Persian Gulf, to have been an ancient native monopoly; rather, Australian blacks seem to have been pressed into service and trained as divers. Other divers were brought over from the Malay peninsula and Indonesia. Licensing
593 began at different periods in different areas, the first being in 1886 in Western Australia. (*Id.* at pp. 201-07). Japanese fishermen were numerous after 1891. Estimates of the extent of the Australian fishing grounds vary but at least one source says they extended in irregular patches over a distance of 3,000 miles. (*Id.* at p. 199). D.P. O'Connell in his *International Law in Australia* 279 ff. (1965) refers to regular operations off the northwest coast of Australia "as early as 1851." But he says that the licensing system instituted in 1886 was not enforced against foreign vessels operating outside territorial waters – this following the advice of the Law Officers. This restriction may have had a constitutional rather than an international law basis since, O'Connell writes, Malay and Indonesian divers had engaged in this fishery "from time immemorial" and without formal protest. The Japanese fished since at least 1935, similarly without protest. Nor is it clear from what O'Connell writes that later proclamations of rights to the continental shelf were based on ancient claims. Hackworth discussed the western Australian pearl fishery as follows:

"In a despatch of August 23, 1923 the American Consul General in London informed the Department of State as follows:

594 '. . . I continued my investigation of this matter and I now find that not only is a very extensive maritime

jurisdiction claimed along the coast of Ceylon and Madras but this is also the case in other parts of the world where pearl fishing is undertaken. I have ascertained particularly that along the coast of Western Australia jurisdiction is claimed and exercised at great distances from the coast, apparently, as much as fifty miles. It appears to be the fact, moreover, in relation to Western Australia that non-Australian pearl fishers objected to this extensive jurisdiction whereupon a long controversy ensued and in the result the Colonial Office in London upheld the position of the government of Western Australia.

'While definite information is not at present available respecting every British possession, I believe it to be the case that, throughout the world, wherever there are valuable pearl fisheries, the government concerned claims jurisdiction over the marine areas where such fisheries can be carried on not only to the distance out to sea where actual operations are undertaken but to wide reaches of the open sea beyond, the object being to deal effectively with poachers and to prevent them from gaining access to the pearl beds themselves.' (Consul General Skinner to Secretary Hughes, no. 15676, Aug. 23, 1923, MS. Department of State, file 811.114/1884).

595 "On September 17, 1923 the Consul General reported that further research of the subject revealed that the official boundaries of the State of Queensland 'now extend to the coast of Papua, a distance of over 100 miles from the Australian coast.' There was enclosed with the despatch the following memorandum prepared by Consul Reed, under date of September 17, 1923, entitled 'The Three-Mile Limit and British Australasia':

'. . . In 1879 an Act called "The Queensland Coast Islands Act" was passed which provided for the annexation by Queensland of certain islands in the straits lying between

the Continent of Australia and the Island of New Guinea. The official description of the territory thus annexed to Queensland is as follows:

"Certain Islands in Torres Straits and lying between the Continent of Australia and Island of New Guinea that is to say all Islands included within a line drawn from Sandy Cape northward to the south-eastern limit of Great Barrier Reefs thence following the line of the Great Barrier Reefs to their north-eastern extremity near the latitude of nine and a half degrees south thence in a north-westerly direction embracing East Anchor and Bramble Cays then from Bramble Cays in a line west by south (south seventy-nine degrees west) true embracing Warrior Reef Saibai and Tuan Islands thence diverging in a north-westerly direction so as to embrace the group known as
596 the Talbot Islands thence to and embracing the Deliverance Islands and onwards in a west by south direction (true) to the meridian of one hundred and thirty-eight degrees of east longitude."

'From the attached map of Queensland, which has been obtained from the Agent General for Queensland in London, it will be perceived that the official boundary of Queensland extends much more than three miles out to sea and at a point north of Torres Straits touches the mainland of Papua. Apparently, the islands annexed in 1879 lie just off the coast of Papua, which it itself a territory of the Commonwealth of Australia. The distance between the coast of Queensland and that part of the Island of New Guinea called Papua, is over 100 miles.

'The Commonwealth of Australia is at the present time administering the former German portion of New Guinea known as Kaiser Wilhelm's Land, as well as the former German Islands lying south of the equator, under a mandate from the League of Nations. A reprint from

the Official Year Book of the Commonwealth of Australia for 1922 is attached to this report and is entitled: "The Territories of the Commonwealth," and contains an official map of these mandated districts as well as of the Australian territory of Papua. The boundaries of each territory are defined by sea as well as by land. It appears to be the case that jurisdiction is in many cases claimed
597 to a distance of scores of miles from the coast.' (Consul General Skinner to Secretary Hughes, No. 15773, Sept. 17, 1923, MS. Department of State, file 811.114/1971. With respect to the pearl and chank fisheries of Madras and Ceylon, see Consul General Skinner to Secretary Hughes, No. 15630, Aug. 14, 1923, *ibid.* 811.114/1850." II Hackworth, *Digest of International Law* 677-79 (1941).

One commentator seems clearly to base the limitation to foreign vessels in territorial waters on the question of the competence of colonial legislation. (Goldie, "The Occupation of the Sedentary Fisheries off the Australian Coasts." 1953 *Sydney L.R.* 84, 90). He says also: "Submarine areas, by their nature, should not necessarily be subjected to the same legal regime as the waters of the high seas. These waters are primarily a highway of commerce and for this prupose are most useful when open freely to all. But the utility of submarine areas is of a wholly different character." (*Id.* at p. 85).
Goldie emphasizes "occupation" as one basis for claims to submarine areas. That basis, which was asserted by the British in the Bering Sea Fur Seal Arbitration, was shown to be unsound.

598 On the question of the manner of acquisition of subsoil rights, I think a sounder view is expressed in the International Law Association's Committee Report in 1950 on "Rights to the Sea-Bed and its Subsoil" (Report of the Forty-Fourth Conference, Copenhagen, 1952, p. 87 at p. 90). In the words of the Rapporteur, Jonkheer P.R. Feith:

"The theory that not only the waters of the high seas should be regarded as 'res communis' but that also the sea-bed and its subsoil (I am hence forth speaking solely of the sea-bed and its subsoil outside territorial waters) are 'res communis,' 'res extra commercium,' still satisfies very few people.

"It is certainly very tempting, now that the sea is regarded as a 'res extra commercium,' to postulate that the sea-bed and its subsoil are also 'extra commercium' and 'communis omnium.' But we must not allow ourselves to be blinded by this temptation into maintaining, without further examination, that international law classifies the sea-bed and its subsoil as a 'res communis' and puts them on all fours with the waters of the sea.

"The facts indicate otherwise.

"At all times and in many parts of the world coastal states, have, without incurring any protests, undertaken the development of sea-bed and subsoil resources lying outside
599 territorial waters, whenever this was technically possible.

"As soon as technical progress is so far advanced that, in spite of the depth of the sea, the sea-bed or its subsoil can usefully be developed, no-one in practice is prepared to assert that the mineral or other resources to be obtained from the sea-bed and its subsoil by such development are resources belonging to the community of nations, which no state or individual can or may appropriate. Such sea-bed and subsoil resources have always found an owner, in spite of the view of many writers that the sea-bed and its subsoil are 'res communis.'

"And there can be no doubt that international law has sanctioned such appropriation, even though it is in conflict with the idea of 'res communis.'"

I would add here two comments by delegates to the 1958 Geneva Conference of the Law of the Sea – one by the Argentinian and the other by the British Delegate:

"For centuries past, the activities of States had been carried out on the sea-bed outside the limit of the territorial sea – *e.g.*, in the case of sedentary or permanent fisheries. Another important case was the exploitation of mines that ran out from the coast under the sea. For that reason, the right of States to occupy part of the subsoil had had to be recognized, since there was no rule in positive law prohibiting such action. . . .

600 "For a considerable period, the problem of the continental shelf had escaped the attention of international law, but the reason for that was that technical progress had not revealed the possibilities of exploitation of its natural resources. A similar situation had arisen in regard to the law of the air, but there the principle of sovereignty had achieved full recognition and was established in international law. The Argentine delegation, therefore, considered that the approach to the problem should be reversed; the article should first assert the sovereignty of the coastal State over the continental shelf and then proceed to limit that sovereignty." (Extracts from remarks of the representative of Argentina, Fourth Committee U.N. Conference on the Law of the Sea, Vol. 6, pp. 2, 3.)

"On the other hand, it should be remembered that the International Law Commission had agreed that living organisms permanently attached to the bed of the sea should be covered by the regime of the continental shelf. Moreover, in practice coastal State [*sic*] had *de facto* rights in respect of certain living organisms, such as pearl-oysters, sacred chanks (*turbinella pyrum*) and Waxford oysters, outside its territorial sea. His delegation thought it would be wrong to abolish such rights. It would be better to embody them in the international code which
601 the Conference had been convened to draw up." (Extracts from remarks of the representative of Great Britain, *id.* at p. 61, Para. 39.)

Q. Are there further data available to indicate that seabed fisheries outside of territorial waters were controlled and subjected to regulation by the coastal states? A. Yes, I will briefly refer to some other sources which will so indicate. The items include indications of the distance from shore at which various seabed fisheries (pearl, coral, sponge, etc.) were operated. In many instances, as already noted, the accounts do not specify such distances, but I believe the data are sufficient to establish the fact that such fisheries were carried on outside the three-mile limit. It is clear that some of the fisheries were operated close to shore in shallow water, but indications of the size of the fishing fleets, the length of time boats stayed out and the depth at which some fishing was done, lead me to conclude that at least many of these fisheries were deep-sea fisheries. All the technical and scientific accounts I have examined show that what we usually call "fisheries," that is for swimming fish, seals and whales, etc. are treated quite separately from those of the seabed or continental shelf.

Other items indicate that seabed fisheries were under the control of authority of a coastal State which exacted fees, granted concessions, or regulated seasons or methods
602 of fishing, and the like. Although, as I have said, there are instances of rival claims to such fisheries, the evidence is convincing that international practice recognized the right of coastal states to take jurisdiction over them.

The French Government nurtured the coral industry from the 16th century, mostly in the Gulf of Stora (Algeria). It seems to have been an "exclusive privilege" from at least 1750 until 1791 when the Italians came in. Under an ordinance of 1844, foreign boats paid annual fees of 800 francs; French boats were free. The coral which was found at depths ranging from 200 to 600 feet, was most

abundant off the coasts of Corsica, Sardinia, Provence, Africa, near Trapani and the Straits of Messina. (3 *The Technologist* 372-73, 375, 377 (1863); Maine et al. Exhibit No. 346, pp. 373, 375, 377).

An 1862 account states that the Mediterranean coral fishery "used to be . . ." (no date given) carried on largely by the Trapanese of Sicily who went to Bona (Bône) off the coast of Africa. La Calle (Constantine), in Algeria is another source, "now the principal" one. The number of boats fishing coral off Algeria varied: only 62 in 1832; 245 in 1836; 156 near Bône and Calle in 1853. An account is mentioned of "some years ago" in *the Atheneum* 603 which tells how the fishermen paid a fee for an endorsement by the consul at the port nearest their fishing grounds. (2 *The Technologist* 20, 22 (1862); Maine et al. Exhibit No. 347, p. 22).

Because there are many similarities between the coral and the sponge fisheries the latter may be appropriately dealt with here in somewhat summary fashion.

As of 1948 there were Cuban sponge fisheries which had been active since the 1880's, mainly in the Batabano area between Cuba and the Isle of Pines. Most of the bottom is only 3 to 6 fathoms deep. Cuba regulated by law the size of sponges which might be taken. (U.S. Dept. of Commerce Industrial Series No. 82, "World Trade in Sponges," by A.H. Stuart (1948), pp. 43 ff., Maine et al. Exhibit No. 348.)

The sponge industry in the Bahamas dates from 1841. Sponges are taken at depths of 3 to 24 feet. The season is regulated by the government. (*Id.* at p. 56).

The same source indicates that British Honduras' sponge industry centered at Turneffe Lagoon about 30 miles east of Belize. The government began an effort to cultivate sponges in 1926, from which it withdrew in 1939. It

granted private concessions from 1929 for sponge fishing. A 1945 statute prohibited sponging in the Turneffe area for
604 5 years except under license from the Governor. (*Id.* at pp. 60-62).

Greek sponge beds are scattered over the Aegean Sea, Sea of Candia and Gulf of Salonika. In addition, the Greek fleet fishes the sponge beds from Egypt to Tunisia, often going as far as Tangiers. The Greek government started in the 1940's to enforce safety regulations to protect the health of sponge divers. (*Id.* at p. 66).

Egypt's sponge fishery has been described as "Egyptian only in the sense of its geographic location." (*Id.* at p. 75). Foreign companies fish in the Mediterranean waters under special licenses issued by the Department of Fisheries. Egypt has claimed the right to regulate fishing and sponge fishing in the Bay of El-Arab..

"This bay (in northern Egypt), which is only eighteen miles in depth, is seventy-five miles wide at its opening into the sea. In its reply to Questionnaire No. 2 (1926) of the Committee of Experts for the Progressive Codification of International Law, the Egyptian Government stated that 'the extent of Egyptian territorial waters was fixed at three miles by the Decree-Laws of 21 April 1926 on Fishing and Sponge-fishing, except in the Bay of El-Arab, the whole of which, according to the Decree-Law on Sponge-fishing, is included in the territorial sea.'

605 "Articles 1(b) and 4(a) of the Egyptian Decree of 15 January 1951 provide that the inland waters of Egypt include the waters of all bays along the Egyptian coasts, without specifying any limit.

"The British Government protested, through the diplomatic channel, against this Decree, stating that it was unable to accept it as being in conformity with the rules of international law. In its note of protest, the British Government pointed out that no historic bay "is situated in

Egypt.' " (U.M. Doc. A/CONF. 13/1 p. 17, footnotes omitted).

Libya has a sponge fishery, with some of its best producing beds as much as 20 miles from shore. (*Id.* at p. 77). The fishermen come from Greece, Italy, and other countries. "Prior to World War II, the sponge fishermen were permitted to gather sponges in Libyan waters upon payment of a small fee to the local port authorities. Since the beginning of 1946, the British authorities have required £50 per season for each boat." Other regulations were also enforced. (*Id.*).

An early *Scientific American* article describes injuries to men diving in the "skafander" apparatus and also the exhaustion of sponge banks. It indicates that the use of the skafander was prohibited by authorities of Samoa, Crete and Cyprus and also "the governments of Italy and France,
606 the latter acting on behalf of Tunis." *Scientific American*, August 2, 1902, p. 67; Maine et al. Exhibit No. 349. See also *Piccola Biblioteca di Pesca, supra*, pp. 40 ff.

The article states that the Turkish government collects license fees from boats, depending in amount on the fishing methods used. A closed season was also proposed, but not enacted in law. (*Id.*).

Smith, in his *Great Britain and the Law of Nations, supra*, Vol. II at p. 118, quotes from Sir Cecil Hurst's article and then adduces some official opinions of the Law Officers of the Crown. I quote from p. 119 and following; although I would say that Sir Travers Twiss anticipated by several decades the rule that a bay could be claimed only if the headlands were not more than ten miles apart: "The examples cited by Sir Cecil Hurst of such occupation outside the three-mile limit are the Gulf of Manaar and Palk's Bay, separating India from Ceylon, the sponge beds off the coast of Tunis, beds of pearl oysters off the Mexican coast, and

oyster-beds in St. George's Channel. The last-named are regulated by a British statute, the Sea Fishermen Act of 1868.

"Without recapitulating the arguments used by Sir Cecil Hurst it may be of interest to give some supplementary evidence. We may begin with the following opinion of
607 Robinson, dated 9th February 1826, and addressed to Canning: –

'I am honoured with your Commands signified in Mr. Planta's Letter of the 6th Instant transmitting a Letter from the Colonial Department, enclosing Letters from the Consul General at Algiers respecting the detention of two British Vessels for interfering with the French Coral Fishery on that Coast; And you are pleased to request that I will take the same into consideration and report my opinion thereupon, with reference to my former report on the same subject.

'In obedience to your Commands I have the honor [to report] that the accuracy of any representation that could be made in favor of these Vessels, is so much prejudiced by the false assertions of the Masters respecting their employment, which the Consul General at Algiers admits to be untenable, that it would not be advisable I think to interfere to request any favor from the French Government in their behalf.

'There appear to be exclusive Coral Fisheries enjoyed under Grants from the Bey of Tunis, by French and English Companies on the Coast of Barbary at the distance of Ten or fifteen Miles from the Shore–The title to these exclusive privileges might perhaps be questionable. But the French regulations, so far as they have been described appear not to be unreasonable. They permit Individuals of all Countries to fish, within the Limits
608 on payment of a certain Sum. Interlopers are required to pay double, and may then fish freely, subject to the rules

of the French Fishery. It is probable that the Grant to the English Company is protected by similar regulations, and it would not be advisable to raise any question on the subject.'

"This opinion relates to an incident which had taken place the previous summer. No further action was taken, since the vessels concerned (the *John* and *Harriet* and the *Julia*) had already been released under an arrangement made between the French authorities and the local agent of the English company. By this agreement the company undertook to 'satisfy any demand that may be adjudged due for the trespass by any competent tribunal', and it was further agreed that the final settlement of the affair should be left to the two governments. But in the light of Robinson's opinion the matter was allowed to drop.

"From a letter addressed to Lord Granville by the Consul at Tunis (2nd May 1826) it appears that the company had been granted permission to fish 'along the whole coast, at the same time defining it to extend from the Island of Jerbe Eastward to Cape Roux on the West.' The two cutters previously referred to had been arrested for transgressing these limits. Subsequently the Bey of Tunis was induced to extend the westward limit from
609 Cape Rosse to Cape Roux, and the company appears to have delegated its privileges by granting licenses to other vessels of various nationalities. In July, 1826, one of these vessels was fired upon by a French brig, and the incident elicited the following opinion from Robinson (26th July, 1826):

'I am honoured with your Command signified in Mr. Planta's Letter of the 20th Instant, transmitting a Letter from Mr. Thomas Hamlet, respecting a Sardinian Vessel which was captured by a French Ship, while fishing under a British License; and respecting the proceedings of

Sir Thomas Read relative thereto: – And you are pleased to request . . .

'In obedience to your Commands I have the honor to Report, that it may be questionable how far British Subjects could lawfully, without the sanction of their own Government, become Grantees of Territorial Rights of Foreign Princes, to be exercised in the form of exclusive privileges, on the Sea, against other Nations; or as may happen, against their Fellow Subjects, and their own Government. – The inconvenience of such a practice is manifest, in the consequences detailed in these Papers. The British Subjects, become, in turn, Granters of subordinate Licenses to Individuals of other Nations; and a sort of Tribute is paid to them, for Fishing in the sea. This pretension is exercised under representations, which have led
610 to great loss to the Foreign Individuals, and have become the subject of application to His Majesty's Government, in a form that may eventually involve questions respecting the Territorial limits of Sovereignty of the Bey of Tunis, and the Dey of Algiers . . . .

'Referring to my former Report of the 7th of November last [*missing*], I am humbly of opinion, that it is not a case, in which the Parties are entitled to your special interference for the purpose requested, to issue any directions to the Consul.'

"No other reference to this case can be found, except an opinion (10th January, 1827) relating to the correctness of the conduct of the Consul in connection with the incident. We may now pass over a long interval and quote an opinion of Sir Travers Twiss (18th July, 1871), which is of interest as definitely recognising the principle that the bed of the sea can be acquired by prescriptive occupation.

'I am honoured with your Lordship's commands, signified in Mr. Odo Russell's Letter of the 15th instant, stating that he was directed to transmit to me a correspondence

with Her Majesty's Agent and Consul General at Tunis, relative to the right of the Bey of Tunis to the process of fisheries of Sponge and Polypi beyond the distance of three miles from the Shore. That I should perceive that the question was first raised by a British Firm, as affecting the payment of dues levied by the Bey. Mr. Odo Russell was pleased to request that I would take the matter into my consideration, and furnish Your Lordship with my opinion as to the Instructions which should be addressed to Mr. Wood on the subject.

'In obedience to your Lordship's Commands I have the honour to *Report.*

'That there is no objection on principle to the Bey of Tunis asserting an exclusive right to the *fructus* of the banks off the Coast of Tunis to which Sponges and Polypi attach themselves, although the banks in question are at a greater distance than three miles from the Coast-line, provided the Bey can shew a prescriptive enjoyment of such *fructus.* Vattel 1. I, C:23, S. 287, admits that Nations may acquire a right of property in such *fructus* founded on long continued and exclusive enjoyment, and there are on record many instances of the enjoyment of such right of property. Amongst others Her Majesty's government exercises at present such an exclusive right, as regards the *fructus* of the pearl fisheries off the Coast of Ceylon, having received it as a tradition from the previous Sovereigns of the Island; notwithstanding the principal bank, to which the pearl oyster attaches itself, is at a distance of more than 20 miles from the Coast. The prescriptive use on the other hand of such a right is a question of *fact,* which must be established or may be impugned, like other facts. If it can be shewn indeed, that within the memory of living persons fishermen of various nationalities were accustomed to take sponges

and polypi from the banks in question, freely and without the permission of the Bey of Tunis, I should be of opinion that the claim of prescriptive right on his part failed, that this, as I have observed, resolves itself into a question of *fact.* With regard to the exclusive right of the Bey to the *fructus* of any banks, which are enclosed within a line drawn across the mouths of bays, the headlands of which are not more than ten miles apart, I am of opinion that the Bey is justified in asserting an exclusive right to such *Fructus.*'

* * * * *

"There has been a certain amount of doctrinal controversy as to whether the bed of the high seas is a *res nullius,* and therefore capable of appropriation, or a *res communis* in which no state can acquire exclusive rights. The practice cited above clearly favours the former view, and an additional argument to the same effect may be drawn from the abortive negotiations between Great Britain and
613 France for the construction of a Channel tunnel. This project, which appears to have been first suggested by a French engineer in 1802, became the subject of diplomatic exchanges beginning in 1870, and in 1876 a draft convention was drawn up by an Angle-French commission. The scheme proposed that the tunnel should be constructed by two companies, one from each country, and that the international frontier should be fixed at a point midway,but that no claim should be made to jurisdiction in the surface of the sea-bed or in the water above it. The details of civil and criminal jurisdiction were to be settled by supplementary conventions.

'Clearly this scheme implied that it was within the competence of the two countries concerned to appropriate and annex to their national territories so much of the sub-soil as was needed for the construction of the tunnel. For various reasons the project was never completed,

though some work was begun on each side, but the draft convention may serve to indicate the views of the two governments upon the question of law that was involved." (Footnotes omitted.)

* * * * *

614 Q. Have you found evidence of other undersea activity which has not been challenged on legal grounds in the interrelationships of states? A. Yes. I refer to mining. The exploitation of seams of coal and of minerals, especially tin and cobalt, under the surface of the adjacent seas has been practiced for centuries. Much of the historical material has been described by Professor Horwitz in his testimony, and is evidenced by Maine et al. Exhibits Nos. 165-169, 190, 195 and 196. The history of such mining shows that its seaward reach has been limited only by the extent of the resources (*e.g.*, the vein) or the technological resources of the miner. Both of these are limitations of exploitability which have nothing to do with any limitation imposed by international law, by the rights of other states, or by requirements of occupation or prescription. In line with this tradition the International Law Commission, in proposing artilces of a Convention on the continental shelf, was at pains to state:

"Lastly the Commission points out that it does not intend limiting the exploitation of the subsoil of the high seas by means of tunnels, cuttings or wells dug from *terra firma*. Such exploitation of the subsoil of the high seas by a coastal State is not subject to any legal limitation
615 by reference to the depth of the superjacent waters." (International Law Commission Report, 8th Session (1956), p. 42). It must be remembered that the Commission was here discussing "submarine areas adjacent to the coast but *outside the area of the territorial sea*" and was searching

for a suitable criterion by which to measure the outward reach of that area. It had no doubt that the area of the seabed in question could under international law be lawfully exploited by the littoral state, but it recognized that customary international law had not fixed a definite limit at which the right to exploit the surface would cease. Although opinions differed as to the extent in miles or leagues of territorial waters under international law, there was agreement that territorial waters do legally come to an end at some point and that beyond that end point the high seas begin. On the other hand, in regard to the sub-surface area of the continental shelf, it was not possible to say that an ending point had been established in customary international law since all such activity – regarding pearls, chanks, corals, sponges and mining – had remained unchallenged out as far as the relevant technology permitted exploitation.

616 At the risk of repeating what is included by Professor Horwitz in his testimony, I shall include a few references to English mines under the sea.

A technical, geological and historical study of British coal fields has made the following points:

"Coal Under the Sea. – To what distance from the shore coal will be available, is a question which cannot be directly answered, as every seam presents the problem under a different aspect. Questions regarding depth, thickness, regularity and absence of faults, as well as the nature of associated strata, are here presented in relation to the coal-seams themselves: and depth of sea-bottom in relation to the sea. In every case a considerable breadth of coal where it approaches the outcrop must necessarily be left as a barrier; and it is unquestionable, that faults traversing the strata under the sea, at a considerable depth and pressure of water, and especially if there are beds or

porous sandstone overlying the coal-seams, would give facilities for the influx of sea-water into the mines so as to prevent, or impede, the working of the coal. Sir Lindsay Wood has taken 3 miles under the seas as the limit to which the coal-seams will be workable in his estimate of the quantities available for future work.

"With reference to this special coal-field, the late Sir George Elliot considered that, in that portion of the dis-
17 trict south of the Tyne, a minimum distance of 3-1/2 miles may be included as available; and that it is possible that a much wider extent will ultimately be worked by means of shafts sunk below the sea itself at a distance from the shore; on the other hand, the late Mr. Forster assumed a distance of only 2 miles in breadth along the coast for that part of the coalfield north of the Tyne. This difference of opinion, on the part of gentlemen of such experience in mining undertakings, is a sufficient proof that the question is at present involved in much uncertainty." (Edward Hull, *The Coal Fields of Great Britain, Their History, Structure and Resources* (Fifth ed. rev., London 1905), pp. 206-207).

Coal mines extend out beyond the limits of territorial waters: "As a matter of fact some coal-mine galleries have already passed the limit of the territorial sea, for instance off the coast of England near Blyth in Northumberland, where they extend to 5678.4 metres from the low-water line, and near Easington in Durham to roughly 5750 metres, that is respectively 122 and 194 metres beyond the outer limit of the territorial sea." (M. W. Mouton, "The Continental Shelf," Hague Academy of International Law, 1954 *Recueil des Cours*, 347-353).

An 1856 account states that:

"At the Howgill pits, west of Whitehaven, the mining

618 has been carried more than 1000 *yards under the sea,* and about *600 feet below its bottom.*

". . . At one colliery, near Newcastle, the passages are more than twenty miles in extent, with the average area of seventy feet." (Leifchild, *Our Coal and Our Coal-Pits* 132-3 (New Impression 1968 from 2nd ed. 1856); Maine et al. Exhibit No. 350).)

I know of nothing in the record or in the literature on international maritime law which would suggest that it would have been contrary to international law if these "twenty miles" had all extended off-shore out under the sea.

According to another authority describing "The Coal Measures of West Cumberland":

"The undersea coal-bearing area is from St. Bees to Maryport and seawards for an unknown distance. The coal workings extend at Whitehaven from the coast for about 5 miles. The further seward extension is unknown, but the Coal Measures do not extend as far as the Isle of Man. It is probable that the exploitation of undersea coal will be limited by economic factors set by haulage costs and ventilation rather than by geological causes." (Trueman, *The Coalfields of Great Britain* 318 (1954); Maine et al. Exhibit No. 351).

By 1927, the Whitehaven mine in Cumberland already
619 extended four miles into the seabed. (Gray, "Mining Coal Under the Sea in Nova Scotia with notes on comparable undersea coal-mining operations elsewhere," in *Proceedings, Second Triennial Empire Mining and Metallurgical Congress* (1928), at p. 93; Maine et al. Exhibit No. 366, p. 93). At the same time an undersea coal field in Kent, not yet then developed, was estimated to have a workable subsea extension of four miles out from the shore. (*Id.* p. 102).

Other references to the English mines appear in Commander Sayre A. Swarztrauber's *The Three-Mile Limit of Territorial Seas: A Brief History* (unpublished thesis, American University, Washington, D.C. 1970), pp. 183 *et seq.*

Coal mines under the sea were being worked off the English coast as early as the 17th century. The mines were improved under Sir James Lowther and his young engineer Carlisle Spedding who developed new methods for such mines. "'Sir James's riches,' says Sir John Clerk, in a letter dated 1739, 'in part swim over his head, for ships pass daily above the very ground where his colliers work.'" Galloway, *A History of Coal Mining in Great Britain* 98-99 (reprint ed. 1969 of 1882 ed.) (Maine et al. Exhibit No. 352).

Tin and copper mining was an ancient industry in Britain. One mine off Cornwall was worked at a depth of
620 177 fathoms, at least by the early years of the 19th century. Others were worked from shafts "about fifty fathoms out from the beach." Barton, *A History of Tin Mining and Smelting in Cornwall* 42 (1967) (Maine et al. Exhibit No. 353). Professor Horwitz has already fully described how in the mid-19th century it was determined that, while the mining rights in Cornwall above the low-water mark belonged to the Duke of Cornwall, the rights below low-water mark and under the open sea belonged to the crown.

Subsea coal mines were also in operation by 1927 off the coasts of Australia (both New South Wales and Queensland), Chile, Japan and Spain (Maine et al. Exhibit No. 366, pp. 103-112). While at that date none of these mines extended out beyond the three-mile limit, I am entirely confident that if technology and economics had made such extensions possible they would have been carried out without the slightest doubt being raised that the

adjacent coastal state had the exclusive right to regulate and profit from them.

Very extensive undersea coal mining has been carried on off both the eastern and western coasts of Canada. This activity is described in considerable detail in Gray's work already cited (Maine et al. Exhibit No. 366.) The Nova Scotia mines first began to extend under the sea in
621 1867 (*Id.*, p. 9), and by 1927 had reached distances up to a maximum of 2-1/3 miles from shore (*Id.*, p. 5). As early as 1877, a report of the Inspector of Mines of Nova Scotia forecast that undersea mining would eventually extend considerable distances from shore and proposed legislative and regulatory measures to deal with it (*Id.*, pp. 6-7). In 1927 Gray foresaw continued extensions of the mines farther out from shore, mentioning the area from 3 to 5 miles offshore as containing reserves (*Id.*, p. 68). Gray explained that "the right to grant, by leases, access to undersea coal seams, is derived from possession of the foreshore" (*Id.*, p. 72), and described in detail the system of leasing practiced by the provincial government of Nova Scotia as well as governmental regulation of mining practice (*Id.*, pp. 82-87). It appears that the provincial government had granted leases much farther out from shore than the then existing distance of exploitation, and considerably beyond territorial waters, since Gray in describing the area of one lease remarked that "the nearest point . . . lay four miles from shore" (*Id.*, p. 84). It seems to have occurred to no one that this leasing practice could present any problem of international law.

Gray also describes submarine coal mining along the eastern side of Vancouver Island, in British Columbia
622 (*Id.*, pp. 88-91).

Q. To a very large extent, the examples of the exploitation of the resources of the seabed which you have described

date from a period preceding the independence of the United States and therefore reveal the practices of the British and other governments. Can you say whether the United States Government, prior to the Truman Proclamation of 1945, accepted or advocated or claimed that under international law it had the right to exploit riches of the sea outside its territorial waters?

A. Yes, the United States vigorously asserted such rights in its controversy with Great Britain over the control of the fur seal fisheries in the Bering Sea.

By a treaty of 1892 the United States agreed with Great Britain to submit to an international arbitral tribunal a dispute concerning the right of the United States to control the fur seal fishery in the Bering Sea. I wish to read a rather full extract from the case and argument of the United States because it demonstrates that nearly 80 years ago, and more than half a century before the Truman Proclamation of 1945, the United States Government was itself asserting the rights which I believe the thirteen states had upon the conclusion of the Treaty of Peace of 1783, when their position as separate sovereign states was internationally placed beyond dispute.

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It will be noted that counsel for the United States, James C. Carter, rejected what he stated was the British thesis, namely that rights to exploitation of a marine resource outside territorial waters depended upon "occupation" of the bottom of the sea. "How can you occupy the bottom of the sea?" asked Mr. Carter. (Oral Argument of James C. Carter, Esq., on Behalf of the United States Before the Tribunal of Arbitration Convened at Paris Under the Provisions of the Treaty Between the United States of America and Great Britain, Concluded Feb. 29, 1892, P. 324 (Paris, 1893).) This is precisely the position taken by the International Law Commission and incorporated in the Geneva Convention of 1958 on

the Continental Shelf, as already quoted. In words which Mr. Carter himself might well have used, the ILC said in its comment on Article 2 of its draft. "The exercise of the right of control and jurisdiction is independent of the concept of occupation. Effective occupation of the submarine area in question would be practically impossible . . ." And the ILC would agree with Mr. Carter that the rights asserted in the pearl, coral and oyster fisheries are justified because "It is where there is a natural advantage, within a certain proximity to the coast of a particular na-
624 tion, and in respect to which it enjoys peculiar advantages growing out of its proximity, and where, if it is permitted to establish and carry out a system of national regulation, it may furnish a regular constant supply of a certain product of the seas, for the uses of mankind . . ." (United States Oral Argument, *supra*, p. 126). The position which the United States thus took in 1893 refutes the notion that the rights which are mentioned in the Truman Proclamation of 1945 originated at that date; they had old roots in international law.

As will be noted also in the portions of the United States Oral Argument I shall quote, the British argument in this same arbitration conceded:

"That international law recognizes the right of a State to acquire certain portions of the waters of the sea and of the soil under the sea, and to include them within the territory of the State." (United States Oral Argument, *supra*, p. 323.)

The United States, in its argument supporting its claim to the exclusive exploitation of the seal herd in the Bering Sea, rested its case largely on the old doctrine of *ferae naturae* and a resulting right of property in the seal herd; the Tribunal did not accept this argument. Nor did the
625 Tribunal accept the contentions of the United States concerning the rights exercised in the Bering Sea by Russia

and alleged British acquiescence therein. The United States lost the case. This does not alter the fact that, on the legal points at issue in the present case, the United States strongly – and correctly, in my opinion – supported contentions on which the defendant states in this case rely and which, as I maintain, were established in international law in the 18th century. The gist of the matter is that the United States rested on the established doctrine that seabed resources could be the subject of ownership by the adjacent state – which was not disputed – and unsuccessfully attempted to reason from that fact to a sovereign right over *surface* fisheries.

The following are excerpts from Mr. Carter's argument (United States Oral Argument, *supra*, pp. 322-330):

"Mr. Carter . . . Now the pearl fisheries of Ceylon are another instance, as also the coralbeds in certain parts of the world which are protected by the laws of the nations that are situated contiguous to them, and in some instances for the benefit of the citizens of those nations only. In the American Case we have referred to a great number of instances where laws have been passed to establish and preserve, govern and regulate, fisheries and
626 other pursuits carried on on the high seas. Now the general answer to that which Great Britain makes is, that these laws, whether the laws of sovereign states, or of their colonial dependencies, are designed to operate only on their own citizens, and are not aimed at the citizens of other nations, and that they do not, therefore, furnish any support to the assertion that they may be operative against the citizens of other nations. It is said that they are only designed to regulate the conduct of citizens of the nations by whom they are made. I am not going to go through the particular instances in which these regulations have been adopted, for it would occupy altogether too much time. In general, I suppose that though these

regulations were drawn in terms limited to the citizens of the nations by whom they are passed, yet in reality they are designed to be operative upon citizens of all nations; otherwise they would serve only to facilitate a fuller enjoyment of the benefits of the industry by the citizens of other nations, without the competition and rivalry of the nation by whom they are passed; which I do not suppose is their intent. But there are several instances of rules and laws respecting the practice of these industries on the high seas which are admitted by the counsel for Great Britain to be operative upon the citizens of other
627 nations. Turning to the Argument on the part of Great Britain, page 59, we find this:

'It is next submitted –

'That international law recognizes the right of a State to acquire certain portions of the waters of the sea and of the soil under the sea, and to include them within the territory of the State.

'This affords a legitimate explanation of the cases foreign extra-territorial fishery laws cited by the United States, quite apart from any question whether they apply to foreigners or not.

'But it affords no justification for, nor are they analogous to, the Alaskan Seal Statute, as is contended by the United States.

'The territory of the nation extends to low water mark; but certain portions of the sea may be added to the dominion. For example, the sea which lies *inter fauces terrae*, and, in certain exceptional cases, parts of the sea not lying *inter fauces terrae*.

'The claim applies strictly to the soil under the sea. Such claim may be legitimately made to oyster beds, pearl fisheries, and coral reefs; and, in the same way, mines within the territory may be worked out under the sea below low-water mark.

628 'Isolated portions of the high sea cannot be taken by a nation unless the bed on which they rest can be physically occupied in a manner analogous to the occupation of land.

'Those principles, though they explain legitimately all the examples of foreign laws dwelt on by the United States, show also that no right to, or on, so vast an area of the high sea as Behring Sea can be acquired. Nor has any such claim ever been made.'

"Now, we have it admitted here that it is competent to particular nations to assert a right of property in oyster-beds, pearl-fishery beds, and coral-reef beds, and to assert a right of property, although they are out on the high seas beyond the territorial three-mile limit, and to assert that right against the citizens of other nations. They are obliged to make that admission, for it is impossible to examine the various statutes which have been passed by independent states upon these particular subjects, without recognizing the fact that they are designed to apply to the citizens of all nations, and are actually enforced against the citizens of all nations. What is the assertion there? Why, that the state has, by the operation of its rules and regulations, created a national industry in respect to those fisheries, oysters, pearls, and coral, which it is justified in protecting against invasion by the citizens of other nations, al-
629 though these fisheries are situate on the high seas.

"The President. That does not seem to have been the contention. It was founded rather upon the right of occupation.

"Mr. Carter. Well, I am going to discuss the ground upon which they put it, but they assert that there is a right to protect against the invasion of other nations products outside the three-mile limit. I know they seek to base that upon the right of property. I contend that a nation has a right to establish an industry of that sort and protect it against the invasion of other nations. They undertake to

place a limitation upon it, and to suggest reasons upon which the right is founded. I am going to inquire into the validity of these reasons. They say it is a *property* right to the *bottom*, and that it exists wherever the bottom may be *occupied*, and does not exist where the bottom cannot be occupied. Well, that amounts to this, then, that wherever a nation *can occupy the bottom*, although outside the territorial limits, it may rightfully occupy it and exclude other nations from it. How can you occupy the bottom of the sea? Well, you can occupy it only by taking such possession as is possible. You can buoy it where you can reach the bottom, and establish a force and exclude the citizens of other nations from it; and that is all the occupation of the bottom that you can effect. The assertion,
630 then, on the part of my learned friends is, that wherever you can take such possession of the *bottom*, you can exclude other nations from it. Now that goes much further than the Argument of the United States, no part of which goes to support a general right to occupy the sea outside the three-mile limit. We do not assert any such right, nor do we suppose that any such right exists; but that is their assertion; and if it be true, you can take possession of the bottom of the sea anywhere; and if there is any particular piece of coast off Great Britain twenty miles away where the bottom can be easily reached and which is a particularly favorable place for carrying on a cod fishery or a herring fishery, you can take possession of it and exclude the rest of mankind from it. If this bottom theory, upon which they put themselves, has any validity or foundation, you can do that. If the right to establish the industry rest upon an ability to occupy the bottom, then you can establish one wherever you can reach bottom; and if you can establish it in one place, you can establish it in another. I do not suppose it is possible to defend any right like that over the high seas. I do not suppose it is possible to defend

any such right as that over the fisheries of the seas. There must be some other principle that may be called into play.

631 "These regulations are found in the cases of oyster beds, coral beds, beds where the pearl fishery is carried on, beds which are found in a certain proximity to the coast of a country, and which can be worked more conveniently by the citizens of that country than any other.

"We find in practice that the industries are confined to such instances, and in those instances we find rules and regulations passed for the purpose of securing the products of the seas, and designed to make them more useful. Those are the cases in which it can be done, and in those cases it is perfectly justifiable. It is where there is a natural advantage, within a certain proximity to the coast of a particular nation, which it can turn to account better than the citizens of any other nation, and in respect to which it enjoys peculiar advantages growing out of its proximity, and where, if it is permitted to establish and carry out a system of national regulation, it may furnish a regular, constant supply of a certain product of the seas, for the uses of mankind; which product, if it were thrown open to the whole world, would be destroyed. That is reasonable. That stands upon the principles which I have been asserting. That is a solid foundation; but it does not rest upon any notion of a right of occupying the bottom. It rests upon the fact that here is a natural advantage, a peculiar locality offering particular advantages,
632 which, if improved, will lead to the prosecution of a useful and profitable industry, useful to the nation, and useful to the world.

"Under those circumstances, if one nation is permitted to cultivate undisturbed that natural advantage, free from

the invasion of others, that industry can be profitably carried on, but if all come in, it is broken up. In such cases, therefore, the nation which enjoys this advantage says to other nations, rightfully: 'Here is an advantage which Providence has placed within our reach, rather than in yours. We can turn it to account; you cannot. We can use it so that it may produce its natural advantages. In order to do that, it requires regulation. . . .'

"Senator Morgan. Mr. Carter, in point of fact, are these Ceylon pearl fisheries and the coral fisheries of which you spoke held subject to the right of free navigation to commerce.

"Mr. Carter. So I understand. I do not understand that commerce can be prohibited over them. Oh no; surely no. There is no occasion to prohibit commerce. It is only the regulation of the industry that is insisted upon.

"So I have to say that upon conceded principles there is a right in a nation to protect an industry for which it has natural advantages, and which it can create, preserve, and improve by means of rules and regulations
633 which it alone has the power to adopt and to enforce. It is conceded that this may be done in the cases to which I refer of the oyster beds, the pearl beds, and the coral beds, no matter how far they are out from land, wherever they are.

"If they are so situated as to be the special advantage of a particular power, and that particular power chooses to improve that natural advantage by the creation of an industry, it establishes a right which it can defend from invasion by the citizens of other nations. The explanation of that which is attempted to be made in the printed argument of the other side is, that it depends upon an ability *to occupy the bottom.* That does not explain it. That furnishes no ground of reason whatever. If it were

true, it would justify the occupation of a portion of the bottom in any place in the seas, irrespective of the question whether there was a natural advantage or not; and such right to occupy the bottom certainly does not exist. Nor *can* you occupy the bottom of the sea. It is not susceptible of occupation, unless the law should choose to declare that it should be deemed to be the subject of exclusive occupation; and as I have already, I think, sufficiently shown, the law will not do that merely to gratify the whim or the ambition of any particular individual, or any particular nation, but only for the accomplishment of some great social good.

"That right of creating a national industry based upon peculiar natural advantages, and based sometimes upon the mere circumstance that it has been created by rules and regulations, is one that is fully established, in reference to many of several different products of the sea.

"In the protecting of industries of that sort, does the nation extend its jurisdiction over those places? Does it make them a part of its territory? Certainly not. It has no right to do that. It is not consistent with the law of nations that it should do that. There is no occasion for it to do that. There is no need of it. All that it is necessary for it to do is to enforce such regulations on those places as are effective and sufficient to protect the right from invasion by the citizens of other nations. . . .

"To make it entirely analogous, if these seals were in some mannner attached to the bottom, if they were in the habit of congregating at some particular place on the bottom of the sea, then, according to the doctrine which seems to be made the foundation of the right by our friends on the other side, the United States would have a right to go out ahd take possession of that bottom,

incorporate it into its own territory, and treat it as a part
635 of its own nationality.

"I am sure we assert no such right as that. We do not ask to go to any such length as that. All we ask is the right to carry on the industry on our own admitted soil, and to protect it from being broken up by repressing acts upon the high seas which are in themselves essential wrongs.

"Let me defend these particular instances of the coral beds, the pearl beds, and the oyster beds upon the same principles upon which I have defended the assertion of property interest, not only in the seals, but in the seal industry upon the Pribilof Islands. In all these cases, there is a peculiar natural advantage connected with those places and belonging to the nations which lie in nearest proximity to the places where they are situated. In the next place, they are exhaustible. There is not enough for all; and therefore there arises an occasion when you may assert the principles which govern the laws of property. In the next place, if left open to the unregulated invasion of the citizens of all nations, they would be used up and destroyed. The only condition upon which they can be preserved and made beneficial to mankind is that they be allowed to be worked and operated by the particular power which has the best facilities for that purpose. In the next place, they can be preserved only by putting them under a system of regulation, which shall be operative upon the citizens of
636 that as well as of other nations. It is necessary that the citizens of the particular power, whose citizens go out there and improve and occupy these places, should be also made subject to these regulations. In other words, the general condition is presented that mankind may have the benefit of these advantages if they are disposed of in this way, and not otherwise; and, consequently, they ought to

be disposed of in this way. The bottom of the sea in these places is not made the property of the particular powers who assert the right to the industries. It is not their property at all. It is not within their sovereign jurisdiction at all, any more than any other part of the high seas, but it is a theatre where their defensive regulations may be put in operation, and where the rights of their citizens may be defended.

"Let me support these views by a reference to the opinions of the best writers. I read from Puffendorf on the Law of Nature and Nations. The extract is found on page 134 of my argument:

'As for fishing, though it had much more abundant subject in the sea than in lakes or rivers, yet "tis manifest that it may in part be exhausted, and that if all nations should desire such right and liberty near the coast of any particular country, that country must be very much prejudiced in this respect; especially since "tis very usual that some particular kind of fish, or perhaps some more precious commodity, as pearls, coral, amber, or the like, are to be found only in one part of the sea, and that of no considerable extent. In this case there is no reason why the borderers should not rather challenge to themselves this happiness of a wealthy shore or sea than those who are seated at a distance from it.'

"And then Vattel, upon the same subject, says:

'The various uses of the sea near the coasts render it very susceptible of property. It furnishes fish, shells, pearls, amber, etc.; now in all these respects its use is not inexhaustible. Wherefore, the nation to whom the coasts belong may appropriate to themselves and convert to their own profit, an advantage which nature has so placed within their reach as to enable them conveniently to take possession of it, in the same manner as they possess themselves

of the dominion of the land they inhabit. Who can doubt that the pearl fisheries of Bahrem and Ceylon may lawfully become property? And though where the catching of fish is the only object, the fishery appears less liable to be exhausted, yet if a nation have on their coasts a particular fishery ot [*sic*] a profitable nature, and of which they may become masters, shall they not be permitted to ap-
638 priate to themselves that bounteous gift of nature as an appendage to the country they possess, and to reserve to themselves the great advantage which their commerce may thence derive, in case there is a sufficient abundance of fish to furnish the neighboring nations?

'(Sect. 2) A nation may appropriate to herself those things of which the free and common use would be prejudicial or dangerous to her. This is a second reason for which governments extend their dominion over the sea along their coasts, as far as they are able to protect their right.'

"Now, upon the very firm basis of reason and authority we place the right of the United States to protect themselves in the enjoyment of the industry which they have established upon these islands. . . .

"I now pass to the consequences of the establishment of those rights, so far as they involve the question, what acts the United States may do for the purpose of protecting themselves in the enjoyment of the rights thus acquired and established.

"I must assume, in the first place, that if she has the right to the exclusive enjoyment of this industry of taking seals, in consequence of her natural advantages and of the exhaustible character of the product, she has the authority in some manner to enforce that right. Otherwise we should be talking to no purpose. What is a right which
639 there is no means of enforcing? It would be mere words.

It amounts to nothing at all. There is nothing substantial about it. Such things are not the subject of discussion. When it is said that a man or a nation has certain rights of property, it means that they have some rights which can be enforced in some manner. *How* shall they enforce them? That is the question. What acts may the United States do? Can they extend their sovereignty over the seas to an illimitable extent wherever it may be necessary to protect the right? No; they cannot. We make no assertion of that sort. We could not substantiate it, if we did. The sovereign juriscondiction of a nation, is bounded by her territory, with an addition which carries to a certain qualified extent, her sovereignty over a distance on the seas commonly taken as three miles. Beyond that the sovereign jurisdiction of the nation cannot be extended. Beyond that her laws, as laws, have no force or operation. Beyond that, her powers as a legislative power have no effect. The emanations of her legislative power do not extend as exercises of legislative power beyond her territorial jurisdiction. All that we take to be admitted."

The written Argument of the United States also relied on recognized exclusive rights in sedentary fisheries adjacent to Ceylon, Australia, France, Italy, Panama and
640 Mexico (Maine et al. Exhibit No. 367).

On an earlier occasion, in 1832, the United States had engaged in a long diplomatic argument with what was then known as the Government of Buenos Ayres (Argentina). The question at issue was the right of American citizens and ships to fish around the Falkland Islands and around the southern tip of South America. The general nature of the argument is indicated by the following passage from a note from the American charge de affaires to the Buenos Ayres Minister on the 20th of June 1832:

"It is of equal notoriety that from the period of the acknowledgement of their Independence by Great Britain,

they have been in the unmolested enjoyment of the Whale and Seal Fishery in and about these Islands: that these Fisheries, with the full knowledge of Spain, have been prosecuted by them to an extent far exceeding the Fisheries of any and all other Nations. If long and uninterrupted use and possession can impart any right to Fisheries of the above description – the title of The United States is unimpeachable. And Vattel, Book I., chap. 23, S. 287, although he admits the right of Nations owning the Coasts to appropriate to themselves certain Fisheries on their Coasts – expressly excludes them under certain circumstances.

641 'But if (says this Writer) so far from taking possession of it, the Nation has once acknowledged the common right of other Nations to come and fish there, it can no longer exclude them from it. It has left that Fishery in its primitive freedom, at least with respect to those who have been accustomed to take advantage of it. The English not having originally taken exclusive possession of the Herring Fishery on their Coasts, it has become common to them with other Nations.' The acknowledgement spoken of, may be express or implied: a long continued use without interruption, is a virtual acknowledgement of the right to use; and in the instance cited (the Herring Fishery on the English Coast) there has been no formal acknowledgement, on the part of England, that other Nations have a right to use that Fishery; from the acquiescence of England, the acknowledgement is inferred." (The exchange of communications is printed in 20 *British and Foreign State Papers 1832-1833*, 311-441 (1836). The above extract is from pp. 352-353.)

This statement has, I think, an important bearing on the question which I have already discussed at great length, whether actual occupation or use was formerly considered

necessary to create exclusive rights in the continental shelf. (As I have shown, it quite plainly is not necessary today.)
642 I do not think occupation or use was ever necessary, but as the United States' note to Argentina points out, an established custom of free use by others, acquiesced in by the coastal state, might well preclude a later assertion of exclusive rights by it as to the particular resource in question.

To give a hypothetical example: suppose that in 1720, or 1770, or 1785, a pearl oyster bed or a tin deposit, technologically and economically exploitable, had been discovered on the seabed ten miles off the coast of Massachusetts (or any other of the Atlantic colonies). If the Massachusetts authorities had consciously permitted free exploitation of that resource by persons of all nations, and that license had ripened by passage of time into established custom, Massachusetts might well have been limited, as a matter of international law, in later asserting exclusive rights – just as the United States argued respecting Argentina. But I regard it as virtually inconceivable that as a matter of fact, in 1720, 1770 or 1785, Massachusetts *would* have consciously permitted internationally free exploitation on these hypothetical facts. From what I know of the international law climate of that era, both generally and with particular respect to British and American attitudes, I believe it virtually certain that on the discovery of the resource Massachusetts would have
643 asserted the exclusive right to regulate the resource, on behalf of itself, and the exclusive right to exploit it, either on behalf of its own citizens alone or on behalf of all British subjects. (Of course it might have bargained away part or all of its exclusive right by treaty, in return for other benefits.) I do not believe there would have been any significant international protest against that assertion.

And I believe that assertion would have been fully in accordance with the international law and practice of the time. I think other sovereigns would have been bound to respect it, and I think they would have respected it. And I do not think the legal situation was significantly different at any more recent time, including the 19th and early 20th centuries.

So, I believe it is error to say that in the 18th century, or prior to the Truman Proclamation, the right of exclusive exploitation did not exist, or did not exist in the absence of occupation. Of course no one would go to the trouble of making a physical "occupation" (to the very limited extent such an occupation is possible, even today) of the seabed before a resource was discovered, just in the hope that something might turn up. But what has always obtained, in my view, is the exclusive right of the adjacent coastal state to *make* an "occupation" (in the limited
644 sense to which I have referred) and to use and enjoy the resources when the occasion should arise.

Q. Were the 13 American colonies treated internationally as separate sovereign and independent states prior to the date when the Constitution of the United States entered into force? A. Your question must be answered in the affirmative. This fact is clear from the Preliminary Articles of Peace between His Britannic Majesty and the United States of November 30, 1782. Article I of that agreement reads as follows:

"His Britannic Majesty acknowledges that said United States, Viz. New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free Sovereign and independent States; That he treats with them as such; And for himself, his Heirs and Successors,—

relinquishes all Claims to the Government, Propriety, and territorial Rights of the same, and every part thereof; and that all Disputes which might arise in future, on the Subject of the Boundaries of the said United States, may be prevented, It is hereby agreed and declared that the following are, and shall be their Boundaries Viz. . . . " (All the references given to these early treaties here are taken
645 from 2 *Treaties and other International Acts of the United States of America* (Hunter Miller ed. 1931). The article just quoted is at pp. 96-97.)

The same provision is found in Article 1 of the Definitive Treaty of Peace of September 3, 1783:

"His Britannic Majesty acknowledges the sd. United States, viz. New-Hampshire, Massachusetts Bay, Rhode-Island & Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina & Georgia, to be free sovereign & Independent States; that he treats with them as such, and for himself his Heirs & Successors, relinquishes all Claims to the Government Propriety & Territorial Rights of the same and every Part thereof."(*Id.* p. 152).

The same recognition is found in the Treaty of Amity and Commerce between the United States and France of February 6, 1778. The preamble of this treaty begins as follows:

"Treaty of Amity and Commerce.

"The most Christian King, and the thirteen United States of North America, to wit, New-Hampshire, Massachusetts Bay, Rhode-island, Connecticut, New York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South Carolina & Georgia, willing to fix in an equitable and permanent manner the Rules which ought
646 to be followed relative to the Correspondence & Commerce which the two Parties desire to establish between

their respective Countries, States, and Subjects, his most Christian Majesty and the said United States have judged that the said End could not be better obtained than by taking. . . ."

"Traité d'Amitié et de Commerce

"Le Roi Très chretien et les treize Etats-unis de l'Amèrique septentrionale, savoir, Newhampshire la Baye de Massachusett, Rhode-Island, Connecticut, New York, New Jersey, Pennsylvanie, Les Comtés de Newcastle de Kent et de Sussex sur la Delaware, Maryland, Virginie, Caroline septentrionale, Caroline Méridionale et Georgia voulant établir d'une maniere équitable et permanente les règles qui devront être suivies relativement à la Correspondance et au Commerce que les deux parties désirent d'établir entre leurs Pais, Etats et Sujets respectifis, Sa Majesté Trés chretienne et les dits Etas unis ont jugé no pouvoir mieu atteindre à ce but. . . ." (*Id.* p. 3.)

Furthermore, in Article 1 we find the texts both in English and French use both the terms "United States of America" (les Etats unis de l'Amérique) and "the said States" (des dits Etats). While the French text in some subsequent Articles uses the designation "Etats-unis", Article 32 again refers to "the thirteen United States"
647 (des treize Etats-unis). (*Id.* p. 27.)

The Treaty of Alliance with France of February 6, 1778 begins its preamble as follows:

"Treaty of Alliance

"The most Christian King and the United States of North America, to wit, Newhampshire, Massachusetts Bay, Rhodeisland, Connecticut, Newyork, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, having this Day concluded a Treaty of amity and Commerce, for the reciprocal advantage of their Subjects and Citizens have thought it necessary to

take into consideration the means of strongthening those engagements and of rondring them useful to the safety and tranquility of the two parties. . . ."

"Traité d'Alliance éventuelle et deffensive

"Le Roi Très Chrétien et les Etats-unis de l'Amerique Septentrionale, savoir New-Hampshire, la Baye de Massachusset, Rhode-Island, Connecticut, New-york, New-Jersey, Pennsylvanie, Delaware, Maryland, Virginie, Caroline Septentrionale, Caroline Meridionale et Georgie; ayant conclu ce jourd 'huy un Traité d'Amitié, de bonne intelligence et de commerce, pour l'avantage réciproque de leurs Sujets et Citoyens, ils ont cru devoir prendre en considération les moyens de resserrer leurs liaisons, et de les rendre utiles
8 à la Sureté et à la Sureté et à la tranquilité des deux Parties. . . ." (*Id.* p. 35.)

These treaties with France – the first ever made by the United States – were ratified by Congress on May 4, 1778. However, there was a most interesting additional ratification by Virginia, which is described by James Brown Scott, who was selected by Secretary of State Elihu Root to be the chief legal officer of the Department of State:

"On June 2, 1779, the House of Delegates of Virginia

Resolved, nemine contradicente, that it is the opinion of this committee that the treaties of alliance and commerce entered into between His Most Christian Majesty of France on the one part, and the Congress of the United States of *America* on behalf of the said states on the other part, ought to be ratified and confirmed, so far as is in the power of this commonwealth, and the same are accordingly hereby ratified, confirmed and declared binding on this commonwealth.

Resolved, that the Governour be desired to notify to the Minister of His Most Christian Majesty, resident at

Philadelphia, the above ratification under the seal of the commonwealth.

"On June 3rd, the resolution of the House of Delegates was laid before the Senate of Virginia, where it was
649 agreed to on the following day.

"On the 8th of June, the Governor of the State transmitted the act of ratification with a covering letter to M. Conrad-Alexandre Gerard, French Minister in Philadelphia, who, in turn, transmitted them to the Comte de Vergennes, then Minister for Foreign Affairs of France. In the course of his letter, M. Gerard, who had the year before negotiated the two treaties on behalf of his country, said:

"On the 20th of this month the Virginia delegates in a body delivered to me in behalf of their State a package containing a letter from the governor of that Commonwealth and an authentic copy of the Act passed by a unanimous vote of the two legislative branches for the ratification of the treaties concluded between the United States and the King and declaring them binding on the Commonwealth.

"These documents are to-day in the Ministry of Foreign Affairs at Quai d'Orsay, where they were recently examined at my request. They were found to be intact, still bearing the seal of the Commonwealth of Virginia. It is not without interest to observe that these papers bear the signature of Thomas Jefferson, at that time Governor of Virginia, and who three years previously had drafted the Declaration of Independence, to be made effective by the treaty of alliance with France, of which he transmitted
650 the instrument of ratification in behalf of his State. It is to be presumed that he knew the meaning of the Declaration and that he thought his actions to be in accordance with its terms.

"We may perhaps say of Jefferson's letter, with its precious enclosures in Quai d'Orsay, what Macaulay in his *Lays* says of the 'molten image' of Horatius in the Eternal City:

> And there it stands unto this day
> To witness if I lie.

"Without laboring the matter further, it is abundantly clear that the States after the Declaration of 1776 were free, sovereign, and independent, and that they remained so, in the sense of international law, until they changed that status by their subsequent, and, as we shall see, voluntary act." Scott, *Sovereign States and Suits* 55-57 (1925) (Footnotes omitted. See also *Id.* at pp. 35-40, 46-47, 54, 63.)

I have made no study of whether any of the other states ratified the French treaties, or whether any other state ratified any of the subsequent treaties down to 1789, all of which were concluded after the articles of Confederation entered into force. I doubt whether they did, since Article IX gave "the United States in Congress assembled" the sole and exclusive right to make treaties, requiring the vote of nine states in Congress. (As to the French treaties, adopted before the Articles of Confederation came into force, Miller observes that "the urgency of the occasion overrode any technical necessity of a ratification voted by thirteen states." 2 *Treaties and Other International Acts of the United States, supra,* p. 30.) That the delegation of powers over foreign relations, including treaty making, does not impair the sovereignty of the delegating state for international-law purposes is confirmed by the holding of the International Court of Justice in the *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States),* [1952] I.C.J.

176. France established a protectorate over Morocco in 1912. The Court held that under this protectorate "Morocco remained a sovereign State but it made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name of Morocco, and, in principle, all of the international relations of Morocco." *Id.* at 188.

And again the Court said:

"It is not disputed by the French Government that Morocco, even under the protectorate, has retained its personality as a State in international law." *Id.*, p. 185.

652 In the Contract of July 16, 1782 between the King of France and the United States regarding the repayment of money advanced by the King to the United States, one finds that the document is entitled "Contract between the King and the Thirteen United States of North America" (Contrat entre le Roi et les Treize Etats-Unis de l'Amérique Septentrionale). (2 *Treaties and Other International Acts of the United States, supra,* p. 48).

Similar is the Treaty of Amity and Commerce of October 8, 1782 between the United States and the Netherlands, the preamble of which begins as follows:

"A Treaty of Amity and Commerce between Their High Mightinesses the States-General of the United Netherlands, and the United States of America, to wit New-Hampshire, Massachusetts, Rhode Island, and Providence Plantations, Connecticutt, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.

"Their High Mightinesses the States General of the United Netherlands, and the United States of America, to wit New-Hampshire, Massachusetts, Rhode Island, and Providence Plantations, Connecticutt, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina,

653 South-Carolina and Georgia. . . ." (*Id.* p. 59.)

"Tractaat van Vriendschap en Commercie tusschen Haar Hoog Mogende, de Staten Generaal der Vereenigde Nederlanden, en de Vereenigde Staten van America, te weeten New-Hampshire, Massachusetts, Rhode Island, en Providence Plantations, Connecticutt, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia Noord Carolina, Zuyd-Carolina en Georgia.

"Haar Hoog Mogende de Staten Generaall der Vereenigde Nederlanden, en de Vereenigde Staten van America, te weeten New-Hampshire, Massachusetts, Rhode Island en Providence Plantations, Connecticutt, New-York, New-Jersey, Pensylvanien, Delaware, Maryland, Virginien, Noord-Carolina, Zuyd-Carolina en Georgien . . . ."

Likewise, the Treaty of Amity and Commerce of April 3, 1783 with Sweden begins with the following language: "A Treaty of Amity and Commerce Concluded between His Majesty the King of Sweden and the United States of North America.

"The King of Sweden, of the Goths and Vandals, etc., etc., etc., and the thirteen United States of North America, to wit: New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, the counties of New Castle, Kent, and Sussex on Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia . . . ." (*Id.* p. 123.)

654 "Traité d'Amitié et de Commerce Conclu entre Sa Majesté le Roi de Suede et les États Unis de L'Amerique Septentrionale.

"Le Roi de Suede des Goths et des Vandales &c. &c. &c. et les Treize Etats Unis de l'Amerique Septentrionale, scavoir New-Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New-York, New-Jersey, Pensylvanie, les Comtes de New-Castle, de Kent et de Sussex sur la Delaware, Maryland, Virginie, Caroline Septentrionale, Caroline Meridionale et Georgie

. . . ."

In Article 23 of that Treaty the separate quality of the several states is indicated by the language which refers to "the United States of America, or any of them" (les Etats Unis de l'Amérique on quelques uns d'entre Eux"). (*Id.* p. 142.)

Hunter Miller's notes to this Swedish treaty include the following paragraph:

"Certain formal amendments to the opening words of the treaty were proposed (in English) by Congress after ratification (Journals, XXIV, 477); instructions were given to Franklin accordingly by letter of August 15, 1783 (Diplomatic Correspondence, 1783-1789, I, 34-35); but it seems that as formal amendments, those proposals were not pressed. However, on the exchange of ratifications Franklin informed Baron Stael von Holstein, the Ambassador of Sweden at Paris, according to
655 the letter of the latter of February 6, 1784, mentioned below, 'that the United States in their titles will henceforth exclude *North* and call themselves only the United States of America, and that the State which has been known as New Castle, Kent, and Sussex on the Delaware from now on will be called only Delaware' (translation from the Swedish)." (*Id.* p. 149)

In the light of these facts it must be concluded that on the conclusion of the Treaty of Peace with Great Britain in 1783 each one of the thirteen "colonies" had the status of separate states in the international sense, equal to all the other members of the international community of states in the rights and privileges which, in those days, sovereign states enjoyed under international law.

This conclusion is not impaired by the fact that in some of these treaties, in addition to the specification

of the separate States of the "United States," there are references to the "two parties" or "both parties."

It having been acknowledged in the preambles that the foreign Government was contracting with thirteen states, it is as if, in familiar modern contractual language where a multiple or collective group contracts, the treaty had said "hereinafter referred to as the party of the second part."

I have examined the testimony of Professor Joseph H.
656 Smith and I find that the conclusions he reaches, on the basis of the sources of evidence which he analyzes, confirm the conclusion which I have just stated. On the problem of separate individual statehood, he reinforces at his p. 848 (tr.) from a constitutional point of view, what I have stated from an international point of view.

On the question of terminology respecting offshore rights, which I discuss at p. 498 (tr.) and following in my testimony, largely from the evidence of treaty texts, much of Professor Smith's data support the opinion I state. For example, see his pp. 684 (tr.) and following and his summary at pp. 791-792 (tr.). His comments on oyster beds and salt pans (pp. 795, 799-801 (tr.)) are additional evidence of the right to exploit resources of the seabed.

And I agree with the conclusions he states on pp. 828 (tr.), 832-833, 835-836 (tr.), and elsewhere to the effect that Great Britain, in the period in question, claimed sovereignty over the marginal sea and rights to exploit the seabed even outside the three mile limit, off the North American coast as well as in English waters.

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659 DIRECT EXAMINATION OF JOSEPH H. SMITH

BY MR. CLAGETT:

Q. Would you please state your name, background and professional qualifications and experience?

A. My name is Joseph H. Smith. I am George Welwood Murray Professor of Legal History at Columbia Law School. I was appointed Professor of Law at Columbia in 1961 while I was engaged in the practice of law in New York City. The occasion for my appointment was the retirement of Professor Julius Goebel, Jr., who had been responsible for the legal history offerings at Columbia since 1928. I was made George Welwood Murray Professor, the seat held by Professor Goebel for many years, in 1967. I have primary responsibility for the offerings in Anglo-American legal history at the Law School.

660 I teach two courses in the legal history field: *Development of Legal Institutions,* primarily concerned with English legal history until the settlement of the American colonies, and *Early American Law,* which covers the American colonial period and the early Federal period until about 1800. I also offer a seminar entitled *American Legal History* which centers about legal developments in the United States from about 1800 to the Civil War.

Since 1961 I have also been director of the Foundation for Research in Legal History at Columbia Law School, succeeding Julius Goebel in that position. Research conducted under the auspices of the Foundation has resulted in the publication since 1937 of six books in English, American and Anglo-American legal history.

I received a B.A. degree at Yale in 1935 and an LL.B. at Columbia in 1938. Following graduation from Law School, I became a Research Assistant with the Foundation for Research in Legal History and continued in that capacity until early 1942. During this time I engaged in extensive research in various governmental archives, courthouses, libraries and historical societies located in

England, the Channel Islands, the West Indies and the Atlantic seaboard states of the United States. This research was conducted for the purpose of writing a book
661 on appeals the Privy Council from the American colonies which was published after World War II. In 1938-39 I also attended seminars at the Institute for Historical Research of the University of London.

I served in the armed forces of the United States from early 1942 to late 1945.

I was admitted to the New York bar in 1940 but did not practice until early 1946, when I became an associate with the law firm of Rathbone, Perry, Kelley and Drye in New York City. I was an associate and then partner in the successor firm of Kelley, Drye, Newhall and Maginnes, resigning from the firm in 1961 after my appointment to the Columbia Law School faculty. While in practice I continued my interest in legal history by helping to see *Appeals to the Privy Council* through the press, by writing book reviews and by working on the second and third of the publications listed below.

Apart from casebooks or teaching materials, I have been author or editor of the following publications:

Appeals to the Privy Council From the American Plantations (Columbia Univ. Press, 1950; reprinted Octagon Books, 1965).

Colonial Justice in Western Massachusetts (1639-1702): The Pynchon Court Record published under the auspices of The William Nelson Cromwell Foundation by Harvard University Press (1961).

662 *Court Records of Prince Georges County, Maryland 1696-1699* (ed. with Philip A. Crowl, 1964): American Legal Records - Vol . 9, published by the American Historical Association in

collaboration with the Hall of Records Commission of the State of Maryland.

"Administrative Control of the Courts of the American Plantations," in 61 Columbia Law Review 1210 (1961); reprinted in *Essays in the History of Early American Law* (ed. D.H. Flaherty), published for Institute of Early American History and Culture of Williamsburg, Va., by University of North Carolina Press, (1969) at p. 281.

"The Foundations of Law in Maryland: 1634-1715," in *Law and Authority in Colonial America* (Barre Publishers, 1965), at p. 92; reprinted by Dover Publications, Inc., 1970, at p. 92.

"The Provincial Court and the Laws of Maryland," in *Essays in Legal History in Honor of Felix Frankfurter* (ed. M.D. Forkosch, 1966) at p. 387.

"New Light on the Doctrine of Judicial Precedent in Early America: 1607-1776," in *Legal Thought in the United States of America Under Contemporary Pressures* (ed. J.N. Hazard and W.J. Wagner, 1970) at p. 9.

Book reviews, largely in the legal history field, in American Historical Review, Columbia Law Review, University of Detroit Law Journal, New York Law Forum, New York Law Journal, Political Science Quarterly, Villanova Law Review. Some of these involved substantial collateral research.

Sir William Blackstone item for new edition of *Encyclopedia Americana*.

I have also edited the following casebooks or teaching materials:

663 *Cases and Materials on the Development of Legal Institutions* (West Publishing Co., 1965). Three earlier editions in mimeographed form (1902-1964) were issued for the exclusive use of Columbia Law School students.

Supplement to Cases and Materials on the Development of Legal Institutions (1969), multilithed materials (335 pp.) privately printed for the exclusive use of Columbia Law School students.

Cases and Materials on Early American Law and Legal Institutions (1969), multilithed materials (953 pp.) privately printed for the exclusive use of Columbia Law School students.

Since 1963 I have also done a substantial amount of research, principally at the Public Record Office in London, England, with a view to writing a book on the appellate jurisdiction of the High Court of Admiralty over the vice-admiralty courts of the American plantations. This would be a companion piece to *Appeals to the Privy Council from the American Plantations.* Some of the research will probably result in a separate article on the role of the Lords Commissioners for Hearing Prize Appeals, a body distinct from the High Court of Admiralty.

At present I am also working on an article, which should be published next year and which represents a substantial
664 amount of research in the United States and England, dealing with judicial tenure in England, the American colonies, and the period of early statehood with particular emphasis upon the American colonial period and the problem of administrative control from England of judicial commissions and salaries and its political consequences.

An article which I authored jointly with Professor Leo Hershkowitz of Queens College, New York, entitled *"Courts of Equity in the Province of New York: The Cosby Controversy, 1732-1736,* will appear shortly in the American Journal of Legal History.

I have also done some research in the last two years looking forward to a comprehensive article on statutory reception of the laws of England, or portions thereof, by the American colonies.

As Special Assistant to the Attorney General of the United States in 1965, I directed and supervised the research for and preparation of an Historical Appendix (364 pp.) to the brief for the United States in *Harris v. United States* in the Supreme Court of the United States, involving the right to jury trial in criminal contempt cases.

For the years 1967-1969 I served as Chairman of the Committee on the Littleton-Griswold Fund of the American
665 Historical Association, having been a member of the Committee for a number of years before 1967. This Committee is responsible for publication of the American Legal Records Series. As Chairman I was particularly concerned with organizing a project to do extensive research in individual rights in the American colonial courts in the period 1720-1760, and with attempts to secure publication of some 17th century Virginia County Court records (Accomack-Northampton) and of some records of the Connecticut Court of Assistants (1665-1711). While no lohger on the Committee, I have recently served as consultant to the Chairman on three proposed publications of court records or other legal material.

Since 1965 I have been a member of the Advisory Committee to the Project in Legal History of the American Bar Foundation. Each year members of the Committee read, evaluate and make recommendations with respect to applications for Annual or Summer Fellowships in Legal History.

Last year I was appointed a member of the Editorial Advisory Board for a new series of books entitled "Studies in Legal History" to be published by the Harvard University Press in association with the American Society for Legal History. Members are called upon to act as readers and to make recommendations with respect to manuscripts submitted for publication in the series.

666 I was a member of the Round Table Council for Legal History of the Association of American Law Schools, 1963-1968.

Since 1963 I have been the "law member" of the Columbia University Seminar on Eighteenth-Century European Culture. In 1969 I delivered an unpublished paper on "Blackstone as a Figure of the Enlightenment" and distributed a selective bibliography on Sir William Blackstone.

As a member of the Columbia University Seminar on Legal and Political Thought, I delivered, in 1964, an published paper on the "Reception of the Laws of England in Colonial America." In March 1971 I delivered to the same seminar an unpublished paper on "The Doctrine of Judicial Precedent in Early America, 1607-1800," an extension of the article published in *Legal Thought in the United States of America Under Contemporary Pressures,* listed above. That article had been prepared for the VIII Congress of the International Academy of Comparative Law at Pescara, Italy.

I am a member of the Selden Society and The American Society for Legal History. At the request of the Nominating Committee, I have agreed to serve as Treasurer of the latter organization for the next year.

Since my appointment at Columbia I have been consulted in connection with various Ph.D. theses and publication of articles and books covering such subjects as the Provincial Court of Maryland, early English claims to North America, the work of the Committee on Prize Appeals of the Continental Congress, the early development of the assize of nuisance, the County Courts of Virginia in the early 19th century, the right of privacy in colonial New England, estates in land in colonial New York, the administration of decedents' estates in colonial New York, the County Courts of Maryland in the early 18th century, the law practice of John Jay, the reception of the laws of England in Australia (a problem having some relation to the American colonial experience), the history of the Bar Association of the City

of New York, aspects of English law in the novels of Henry Fielding, the sale of literary copyrights in 18th century England, legal developments in New York State in the early 19th century and the role of the crown law officers in the administration of the American colonies.

While in my teaching of legal history I am concerned with medieval England and 19th century American developments, my primary academic interest is in Anglo-American legal history in the 17th and 18th centuries with emphasis upon control by English judicial bodies and administrators of American colonial laws and legal institutions. An important aspect of this interest is the problem of the reception
668 of the laws of England by the various American colonies.

Q. In your opinion, are there particular difficulties in ascertaining the status and laws of the various American colonies in the 17th and 18th centuries, and the relations between the colonies and the crown and other authorities in England, which would make it useful for the Court to hear the testimony of an expert?

A. Yes, I believe there are particular difficulties in the areas to which you advert. In dealing with the laws, the constitutions and the administration of the American colonies, one is essentially dealing with several bodies of law. On the English side one has to have familiarity with the body of English decisional law which determined what might be called the constitutional status of the dominions of the crown outside the realm. Today a vast body of law has developed with respect to the relations of the English crown to its colonies or former colonies. At the time of the settlement of most of the American colonies, this body of law was in a nascent stage.

The royal prerogative played a large role in English colonization. Its content and scope are formed in English decisions, in acts of Parliament and in administrative custom

and practice. Instruments such as royal charters or letters patent, proclamations, orders in council, gubernatorial commissions and instructions all play a role. The opinions and advice of the crown law officers (the Attorney General, the Solicitor General and, to a lesser extent, the King's Advocate) were important elements in colonial administration. The actions of bodies such as the Privy Council, the Board of Trade, the Board of Customs, the Lords Commissioners of the Admiralty, etc., were significant in the governing of the colonies.

The first problem is one of sources – apart from the English reprints and the abridgments, where does one locate charters, commissions, orders in council, reports of the Board of Trade, etc.? Beyond the difficulty of dealing with manuscript sources, one must be able to interpret or construe words in the sense used several centuries ago and to evaluate actions in the light of the realities of law and administration in the 17th and 18th centuries.

English decisional law, acts of Parliament and the administrative acts of English agencies, if not always accessible for American scholars, are relatively centralized and to some extent available in printed sources. From the colonial side the picture is more fragmented, although much of the material sent to England by colonial governors and administrators is located at the Public Record Office in Chancery Lane, London.

Most of the North American colonies have printed substantial portions of the material for their colonial periods such as laws or acts of the Assembly, legislative journals, conciliar records and court records. However, in most colonies much remains in manuscript form. Those remaining in manuscript are frequently widely scattered and poorly indexed. Research may lead to national or state archives, public libraries, historical societies, court houses, university libraries and private collections.

In areas where evidence is scanty or ambiguous, the expert is called upon to exercise a judgment based upon experience stretching over wide reaches of American colonial law and legal institutions.

Q. Would it also be useful, in your opinion, to have the Court hear the testimony of an expert on the legal situation during the period of the formation of the Union?

A. Yes, I believe it would be. There is a certain degree of continuity between the colonial period, the period of Confederation and the early Federal period. In dealing with the Western lands claims, for instance, one is thrown back to the colonial charters from the crown. In many aspects of law and legal systems there was no sharp break
671 with the past at the time of the Declaration of Independence. Much of the background of the Federal Constitution is best understood from the viewpoint of the various constitutional issues raised during the colonial period. While the documentary sources and the literature concerning the formation of the union are relatively limited in comparison with the multiplicity of the colonial period, an expert witness can still perform a useful function.

* * * * *

BY MR. CLAGETT:

Q. Please summarize briefly your understanding of the English law in effect at the outset of English colonization in America with respect to the legal status of the seabed and subsoil of the continental shelf.

A. An understanding of the ownership of the seabed and subsoil under the seas adjoining the American colonies requires reference to the state of the common law in England in the 17th and 18th centuries. As Professor Horwitz stated in his testimony, "under English law and practice of the 17th and 18th centuries, ownership of the seabed under
672 the high seas off English coasts was vested in the crown." (Tr. 120.) English law, or more precisely, the English

common law, clearly recognized crown proprietary rights in the seabed off the English coasts, although the precise distance this ownership extended from the coast was a matter of some uncertainty.

While this common law principle, basically a description of one aspect of the royal prerogative, is first widely articulated in the 17th century, it clearly derives from a much older English legal tradition recognizing the King's sovereignty over the English seas. We find this widespread articulation in the 17th century as a result of controversies over fishing rights, the boundaries of coastal lands and the jurisdiction of the admiralty – the Lord High Admiral and the High Court of Admiralty. The 17th century was a time of tremendous increase in the amount of printed material devoted to legal disputes and controversies and to the law in general. With the age of Sir Edward Coke the printing press became a valuable adjunct to a wider expression of views with respect to various aspects of English law. Actually, as Professor Horwitz points out, the principle that the crown by virtue of its prerogative owned the seabed and subsoil of the seas was given currency during the reign of Elizabeth by Thomas Digges, by the High Court of Admiralty and by William Welwood in his *An Abridgement of all Sea Lawes.* (Tr. 120, 123-127.)

These expressions of the extent of the royal prerogative were made in treatises and elsewhere in the context of the seabed under the high seas off the English (and Irish) coasts. However, the age of Elizabeth was also the age of exploration, and it is clear from a perusal of the available exploration and settlement charters that the royal prerogative in the sense of dominion of the surrounding or adjoining seas was fully expressed in these charters and transferred to dominions of the crown outside the realm in the Western Hemisphere.

Q. Please describe the evidence on which you base that conclusion.

A. From the outset, English exploration and discovery in the Western world rested upon the concept that an English subject taking possession of an uninhabited country or one inhabited only by infidels, basically the *terra nullius* of Roman law, took possession in the name of the King and to his use. Much of the exploration and discovery was done under letters patent or licenses from the crown; in some cases the licensees were not even English subjects. The early patents for exploration and discovery left undefined the exact legal consequences of declaring that the King was
674 sovereign of an island or other area previously regarded as *terra nullius.*

The first letters patent granted to John Cabot and his sons by Henry VII, dated March 5, 1495, empowered the patentees "to find, discover and investigate whatsoever islands, countries, regions or provinces of heathens and infidels, in whatsoever part of the world placed, which before this time were unknown to all Christians," with license to set up the royal banners and ensigns in any town, city, castle, island or mainland whatsoever, newly found by them. (Maine et al. Exhibit No. 239, p. 204). They were also granted the right to "conquer, occupy and possess whatsoever such towns, castles, cities and islands by them thus discovered that they may be able to conquer, occupy and possess, as our vassals, and governors, lieutenants and deputies therein, acquiring for us the dominion, title and jurisdiction of the same towns, castles, cities, islands and mainlands so discovered." (*Id.* at pp. 204-205).

The crown was to receive one-fifth of "all the fruits, profits, emoluments, commodities, gains and revenues" accruing from voyages under the letters patent. No other subjects, without license from the patentees, were to visit

any such mainlands, islands, towns, cities, castles or other places whatsoever discovered by the patentees. (*Id.* at p. 205).

It was on the basis of a voyage made by Cabot under these letters patent that England later laid claim to much of the Atlantic seaboard. (*CSP, Col. 1661-68,* Nos. 510, 622) (Maine et al. Exhibit No. 240, pp. 147, 177-78).

A few years later, on March 19, 1501, the King granted letters patent to Richard Warde, Thomas Asshehurst, John Thomas, João Fernandes, Francisco Fernandes, and João Gonsalves. The first three patentees were Bristol merchants; the last three were from the Azores and subjects of the King of Portugal. The patent granted full and unrestricted authority and power "to find, recover, discover and search out whatsoever islands, countries, regions or provinces of heathens and infidels, in whatever part of the world they may lie, which before this time were and at present are unknown to all Christians, and to set up our banners and ensigns in any town, city, castle, island or mainland by them thus newly found, and to enter and seize these same towns, and as our vassals and governors, lieutenants and deputies to occupy, possess and subdue these, the property, title, dignity and suzerainty of the same being always reserved to us." (Maine et al. Exhibit No. 241, p. 237).

It was then provided that the King's other subjects might visit and inhabit the newly found lands and islands, upon license from the patentees, who were granted full power and authority to rule and govern all persons removing to such lands and islands. This authority included the power to make, set up, ordain and appoint laws, ordinances, statutes and proclamations for the good and peaceful rule and government of such persons. (*Id.* at p. 238). There was no limitation, as was customary in later colonial charters, that the laws, etc., not be repugnant or contrary to the

laws of England. However, by implication, in a later provision granting the Portuguese patentees the rights of English subjects (*id.* at pp. 243-244) it would appear that any laws, etc., made were not to deprive English subjects of their rights. The patentees were to hold the lands, islands and places of the King by fidelity alone, without any compensation or anything else being rendered or made "always excepting the dignity, dominion, regality, jurisdiction and suzerainty of the same, wholly reserved to us [the King and his heirs]." (*Id.* at p. 243).

The patentees were also given the office of Admiral at sea in any of the newly discovered places, countries and provinces and as "our Admiral" given full power and authority to do, exercise and carry out "all and singular the things which pertain to the office of Admiral, according to the law and naval custom obtaining in this our realm of England." (*Id.* at p. 242).

677 Another patent was granted on December 9, 1502 by Henry VII to Hugh Elyot, Thomas Asshehurst, João Gonsalves and Francisco Fernandes giving "full and free authority, faculty and power . . . to find, recover, discover and search out any islands, countries, regions or provinces whatsoever of heathens and infidels in whatsoever part of the world placed, and to set up our banners and ensigns in any city, town, castle, island or mainland by them thus newly found, and to enter and seize the said cities, towns, castles, islands and mainlands for us and in our name, and as our vassals and governors, lieutenants and deputies to occupy, possess, and subdue these, the property, title, dignity and suzerainty of the same being always reserved to us." (Maine et al. Exhibit No. 242, pp. 250-251). Other provisions in the letters patent were substantially the same as those contained in the earlier patent to Richard Warde and others, with no necessity of repeating the provision, although there

was no necessity of making the Portuguese patentees English subjects for most purposes.

These several early patents for exploration and discovery do not contain specific or implied grants of the adjoining seas or even of harbors and rivers. This is explicable on several grounds. Since the three patents were not "grants" 678 – because of the reservation of all sovereignty and property in the crown – but mere commissions of agency, there was no occasion to specify all the property rights which the crown could or would claim in the areas to be explored. Secondly, international rivalries in respect to colonization had not intensified. The settlements contemplated were largely in the nature of trading ventures. However, despite the lack of explicit contemporary judicial expression the patents make it clear that the King as sovereign had as great, if not greater, rights in the conquered infidel cities, countries and places as within the realm.

The 1578 letters patent granted by Queen Elizabeth to Sir Humfrey Gilbert authorized the patentee in general terms to discover "remote, heathen and barbarous lands, countreys and territories not actually possessed of any Christian prince or people" and to occupy and hold such lands, countries and territories "with all commodities, jurisdictions, and royalties *both by sea and land*" (Maine et al. Exhibit No. 193, p. 17, emphasis added. See also Exhibit No. 139, p. 49).

Full understanding of these letters patent and others requires some explanation of terms which are no longer current or now have different meanings.

679 The meaning of the word "commodities" appears in the following passage from *London v. Southwell Collegiate Church* (Chapter), Hob. 303, at p. 304 (1618): "[T]he advowson did not pass by . . . the said words. The words are four: commodities, emoluments, profits and advantages, to the prebend belonging; all which four words are

of one sense and nature, implying things gainful." A much later case, *The Frederick VIII,* [1917] P. 43, 44-46 defines as follows: "The word 'commodity' is one of extensive meaning, denoting anything that is useful, convenient, or serviceable."

The word "jurisdictions" has not changed in its meaning.

The word "royalties" (*regalia* or *regalitates* in Latin) as used above, meant the rights of the King or Queen, *jura regis* or *jura regalia,* otherwise collectively called The King's or Queen's prerogative. The term "royalties" is synonymous with "regalities" or "regalia"; all these terms refer to the complex collection of rights which constituted the royal prerogative, which, as we have seen, included *inter alia* the crown's rights in the sea and seabed. See Blount, *Law-Dictionary,* (3d ed. 1717); 2 Cunningham, *A New and Complete Law Dictionary,* (1765); see also 5 Jacob, *Law Dictionary* 551 (Phil. ed. 1811). A well-recognized and major
680 portion of the King's royalties or regalities was the regality *in dominio,* which comprised those portions of the royal prerogative relating to overlordship and ownership of and powers over land, including, for example, proprietorship of mines and rights to royal forests. See *e.g.* Lapsley, *The County Palatine of Durham; A Study in Constitutional History* 54-67 (1900) (Maine et al. Exhibit No. 331). The regality *in dominio* include royal rights in the sea, such as the right of wreck (*id.* at 62-63) and the right to royal fish, whales and sturgeons either cast ashore or taken in the marginal sea (*id.* at 58). I believe it is clear that the regality or royalty *in dominio* included all crown rights in the marginal sea and seabed, and that when the term "royalties" was used in colonial charters it was intended and understood to include those rights.

The 1578 Gilbert patent also provided that the patentee hold and occupy "all the soyle of all such lands, countries & territories so to be discovered or possessed as aforesaid, and of all Cities, Castles, Townes and Villages, and places in the same, with the rites [rights], royalties and jurisdictions, as well marine as other, within the sayd lands or countreys of [or] the seas thereunto adjoyning to be had or used with ful power to dispose thereof, & of every part thereof in fee simple or otherwise, according to the order of the Laws of England, as nere as the same conveniently may be, at his, and their will & pleasure, to any person then being, or that shall remaine within the allegiance of us, our heires and successours." (Maine et al. Exhibit No. 193, p. 18 and No. 139, pp. 49-50).

In my opinion, the above-recited clauses from the letters patent were designed to grant, and did grant, to the patentee maritime or admiralty jurisdiction and also the soil of the adjoining seas. The Queen in effect obviously assumed that when Sir Humfrey discovered and took possession of any "remote, heathen and barbarous lands, countreys and territories" (*Id.* at p. 17 and No. 139 at p. 49) the royal rights or prerogative with respect to such land areas and the adjoining seas were identical to those possessed by the Queen within the realm.

The patent also granted the right to repulse and keep out "as well by Sea as by land and by all other wayes whatsoever" any other persons who without the special license of Sir Humfrey attempted to inhabit "within the space of two hundredth leagues, neere to the place or places within such countreys as aforesayd . . . where the said Sir Humfrey, his heires or assignes, or any of them, or his or their, or any of their associates or companies, shall within sixe yeeres next ensuing, make their dwellings and abidings." (*Id.* at p. 19 and No. 139 at p. 50).

The patent further granted "full and meere power and authoritie to correct punish, pardon, governe and rule by their, and every or any of their good discretions and policies, as well in causes capitall or criminall, as civill, both marine and other, all such our subjects and others as shall from time to time adventure themselves in the sayd journeys or voyages habitative or possessive, or that shall at any time hereafter inhabite any such lands, countreys or territories as aforesayd, or that shall abide within two hundred leagues of any sayd place or places, where the sayd sir Humfrey or his heires, or assignes, or any of them, or any of his, or their associats or companies, shall inhabite within sixe yeers next ensuing the date hereof. . . (*Id.* at pp. 20-21 and No. 139 at p. 51).

In early 1584 Queen Elizabeth granted letters patent to Adrian Gilbert and others for search and discovery of the Northwest Passage to China. (Maine et al. Exhibit No. 192). The charter, *inter alia*, granted "full power and absolute authoritie to trade and make their resiance [residence] in any of the sayde Isles, Countreys, Regions, Provinces, Territories, Seas, Rivers, Portes, Bayes, and Havens, and all manner of other places whatsoever with all commodities, profites, and emoluments in the sayde places or any of
683 them, growing and arising, with all manner of priviledges, prerogatives, jurisdictions and royalties both by sea and land whatsoever, yeelding and paying therefore unto us, our heires and successors, the tenth part of all such golde and silver oare, pearles, jewels, and precious stones, or the value thereof, as the sayd Adrian Gylbert and his sayd associates, their heirs and assignes, servants, factors, or workemen, and every or any of them shall finde. . . ." (*Id.* at p. 377).

The patent also gave Adrian Gilbert and his associates the right to exclude others from trading with or inhabiting,

without special license, any "Iles, Countreys, Regions, Provinces, Territories, Seas, Rivers, Ports, Bayes, or Havens, or any other of the premisses by the sayd Adrian Gylbert or his associats, their heires and their said assignes or any of them, to be found by them, discovered and traffiqued unto . . . ", and made such invasions unlawful. (*Id.*).

While the language of the patent is somewhat variant from that of the earlier 1578 charter, in my opinion the language employed granted the crown's rights to the soil under seas adjoining any place of trade or habitation established under the charter terms. How far out the rights extended was left as indefinite as under the statements
684 of the principle with respect to the realm itself.

About six or seven weeks after the grant to Adrian Gilbert and others Queen Elizabeth granted letters patent to Sir Walter Raleigh "to discouer [discover], search, finde out, and view such remote, heathen and barbarous lands, countries, and territories, not actually possessed of any Christian Prince, nor inhabited by Christian People . . . and the same to haue, holde, occupie and enjoy to him, his heires and assignes for ever, with all prerogatives, commodities, jurisdictions, royalties, priuileges, franchises, and preheminences, thereto or thereabouts both by sea and land, whatsoeuer we by our letters patents may graunt, and as we or any of our noble progenitors haue heretofore graunted to any person or persons, bodies politique or corporate. . . ." (Maine et al. Exhibit No. 140, p. 53).

The above quoted language is fuller than that of the 1578 grant to Sir Humphrey Gilbert, and may represent the efforts of careful counsel for a royal favorite. As a practical matter it is doubtful that any greater rights were granted than in the earlier letters patent. The words "prerogatives", "jurisdictions", "privileges" and "franchises" need no definition. "Commodities" and "royalties" have

been defined above. The word "preheminences" does not appear in any law dictionary examined but it frequently
685 appears in company with prerogatives and privileges and seemingly refers to the "pre-eminence" of the King or crown.

In words virtually identical with those of the 1578 Gilbert patent Raleigh was granted "all the soile of all such lands, territories, and Countries, so to be discouered [discovered] and possessed as aforesaid and all such Cities, castles, townes, villages, and places in the same, with the right, royalties, franchises and jurisdictions, as well marine as other within the saide landes, or Countreis, or the seas thereunto adjoyining, to be had, or used, with full power to dispose thereof, and of euery part in fee-simple or otherwise, according to the order of the lawes of England, as neere as the same conueniently may bee . . ." (*Id.* at p. 54).

Also granted, as in the 1578 Gilbert patent, was the power to keep others at a 200 leagues distance and a power to govern all within the same distance from any settlement under the charters. (*Id.* at p. 55).

Q. Was there any contemporaneous judicial definition of the rights of the crown and the status of English law in English colonies? A. The first judicial articulation of the constitutional position of the King in relation to
686 what came to be called dominions of the crown outside the realm came in 1608 in *Calvin's Case* or *The Case of the Post-nati*, 7 Coke Rep. 2a (Exchequer Chamber) (Maine et al. Exhibit No. 243). Earlier arguments on the same set of facts are reported in Moore (K.B.) 790. (Maine et al. Exhibit No. 244). An action in King's Bench and a companion suit in the High Court of Chancery were both adjourned to the Court of Exchequer. This famous case did not directly involve the plantations. An assize of novel disseisin had been brought in King's

Bench, the defendants pleaded in law the alienage of the plaintiff and plaintiff demurred thereto. The question then, as a matter of law, was whether Robert Calvin the plaintiff, being born in Scotland after the crown of England descended to James I, was an alien born and consequently disabled to bring any real or personal action for any lands within the realm of England. The full report of the case in Coke's Reports is very long and the focal problem was *ligeance.* The most important passage is at pages 17b and 18a of Coke's Report. (Maine et al. Exhibit No. 243, pp. 397-399). The manner of acquiring dominion entered into the discussion and the question was treated in terms of the English law of real property. All the realm was in tenure and consequently any additions of property could be acquired only by conquest. The
687 decision then went on to differentiate between the conquest of the kingdom of a Christian king and the conquest of the kingdom of an infidel. If a king came to a Christian kingdom by conquest, seeing that he had power of life and death, he might at his pleasure alter and change the laws of that kingdom. However, until he made such an alteration, the ancient laws of the conquered kingdom remained in effect. But if a Christian king conquered the kingdom of an infidel and brought them under his subjection, *ipso facto* the laws of the infidel were abrogated, for they were not only against Christianity but also against the law of God and of nature. In that case, until certain laws were established the Christian king by himself and by such judges as he should appoint, should judge the infidels and their causes according to natural equity.

The significance of this passage is that it gave the king virtually *carte blanche* in establishing the government and laws of a "conquered country." In later years objections

were raised that the rule laid down primarily contemplated the government of the "conquered" not the "conquerors" and that most of the American colonies, as a factual matter, could not properly be regarded as "conquered" in that settlement or occupation was not accompanied by any armed "conquest" of the native Indian tribes.

688 It was not until many years after *Calvin's Case* that the English central courts enunciated the corollary principle that in the case of the settlement of an uninhabited country, newly discovered by English settlers, the settlers carried the laws of England with them. I shall discuss these later cases subsequently in my testimony. At this point I would like to point out that the argument or speech of Lord Bacon, as counsel for Calvin in the Exchequer Chamber, does enunciate the view that an English subject carries the laws of England with him as his birthright. (Maine et al. Exhibit No. 245).

Calvin's Case was probably the most important English case dealing with the constitutional status of the colonies, which were usually called plantations or dominions of the crown outside the realm in the 17th or 18th centuries. The opinions and arguments in *Calvin's Case* were published in pamphlet form, as were some of the related Parliamentary proceedings involving a projected union with Scotland.

As we shall see, as late as 1774 Lord Mansfield reiterated in large part the precepts laid down in *Calvin's Case* in a decision which dealt with the prerogative of the crown in Grenada, a Windward island conquered from the French. *Campbell v. Hall,* 1 Cowper 204 (K.B.) (Maine et al. Exhibit No. 246) and Lofft 655 (Maine et al. Exhibit No. 247). This decision, in turn,
689 in conjunction with the status of conquered Quebec, was

the subject of a three-volume commentary and critique by Baron Maseres. (*The Canadian Freeholder: In Three Dialogues Between an Englishman and a Frenchman, Settled in Canada* (1779).)

There was little advance in English judicial circles beyond the learning displayed in *Calvin's Case* until the 1690's although the problem of the extent to which the laws of England did or should extend to the plantations, particularly the West Indian islands, was fairly frequently before the Lords of Trade and Plantations or some other comparable body. (See for example, *CSP, Col., 1677-1680,* Nos. 1323, 1346, 1347, 1405.) (Maine et al. Exhibit No. 248, pp 497-8, 520-1, 554). However, two cases of the 1670's, *Craw v. Ramsey,* Vaughan 274 (C.P. 1670) (Maine et al. Exhibit No. 249), and *Concerning Process out of the Courts at Westminister into Wales of Late Times and How Anciently,* Vaughan 395 (Maine et al. Exhibit No. 250), underscore that the "English plantations" were dominions belonging to the crown of England and not to the King of England and recognize a concept of settled countries or plantations as opposed to the sole category of "conquered countries", as in *Calvin's Case.* (Maine et al. Exhibit Nos. 243 and 244).

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BY MR. CLAGETT:

Q. Please turn now to the royal charters of the colonies which eventually became the states defendants in this action. What provisions do they contain, if any, regarding seabed rights and how do you construe those provisions? A. The first charter of Virginia, granted in 1606, provided for a "first colony" to be planted on the North American Atlantic coast between 34 and 41 degrees north latitude and a "second colony" to be

planted on the same coast between 38 and 45 degrees north latitude. The grant of the "first" or southern colony was phrased as follows:

"And that they shall have all the Lands, Woods, Soil, Grounds, Havens, Ports, Rivers, Mines, Minerals, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever, from the said first Seat of their Plantation and Habitation by the Space of fifty Miles of *English* Statute
695 Measure, all along the said Coast of *Virginia* and *America*, towards the *West* and *Southwest*, as the Coast lyeth, with all the Islands within one hundred miles directly over against the same Sea Coast; And also all the Lands, Soil, Grounds, Havens, Ports, Rivers, Mines, Minerals, Woods, Waters, Marshes, Fishings, Commodities, and Hereditaments, whatsoever, from the said Place of their first Plantation and Habitation for the space of fifty like *English* Miles, all alongst the said Coasts of *Virginia* and *America*, towards the *East* and *Northeast*, or towards the *North*, as the Coast lyeth, together with all the Islands within one hundred Miles, directly over against the said Sea Coast: And also all the Lands, Woods, Soil, Grounds, Havens, Ports, Rivers, Mines, Minerals, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever, from the same fifty Miles every way on the Sea Coast, directly into the main Land by the Space of one hundred like *English* Miles; . . . ." (Maine et al. Exhibit No. 41, p. 3784).

The grant of the "second" or northern colony was similarly worded. (*Id.* at p. 3785).

In addition, the councils of the two colonies were given the rights to "dig, mine, and search for all Manner of Mines of Gold, Silver, and Copper, as well within any Part of their said several Colonies, as of the said main
696 Lands on the Backside of the same Colonies . . . ." (*Id.* at p. 3786).

A comparison of this 1606 charter with the earlier letters patent to Gilbert and Raleigh and the two later Virginia patents may leave some doubt whether this charter was intended to vest in the patentees rights to the soil of the adjacent seas. However, the noted American historian, Charles McLean Andrews, has stated that the territorial boundaries set forth in the 1606 charter for the first colony "formed a section of land, which according to the wording of the patent was to extend fifty miles north along the seacoast above the first settlement and fifty miles south, one hundred miles into the interior and one hundred miles out to sea." 1 *Colonial Period of American History* 84. (Maine et al. Exhibit No. 251, p. 84).

The second Virginia charter of 1609, an "Enlargement and Explanation" of the 1606 "Grant, Privileges and Liberties" to the "first colony," granted,

"all those Lands, Countries, and Territories, situate, lying, and being in that Part of America, called Virginia, from the Point of Land, called Cape or Point Comfort, all along the Sea Coast to the Northward, two hundred miles, and from the said Point of Cape Comfort, all along the Sea Coast to the Southward, two hundred Miles, and all that Space and Circuit of Land, lying from
697 the Sea Coast of the Precinct aforesaid, up into the Land throughout from Sea to Sea, West and Northwest; And also all the Islands lying within one hundred Miles along the Coast of both Seas of the Precinct aforesaid; Together with all the Soils, Grounds, Havens, and Ports, Mines, as well Royal Mines of Gold and Silver, as other Minerals, Pearls, and precious Stones, Quarries, Woods, Rivers, Waters, Fishings, Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preheminences within the said Territories, and the Precincts thereof, whatsoever, and

thereto, and thereabouts both by Sea and Land, being, or in any sort belonging or appertaining, and which We, by our Letters Patents, may or can grant, in as ample Manner and Sort, as We, or any our noble Progenitors, have heretofore granted to any Company, Body Politic or Corporate, or to any Adventurer or Adventurers, Undertaker or Undertakers of any Discoveries, Plantations, or Traffic, of, in, or into any Foreign Parts whatsoever, and in as large and ample Manner, as if the same were herein particularly mentioned and expressed; . . . ." (Maine et al. Exhibit No. 42, pp. 3795-96).

Also granted was the right "to dig and to search for all manner of Mines of Gold, silver, Copper, Iron, Lead, Tin, and all sorts of Minerals, as well within the precinct aforesaid, as within and [any] part of the mainland not
698 formerly granted to any other." (*Id.* at p. 3798).

The letters patent further provided

"that in all Questions and Doubts that shall arise upon any difficulty of Construction or Interpretation of any Thing contained either in this, or in our said former Letters-patents, the same shall be taken and interpreted in most ample and beneficial Manner for the said Treasurer and Company, and their Successors, and every Member thereof." (*Id.* at p. 3801).

I conclude that the letters patent were intended to, and did, grant the seabed and subsoil of the adjoining sea to a distance of one hundred miles from the shore. This conclusion is supported by

(1) The comprehensive language employed in the grant – "Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preheminences."

(2) The geographic specificity of the rights granted – "within the said Territories, and the Precincts thereof, whatsoever, and thereto, and thereabouts *both by Sea*

and Land, being, or in any sort belonging or appertaining" (Emphasis added) (the word "Precincts" in this context meaning "environs").

(3) The "as large and ample Manner" language, construed in the light of the Gilbert and Raleigh patents.

(4) The favorable construction or interpretation clause.

599 The inclusion in the charter of "all the Islands lying within one hundred Miles along the Coast of both Seas of the Precinct aforesaid" may have been influenced by the fourteenth century work of Bartolus, *Tractatus de Insula.* As stated by Professor Julius Goebel, Jr., in his book, *The Struggle for the Falkland Islands* (1927), at pp. 74-75:

"One having jurisdiction over the territory adjacent to the sea, says Bartolus, has jurisdiction over the sea for one hundred miles notwithstanding the fact that the sea is common to all, and it follows from this that jurisdiction over the islands within such waters is properly vested in the nearest state. For two days' journey, says Bartolus, is what the law regards as sufficiently near on land, and one hundred miles at sea is less than two day's journey."

Some of the early writers were fascinated by the problem of new islands arising from the sea. Unless the patentees had a right to the soil of the adjoining seas, such new arisen island, regarded as *nullius,* might be lawfully occupied by a foreign power, such as Spain, or might be granted by the crown to other patentees. It made sense from both the standpoint of the patentees and of the crown, particularly under the uncertain conditions of early colonization efforts, for the crown to grant and the Virginia Company to hold rights to the
00 soil of the adjoining seas to a distance of over one

hundred miles from the shore.

It is inconceivable to me that the King would accept at this time or later the view or concept that the rights of the crown in the colonies or plantations abruptly terminated at the low water mark. Who was to say the King nay? Assuming that the crown had rights to the soil of the sea comparable to those enjoyed with respect to the realm, it is inconceivable that charter after charter could be granted without including a grant of these rights to the various patentees or a demand therefor. That extended research reveals no negotiation or bargaining directed toward the acquisition of such rights leads me to conclude that they were included in one form of diplomatic language or another virtually as a matter of course, in every grant scrutinized.

Certainly I have found no evidence of any thin line drawn by the negotiators for the crown between (1) land under water in rivers, ports, harbors, bays and arms of the sea and (2) land under the adjoining seas. If such a fine distinction was being consciously drawn it would have surfaced somewhere in the years of colonization extending from the reign of Elizabeth to the American Revolution. And as I understand the position of the United States in
701 this proceeding, it concedes that grants were made by the crown of the soil beneath the waters of rivers, ports, harbors, bays and arms of the sea.

The third Virginia charter, granted in 1612, after making reference to the terms of the second or 1609 charter set forth the following recital:

"Now forasmuch as we are given to understand that in those Seas adjoining to the said Coasts of Virginia, and without the Compass of those two hundred Miles by Us so granted unto the said Treasurer and Company as aforesaid, and yet not far distant from the said Colony in

Virginia, there are or may be divers Islands lying desolate and uninhabited, some of which are already made known and discovered by the Industry, Travel and Expences of the said Company, and others also are supposed to be and remain as yet unknown and undiscovered, all and every of which it may import the said Colony both in Safety and Policy of Trade to populate and plant; in Regard whereof, as well for the preventing of Peril, as for the better Commodity of the said Colony, they have been humble suitors unto Us, that We would be pleased to grant unto them an Enlargement of our said former Letters-Patents, as well for a more ample Extent of their Limits and Territories into the Seas adjoining to and upon the Coast of Virginia, as also for some other Matters and Articles concerning the better government of the said Company and Colony, in which Point our said former Letters Patents do not extend so far as Time and Experience hath found to be needful and convenient . . ." (Maine et al. Exhibit No. 43, p. 3803).

The document then granted and confirmed to the grantee (The Treasurer and Company of Adventurers and Planters of the City of London for the first Colony in Virginia): "all and singular those Islands whatsoever situate and being in any Part of the Ocean Seas bordering upon the Coast of our said first Colony in Virginia, and being within three Hundred Leagues of any of the Parts heretofore granted to the said Treasurer and Company in our said former Letters-Patents as aforesaid, and being within or between the one-and-fortieth and thirtieth Degree of Northerly Latitude: together with all and singular Soils, Lands, Grounds, Havens, Ports, Rivers, Waters, Fishings, Mines and Minerals, as well Royal Mines of Gold and Silver, as other Mines and Minerals, Pearls, precious Stones, Quarries, and all and singular other Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preheminences, both within

the said Tract of Land upon the Main, and also within the said Islands and Seas adjoining whatsoever and thereunto or thereabouts, both by Sea and Land being or situate: And which, by our Letters-Patents, we may or can grant,
703 and in as ample Manner as We or any our noble Progenitors have heretofore granted to any Person or Persons, or to any Company, Body Politick or corporate, or to any Adventurer or Adventurers, Undertaker or Undertakers of any Discoveries, Plantations, or Traffick, of, in, or into any foreign Parts whatsoever, and in as large and ample Manner as if the same were herein particularly named, mentioned, and expressed. Provided always, that the said Islands or any Premises herein mentioned, or by these Presents intended or meant to be granted, be not actually possessed or inhabited by any other Christian Prince or Estate, nor be within the Bounds, Limits, or Territories of the Northern Colony heretofore by Us granted to be planted by divers of our loving Subjects in the North Parts of Virginia." (*Id.* at p. 3804).

As in the case of the 1609 charter, the 1612 letters patent contained a provision

"that in all Questions and Doubts, that shall arise, upon any Difficulty of Construction or Interpretation of any Thing, contained in these, or any other our former Letters-patent, the same shall be taken and interpreted in most ample and beneficial Manner for the said Treasurer and Company, and their Successors, and every Member thereof." (*Id.* at p. 3810).

704 The primary purpose of the third charter was to extend the "first colony's" eastern or seaward boundaries to include the Bermudas, lying almost six hundred miles off Cape Henry. The settlement of Virginia had not been commercially successful and the Bermudas offered an additional area for exploitation by the Virginia Company. However, the Bermuda Islands shortly passed into other hands. In

November, 1612 the Virginia Company sold its title and rights in Bermuda to a new group, which remained dependent upon the Virginia Company's charter. In November 1614 the Bermuda group surrendered these acquired rights to the crown. The King then issued a royal charter dated June 29, 1615, to the "Governor and Company of the City of London for the Plantation of the Somer Islands." Provisions in the Bermuda charter made it clear that the Virginia Company had surrendered only the Bermudas or Somer Islands out of the total territory granted to it in 1612. Craven, "An Introduction to the History of Bermuda", 17 *William and Mary Quarterly*, Second Series 176, 195 (1937). (Maine et al. Exhibit No. 252, p. 195).

Leaving aside the inclusion and exclusion of the Bermudas, the third charter to the Virginia Company confirms and strengthens the view that the soil under the seas off
705 the Virginia coast to a distance of one hundred miles was vested in the grantee, the Virginia Company. The third charter was not intended to, and did not, grant the seas and subsoil stretching from the Virginia mainland to the Bermudas. The clauses granting *jura regalia* were limited to the mainland area and the Bermuda islands area and the seas adjoining each area. The point of reference in the later colonial period was always the limits of the 1609 charter.

Despite the loss of its charter by the Virginia Company in 1624 and the loss of territory by subsequent royal grants, such as those for Maryland and Carolina, in my opinion the eastern bounds of Virginia at the time of the American Revolution were still as settled by the 1609 charter. Professor Flaherty, who I understand will be appearing as a witness for Virginia, has a detailed account of the Virginia boundary situation and I do not wish to duplicate his testimony. I certainly agree with his conclusions as to

the eastern boundary of the province in the period 1624 to 1776.

The "second colony" under the Virginia charter of 1606 commenced colonization of the New England coast and then, in order to avoid all confusions, questions and dif
706 ferences with the "first colony," sought new letters patent from the crown. (Maine et al. Exhibit No. 1). This petition resulted in a grant to the Council of New England, to be called New England, bounded as follows:

"that all that Circuit, Continent, Precincts, and Limitts in America, lying and being in Breadth from Fourty Degrees of Northerly Latitude, from the Equnoctiall Line, to Fourty-eight Degrees of the said Northerly Latitude, and in length by all the Breadth aforesaid throughout the Maine Land, from Sea to Sea, with *all the Seas,* Rivers, Islands, Creekes, Inletts, Ports, and Havens, within the Degrees, Precincts, and Limitts of the said Latitude and Longitude, shall be the Limitts, and Bounds, and Precincts of the second Collony . . . ." (Maine et al. Exhibit No. 11, p. 1829). (Emphasis added).

The significant language in the grant reads as follows:

"all the aforesaid Lands, and Grounds, Continent, Precinct, Place, Places and Territoryes, viz, the aforesaid Part of America, lying and being in Breadth from fourty Degrees of Northerly Latitutde from the Equinoctiall Line, to fourty-eight Degrees of the said Northerly Latitude inclusively, and in Length of, and within all the Breadth aforesaid, throughout the Maine Land from Sea to Sea, together also, with the Fishings, Mines, and Mineralls, as well Royall
707 Mines of Gold and Silver, as other Mine and Mineralls, precious Stones, Quarries, and all, and singular other Comodities, Jurisdictions, Royalties, Priveliges, Franchises, and Preheminences, both within the same Tract of Land upon the Maine, and *also within the said Islands and Seas*

adjoining: Provided always, that the said Islands, or any of the Premises herein before mentioned, and by these Presents intended and meant to be granted, be not actually possessed or inhabited by any other Christian Prince or Estate, nor be within the Bounds, Limitts, or Territoryes, of that Southern Collony heretofore by us granted to be planted by diverse of our loving Subjects in the South Parts, to have and to hold, possess and enjoy, all, and singular, the aforesaid Continent, Lands, Territoryes, Islands, Hereditaments, and Precincts, *Sea Waters,* Fishings, with all, and all Manner their Commodities, Royalties, Liberties, Preheminences, and Profitts, that shall arise from thence, with all and singular, their Appertenances, and every Part and Parcell thereof, and of them. . . ." (*Id.* at p. 1834). (Emphasis added).

As in the 1609 and 1612 Virginia patents, the charter contained the following clause:

"And further our will and pleasure is, that in all Questions and Doubts, that shall arise upon any Difficulty of Instruction or Interpretation of any Thing contained
708 in these our Letters-pattents, the same shall be taken and Interpreted in most ample and beneficial Manner, for the said Council and theire Successors, and every Member thereof." (*Id.* at p. 1840):

Under the terms of this grant the Council of New England undoubtedly was granted the right to the soil of the adjacent seas; the charter provisions I have read specifically refer to "Seas adjoining" and "Sea Waters." Whether this right extended to a distance of one hundred miles from the coast, as in the original grant to the "second colony," may find an affirmative answer in the favorable construction or interpretation clause. Another solution, of course, would be to regard as applicable the same flexible limits as operated in the realm itself. Certainly nothing in

the petition for a charter for New England would warrant any reduction in the extent of the hitherto granted subsoil of the sea. (Maine et al. Exhibit No. 1).

That the royal grant to the Plymouth Company or Council of New England was construed contemporaneously as including "the seas and islands lying within one hundred miles of any part of the coasts of the country" granted appears from the August 10, 1622 grant of the province of Maine by the Plymouth Company to Sir Ferdinando Gorges and Captain John Mason. (Maine et al. Exhibit
709 No. 2).

This indenture described the royal patent to the Plymouth Company as granting

"all that part or porcon of that country now commonly called New-England wch is situate, lying and being between the latitude of forty and forty-eight degrees northerly latitude, *together with the seas and islands lying within one hundred miles of any part of the said coasts of the country aforesaid*: and also all the lands, soyle, grounds, havens, ports, rivers, mines, as well royal mines of gold and silver, as other mines, minerals, pearls and pretious stones, woods, quaries, marshes, waters, fishings, hunting, hawking, fowling, commodities and hereditaments whatsoever, together with all prerogatives, jurisdictions, royaltys, privileges, franchises and preliminaries within any of the said territories and precincts thereof whatsoever." (*Id.* at p. 1622). (Emphasis added).

The indenture then went on to grant to Gorges and Mason "all that pat [part] of the main land in New-England lying upon the sea-coast betwixt ye rivers of Merrimack and Sagadahock, and to the furthest heads of the said rivers, and soe forwards up into the land westward until threescore miles be finished from ye first entrance of the aforesaid rivers, and halfway over; that is to say, to the midst

of the said two rivers wch bounds and limitts the lands
710 aforesaid together wth all the islands and isletts within five leagues distance of ye premises and abutting upon ye same or any part or parcell thereof.

As also all the lands, soyle, grounds, harbors, ports, rivers, mines, mineralls, pearls, pretious stones, woods, quarries, marshes, waters, fishings, hunting, hawking, fowling, and other commodities and hereditaments whatsoever; with all and singular their appurtenances, together with all prerogatives, rights, royalties, jurisdictions, privileges, franchises, liberties, preheminences, marine power, *in and upon ye said seas and rivers;* as also all escheats and casualties thereof, as flotson, jetson, lagon, with anchorage, and other such duties, immunities, sects, isletts and appurtenances whatsoever, with all the estate, right title, interest, and claim and demands whatsoever wch ye said President and councill and their successors, of right ought to have or claim in or to the said porcons of lands, rivers, and other ye said premises, as is aforesaid by reason or force of his highness' said Letters Patents, in as free, large, ample and beneficial manner, to all intents, constructions and purposes whatsoever, as in and by the said Letters Patents ye same are among other things granted to the said President and councill aforesaid, ... " (*Id.*
11 at pp. 1622-23. Emphasis added).

Again the charter defines the grant as "all the islands and isletts within five leagues distance of ye premises and abutting upon ye same or any part or parcell thereof." There is no mention of adjoining seas within this five league limit. Yet the charter goes on to grant "all prerogatives, rights, royalties, jurisdictions, privileges, franchises, liberties, preheminences, marine power, in and upon ye said seas and rivers" and in effect whatever rights the Council of New England had in the premises. My conclusion

is that the patentee obtained a right to the soil of the adjoining seas up to the distance of five leagues, as well as to islands within such bounds.

Incidentally, it might be pointed out that the 1620 royal grant to the Council of New England and the 1622 grant by the Council to Gorges and Mason, taken together, confirm the meaning attributed above to the 1609 Virginia patent.

In 1639 Sir Ferdinando Gorges applied for and received a royal charter which was in substance a confirmation of the 1622 grant from the Plymouth Company. The letters patent incorporated a province or county, to be called the
712 Province or County of Maine, and defined its limits to include

"the Northe halfe of the Isles of Shoales togeather with the Isles of Capawock and Nawtican neere Cape Cod as alsoe all the Islands and Iletts lyeinge within five leagues of the Mayne all alonge the aforesaide Coasts betweene the aforesaid River of Pascataway and Segadahocke with all the Creekes Havens and Harbors thereunto belonginge. . . . " (Maine et al. Exhibit No. 3, p. 1626).

The charter went on to provide that the grant was made with

"all and singuler the Soyle and Grounds thereof as well drye as covered with waters and all Waters Portes Havens and Creekes of the Sea and Inletts of the said Province of Mayne and Premisses as to them or any of them belonginge or adjacent as alsoe all Woodes Trees Lakes and Rivers within the said Provynce of Mayne and Premisses or Lymitts of the same togeather with the Fish[illegible] of whatsoever kinde as well Pearle as Fishe as Wha[illegible]urgeons or any other either in the Sea or Rivers and [illegible]e All Royaltyes of Hawkeing Hunting Fowleing Warren and Chases within the said Province of Mayne and Premisses aforesaid Deere

of all sorts and all other Beasts and Fowles of Warren
13 and Chase and all other Beasts there and alsoe All Mynes and Care of Goulde Silver Precious Stones Tynne Leade Copper Sulphure Brimstone or any other Mettal or Mynerall matter whatsoever within the said Province and Premisses or any of them opened or hidden and all Quarries there And all Gould Pearle Silver Precious Stones and Ambergreece whiche shallbee founde within the said Province and Premisses or any of them and the Lymitts and Coasts of the same or any of them or any parte of them or any of them and all and singular other Proffitts Benefitts and Commodityes groweing comeing accrueing or happening or to be had perceived or taken within the said Province and Premisses Lymitts and Coasts of the same or any of them. . . .

. . . with all and singular and as large and ample Rights Jurisdiccons Priviledges Prerogatives Royalties Liberties Immunityes Franchises Preheminences and Hereditaments *as well by Sea as by Lande* within the said Province and Premisses and the Precincts and Coasts of the same or any of them and *within the Seas belonging or adjacent to them* or any of them as the Bishopp of Durham within the Bishopricke or Countie Palatine of Duresme in our Kingdome of England now hath useth or enjoyeth or of right hee ought to have use or enjoye within the said Countie Palatine as if the same were herein particulerly menconed and expressed . . . " (*Id.* at pp. 1626-27). (Em-
14 phasis added).

In addition, Gorges, his heirs and assigns, were granted "All Treasure Trove Goodes and Chattells of Felons and Felons themselves Waifes Estrayes Pyrats Goodes Deodands Fynes and Amerciaments of all the Inhabitants and others happening groweinge or ariseing in the said Province and other the Premisses or any part thereof or in any Voyage

or Passage to or from the same aswell for Offences committed against our selfe our heires and successors or thinges concerninge our selfe our heires or successors or our proffitt as against others or thinges concerninge others or the proffitts of others and all and all manner of Wrecks of Shipps or Merchandize and all that which to wrecks belongeth by what means soever happening within or upon the Havens Coasts Creeks or Shoares of the Premisses or any parte thereof And Wee Doe for us our heires and successors create ordeyne and constitute the said Fardinando Gorges his heires and assignes the true and absolue [absolute] Lords and Proprietors of all and every the aforesaid Province of Mayne and Premises aforesaid and all and every the Lymitts and Coasts thereof Saveing always the faith and allegiance and the Supreame Dominion due to us our heires and successors. . . . " (*Id.* at pp. 1627-28).

715 Full power and authority was given "to erect Courtes of Justice aswell ecclesiasticall as civill and temporall whatsoever and to appoynt and constitute from tyme to tyme Judges Justices Magistrates and Officers as well of the said Courte and Courtes of Justice as otherwise aswell by Sea as by Lande for the hearing and determining of all manner of Causes whatsoever within and concerning the said Province and Premisses or any of them or the Inhabitants or Residents there and Passengers to or from the same aswell by Lande as by Sea. . . . " (*Id.* at pp. 1628-29).

Full and absolute power and authority was granted to erect and appoint within the said province and premises "such and soe many Portes Havens Creekes and other Places for the ladeing and unladeing of Shippes Barques and other Vessells, and in such and soe many places and to appoynt such Rights Jurisdiccons Priviledges and Libertyes unto the said Portes Havens and Creekes belonging as to

him or them shall seeme meete." (*Id.* at pp. 1631-32). Tolls were authorized for loading or unloading merchandise at any such ports, havens and creeks. (*Id.* at p. 1632).

A saving clause provided as follows:

"Saveing allwayes to all our Subjects of Our Kingdome of England Libertie of Fisheing as well in the sea as in the
716 Creekes of the said Province and Premisses aforesaid and the Priviledge of Salteing and dryeing of theire Fishe and Dryeing of theire netts a Shoare of the said Province and any of the Premisses or in any of the said Portes, Creekes withstanding which said Liberties and Priviledges our pleasure is that the said subjects of us our heires and successors shall enjoye without any noteable damage or injuries to bee done to the said Sir Fardinando Gorges his heires and assignes or the Inhabitants of the said Province or any of the Premisses or in any of the said Portes, Creeks or Shoares aforesaid but chiefly in the Woodes there groweing. . . . " (*Id.*)

As to admiralty rights the patent provided as follows:

"And Wee Doe further for us our heires and successors give and graunte unto the said Sir Fardinando Gorges his heires and assignes for ever all Admirall Rights Benefitts Jurisdiccons and likewise all Priviledges and Commodities to the said Admirall Jurisdiccon in any wise belonging or apperteyning in and uppon the Seas Rivers and Coasts of or belonging to the said Province and Premisses or every or any of them or to the same adjoyneing within twentie leagues of the said Province and Premises of any of them and in and upon all other Rivers and Creekes thereof And likewise power to heare and determine all manner of Pleas for and concerning the same Saveing allwayes to us our
717 heires and successors and to the Lord High Admirall of England for the tyme being of us our heires and successors all and all manner of Jurisdiccon Rights Powers

Benefitts and authorities whatsoever incident or belonging to the said office of Admirall which itt shalbee lawful from tyme to tyme to us our heires or successors or the Lord High Admirall of England for the tyme being to have use and exercise within the said Province and Premisses and the Seas and Rivers thereof or within twentie leagues of the same as aforesaid when wee shall thinke fitt. . . . " (*Id.* at p. 1633).

Finally, as to construction of the letters patent the following was set forth in the document:

"And further Wee Will and by these Presents for us our heires and successors Doe graunte to the said Sir Fardinando Gorges his heires and assignes that these our Letters Patents or the enrollment of them shalbee in all things and to all intents and purposes firme good effectuall and sufficient in the lawe against us our heires and successors aswell in all Courts as elsewhere within our Kingdome of England or in any other our Kingdomes and Domynions as in the said Province and Premisses aforesaid or in any of them and shallbee construed reputed and taken aswell according to the true meaning and intent as to the wordes of the same most benignely favorably and beneficially to
718 and for the said Sir Fardinando Gorges his heires and assignes (noe interpretacon being made of any worde or sentence Whereby Gods worde true Christian Religion now taught professed and maynteyned the fundamentall Laws of this Realme or Alleagiance to us our heirs or successors may suffer prejudice or diminucon) any omission misinformacon want of certaine expression of the contents lymitts and boundes or the certeyne scituacon of the said Province and Premisses aforesaid hereby meant or intended to be graunted or in what latitude or degree the same are or any defect in these Presents or any Lawe Statute or other cause or matter to the contrary notwithstanding. . . . " (*Id.* at pp. 1636-37).

a confirmatory grant from Charles I in the following words:

"all the saide Parte of Newe England in America, lyeing and extending betweene the Boundes and Lymytts in the said receted Indenture expressed, and all Landes and Groundes, Place and Places, Soyles, Woods and Wood Groundes, Havens, Portes, Rivers, Waters, Mynes, Mineralls, Jurisdiccons, Rightes, Royalties, Liberties, Freedomes, Immunities, Priviledges, Franchises, Preheminences, Hereditaments, and Comodities whatsoever, to them the saide Sir Henry Rosewell, Sir John Younge, Thomas Southcott, John Humfrey, John Endecott, and Simon Whetcombe, theire Heires and Assignes, and to their Associatts, by the saide recited Indenture, given, graunted, bargayned, solde, enfeoffed, aliened, and confirmed, or mencoed, or intended thereby to be given, graunted, bargayned, sold, enfeoffed, aliened, and confirmed: . . . . " (Maine et al. Exhibit No. 24, pp. 1848-49).

22 The charter in a further paragraph granted the same territory, this time specifically described, and

"all Landes and Groundes, Place and Places, Soyles, Woodes, and Wood Groundes, Havens, Portes, Rivers, Waters and Hereditaments whatsoever, lyeing within the said Boundes and Lymytts, and every Parte and Parcell thereof; and *also all Islandes in America aforesaide, in the saide Seas, or either of them, on the Westerne or Easterne Coastes, or Partes of the said Tracts of Landes hereby mencoed to be given and graunted, or any of them;* and all Mynes and Mynerals as well Royal mynes of Gold and Silver and other mynes and mynerals, whatsoever, in the said Landes and Premisses or any parte thereof, and free Libertie of fishing in or within any the Rivers or Waters within the Boundes and Lymytts aforesaid, and the Seas thereunto adjoining; . . . " (*Id.* at p. 1850). (Emphasis added).

These patentees were

"To have and hould, possesse and enjoye the saide partes of New England in America, which lye, extend, and are abutted as aforesaide, and every parte and parcell thereof; and all the Islandes, Rivers, Portes, Havens, Waters, Fishings, Fishes, Mynes, Myneralls, Jurisdiccons, Franchises, Royalties, Liberties, Priviledges, Comodities, and Premisses
723 whatsoever, with the Appurtenances, ... " (*Id.*)

Later in the letters patent it was provided

"That theis Presents shall not in any manner envre, or be taken to abridge, barr, or hinder any of our loving subjects whatsoever, to vse and esercise the Trade of Fishing vpon that Coast of New England in America, by theis Presents mencoed to be graunted. But that they, and every, or any of them, shall have full and free Power and Liberty to continue and vse their said Trade of Fishing vpon the said Coast, *in any the Seas therevnto adioyning* or any Armes of the Seas or Saltwater Rivers where they have byn wont to fishe, and to build and sett vp vpon the Landes by theis Presents graunted, such Wharfes, Stages, and Workehouses as shalbe necessarie for the salting, drying, keeping, and packing vp of their Fish, to be taken or gotten vpon the Coast; and to cutt down, and take such Trees and other Materialls there groweing, or being or shalbe needefull for that Purpose, and for all other necessarie Easements, Helpes, and Advantage concerning their said Trade of Fishing there, in such Manner and Forme as they have byn heretofore at any tyme accustomed to doe, without making any wilfull Waste or Spoyle, any Thing in theis Presents conteyned to the contrarie notwithstanding." (*Id.* at p. 1859). (Emphasis added).

724 Lastly, the letters patent ordained that

"theis our Letters patents shalbe firme, good, effectuall, and availeable in all Things, and to all Intents and

Construccons of Lawe, according to our true Meaning herein before declared, and shalbe construed, reputed, and adiudged in all Cases most favourablie on the Behalf, and for the Benefitt and Behoofe on the saide Governor and Company and their Successors; . . . . " (*Id.*)

A close comparison of the 1620 patent to the Plymouth Company, the 1628 patent to Henry Rosewell and others and the 1629 patent to the Massachusetts Bay Company reveals that a grant of the "adjoining seas" contained in the first grant is lacking in the second (or at least in the recital thereof) and third grants above. However, I do not believe that the omission is significant or meant to deny any right of the soil of the sea to the several patentees.

I believe that this right was included in two granting clauses of the 1629 patent. First, in the clause which granted and confirmed all jurisdictions, rights, royalties, liberties, freedoms, immunities, privileges, preeminences, hereditaments and commodities whatsoever granted or intended to be granted by the Plymouth Company in its 1628 charter. (Maine et al. Exhibit No. 24, p. 1848).
725 Secondly, in the clause granting jurisdictions, franchises, royalties, liberties, privileges, commodities, and premises whatsoever without reference to the Rosewell patent. (*Id.*)

In view of the extensive rights to the seabed held by the Plymouth Company by royal patent and the policy of the Company in usually including similar, if more limited, rights in its charters, I find it difficult to believe that there was not some grant of the soil under the adjoining seas intended under the Rosewell patent. Secondly, in view of the policy of the crown as expressed in earlier and later letters patent, I find it hard to believe that the Massachusetts Bay Company would be discriminated against by the King or that the negotiators for the Company

would accept such discriminatory treatment. Thirdly, the extended treatment of the reservation of the right to fish in the adjoining seas to non-Massachusetts subjects indicates, in my judgment, that a proper construction of the 1629 charter would include a grant of the soil of the adjoining seas, in accordance with the rule prevailing with respect to the realm.

This 1629 charter to the Massachusetts Bay Company was avoided by *scire facias* proceedings in the Court of Chancery in England in 1684. Seven years later, after the
726 Glorious Revolution of 1688, a second charter was granted for Massachusetts Bay. It is discussed later in my testimony.

To come back to Maine, I should point out that Ferdinando Gorges, grandson of Sir Ferdinando Gorges, by an indenture of March 13, 1677/8, granted, bargained and sold the County Palatine of Maine to John Usher. The relation of boundaries and *jura regalia* is somewhat compressed but there is no doubt that the grandson intended to convey rights to the soil beneath the adjoining seas to a distance of five leagues from the mainland, that is, to the extent granted by the crown in 1639. (Maine et al. Exhibits Nos. 5 and 46). Two days later Usher conveyed his rights in the County Palatine to the Governor and Company of Massachusetts Bay in New England, the indenture containing substantially the same description of the grant of lands, soils and *jura regalia.* (Maine et al. Exhibit No. 6). Whether or not the grant by Usher to the Massachusetts Bay Company survived the *scire facias* proceeding is of little consequence. For, as we shall see, under the second Massachusetts Bay charter, that of 1691, Maine was incorproated into the province of Massachusetts Bay and accordingly governed by the provisions of that charter with respect to the rights to the soil of the adjoining aeas.

727 The 1632 royal patent to Caecilius Calvert, Lord Baltimore, for the Province of Maryland, after describing the territory covered by the grant, went on to provide for a grant and confirmation of

"all Islands and Inlets within the Limits aforesaid, all and singular *the Islands and Islets, from the Eastern Shore of the aforesaid Region, towards the East, which had been, or shall be formed in the Sea, situate within Ten marine Leagues from the said shore;* with all and singular the Ports, Harbours, Bays, Rivers and Straits belonging to the Region or Islands aforesaid, and all the Soil, Plains, Woods, Marshes, Lakes, Rivers, Bays, and Straits, situate, or being within the Metes, Bounds and Limits aforesaid, with the Fishings of every kind of Fish, as well of Whales, Sturgeons, and other royal Fish, as of other Fish, *in the Sea,* Bays, Straits, or Rivers *within the Premises,* and the fish there taken; And moreover all Veins, Mines and Quarries as well opened as hidden, already found, or that shall be found within the Region, Islands, or Limits aforesaid, of Gold, Silver, Gems, and precious Stones, and any other whatsoever, whether they be of Stones, or Metals; or of any other Thing, or Matter whatsoever; . . . . " (Maine
728 et al. Exhibit No. 141, p. 1678). (Emphasis added).

Broad judicial powers were conferred, including maritime or admiralty jurisdiction, as follows:

"to constitute and ordain Judges, Justices, Magistrates and Officers of what kind, for what Cause, and with what Power soever, within that Land, and *the Sea of those Parts,* and in such form as to the said now Baron of Baltimore, or his Heirs, shall seem most fitting: And also to Remit, Release, Pardon, and Abolish, all Crimes and Offences whatsoever against such Laws, whether before, or after Judgment passed: and to do all and singular other Things belonging to the Completion of Justice and

to Courts, Praetorian Judicatories, and Tribunals, Judicial Forms and Modes of Proceeding, although express Mention thereof in these Presents be not made: and, by Judges by them delegated, to award Process, hold Pleas, and determine in those Courts, Praetorian Judicatories, and Tribunals, in all Actions, Suits, Causes, and Matters whatsoever, as well Criminal as Personal, Real and Mixed, and Praetorian . . . . " (*Id.* at p. 1680). (Emphasis added).

The charter further granted power to erect and constitute "within the Province of Maryland, and the Islands and Islets aforesaid, such, and so many Sea-Ports, Harbors, Creeks, and other Places of Unlading and Discharge of
729 Goods and Merchandizes out of Ships, Boats, and other Vessels, and of Lading in the same, and in so many, and such Places, and with such Rights, Jurisdiction, Liberties, and Privileges, unto such Parts respecting, as to him or them shall seem most expedient . . . ."

"Saving always to Us, our Heirs and Successors, and to all the Subjects of our Kingdoms of England and Ireland of Us, our Heirs and Successors, the Liberty of Fishing for Sea-Fish, as well in the *Sea*, Bays, Straits, and navigable Rivers, as in the Harbors, Bays, and Creeks *of the Province aforesaid;* and the Privilege of Salting and Drying Fish on the Shores of the same Province; and, for that Cause, to cut down and take Hedging-Wood and Twigs there growing, and to build Huts and Cabins, necessary in this Behalf, in the same Manner, as heretofore they reasonably might, or have used to do. Which Liberties and Privileges, the said Subjects of Us, our Heirs and Successors, shall enjoy, without notable Damage or Injury in any wise to be done to the aforesaid now Baron of Baltimore, his Heirs or Assigns, or to the Residents and Inhabitants of the same Province in the Ports, Creeks, and Shores aforesaid, and especially in the Woods and Trees there growing." (*Id.* at pp. 1683-84). (Emphasis added).

730 Finally it was provided that:

"And if, peradventure, hereafter it may happen, that any Doubts or Questions should arise concerning the true Sense and Meaning of any Word, Clause, or Sentence, contained in this our present Charter, We will charge and command, That Interpretation to be applied always, and in all Things, and in all Courts and Judicatories whatsoever, to obtain which shall be judged to be the more beneficial, profitable and favorable to the aforesaid now Baron of Baltimore, his Heirs and Assigns. . . . " (*Id.* at p. 1686).

Under this charter, in my opinion, Lord Baltimore, as patentee, became vested with the right to the soil of the sea for a distance of at least ten marine leagues seaward from the Eastern shore.

The charter clearly contemplates that parts of the sea were within the bounds of the province. It is also perhaps unique in including "islands to be formed," as well as those already in existence at the time of the grant, within a certain distance from the eastern sea shore. I have remarked earlier upon the relationship of ownership of the bottom of the sea to such islands rising from the sea.

From 1691 to 1715 the Maryland charter was suspended to the extent that it granted governmental rights to Lord
731 Baltimore. However, there is no indication that the several royal governors appointed for the Province assumed for the crown the rights to the Atlantic seabed granted in the charters. (*CSP, Col., 1689-1692,* Nos. 1026, 1028, 1297) (Maine et al. Exhibit No. 253, pp. 310, 380). Even if they did, the fourth Lord Baltimore was restored in 1715 to all proprietary and governmental rights under the charter.

A 1663 royal charter of Charles II incorporated "The Governor and Company of the English Colony of Rhode-Island and Providence Plantations in New-England, in America" and granted to that body

"all that parte of our dominiones in New-England, in America, conteyneing the Nahantick and Nanhyganset Bay, and Countryes and partes adjacent, [within defined limits] . . . ."

"and, in particular, the lands, belonging to the townes of Providence, Pawtuxet, Warwicke, Misquammacok, alias Pawcatuck, and the rest vpon the maine land in the tract aforesayd, together with Rhode-Island, Blocke-Island, and all the rest of the islands and banks in the Narragansett Bay, and bordering vpon the coast of the tract aforesayd (Ffisher's Island only excepted), together with all firme lands, soyles, grounds, havens, ports, rivers, waters, fishings, mines, royall, and all other mynes, mineralls, precious stones, quarries, woods, wood-grounds, rocks, slates, and
732 all and singular other commodities, jurisdictions, royalties, priviledges, franchises, preheminences and hereditaments, whatsoever, within the sayd tract, bounds, landes, and islands, aforesayd, or to them or any of them belonging, or in any wise appertaining: . . . " (Maine et al. Exhibit No. 150, pp. 3220-21).

The letters patent also ordained and appointed "that these presents shall not, in any manner, hinder any of oure lovinge subjects, whatsoever, ffrom vseing and exercising the trade of fishing vpon the coast of New England, in America; butt that they, and every or any of them, shall have ffull and ffree power and liberty to continue and vse the trade of ffishing vpon the sayd coast, in any *of the seas thereunto adjoyninge*, or any armes of the seas, or salt water, rivers and creeks, where they have been accustomed to ffish; and to build and to sett upon the waste land, belonginge to the sayd Collony and Plantations, such wharfes, stages and worke-houses as shall be necessary for the salting, drying and keepeing of theire fish, to be taken or gotten upon the coast. And ffurther,

for the encouragement of the inhabitants of our sayd Collony of Providence Plantations to sett vpon the businesse of takeing whales, itt shall bee lawefull ffor them, or any of them, having struck whale, dubertus, or other greate ffish, itt or them, to pursue unto any parte of that coaste, and into any bay, river, cove, creeke or shoare, belonging thereto, and itt or them, vpon sayd coast, or in the sayd bay, river, cove, creek or shoare, belonging thereto, to kill and order for the best advantage, without molestation, they makeing noe wilfull waste or spoyle, any thinge in these presents conteyned, or any other matter or thing, to the contrary notwithstanding. And further alsoe, wee are gratiously pleased, and doe hereby declare, that if any of the inhabitants of oure sayd Collony doe sett upon the plantinge of vineyards (the soyle and clymate both seemeing naturally to concurr to the production of wynes), or bee industrious in the discovery of *ffishing banks, in or about the sayd Collony*, wee will, ffrom tyme to tyme, give and allow all due and fitting encouragement therein, as to others in cases of lyke nature." (*Id.* at p. 3219.) (Emphasis added).

Finally, the instrument provided that the letters patent should be construed, reputed and adjudged in all cases most favorably on the behalf, and for the benefit and behoof, of the Governor and Company and their successors. (*Id.* at pp. 3221-22).

It is my opinion that by virtue of this charter with its grant of royalties the patentee had a right to the soil beneath the seas adjoining to the same extent as did the crown in England.

My conclusion rests in large part upon the sweeping clause in the charter granting "all and singular other commodities, jurisdictions, royalties, privileges, franchises, preheminences and hereditaments, whatsoever, within the

sayd tract, bounds, landes, and islands, aforesayd, or to these or any of them belonging, or in any wise appertaining." If this language did not encompass the King's right to the soil of the adjoining seas, it is hard to visualize what words could have been effective. If these did not accomplish the grant, what words in the lexicon of the Stuart prerogative would have done the job? Secondly, the long and elaborate treatment of fishing rights by inference, in my opinion, confirms that the charter was intended to and did grant the right to the soil of the adjoining seas to the extent, at least, of the crown's right with respect to the realm.

Charles II on March 12, 1664, made a grant to his brother James, Duke of York, of lands and territories described as follows:

"all that part of the maine land of New England beginning at a certainplace called or knowne by the name of St. Croix next adjoyning to New Scotland in America and from thence extending along the sea coast unto a certain place
735 called Petuaquine or Pemaquid and so up the River thereof to the furthest head of ye same as it tendeth northwards and extending from thence to the River Kinebequi and so upwards by the shortest course to the River Canada northward and also all that Island or Islands commonly called by the severall name or names of Matowacks or Lond [Long] Island scituate lying and being towards the west of Cape Codd and ye narrow Higansetts abutting upon the maine land between the two Rivers there called or knowne by the several names of Conecticutt and Hudsons River together also with the said river called Hudsons River and all the land from the west side of Conecticutt to ye east side of Delaware Bay and also all those severall Islands called or knowne by the names of Martin's Vinyard and Nantukes otherwise Nantuckett together with all

ye lands islands soyles rivers harbours mines minerals quarryes woods marshes waters lakes ffishings hawkings hunting and ffowling and all other royalltyes proffitts commodityes and hereditaments to the said severall islands lands and premisses belonging and appertaining with theire and every of theire appurtenances and all our estate right title interest benefitt advantage claime and demand of in or to the said lands and premises or any part or parcell thereof . . . . " (Maine et al. Exhibit No. 67, pp. 1637-38).

Also granted was absolute power and authority "to correct punish pardon governe and rule all such the subjects of us our heires and successors who may from time to time adventure themselves into any of the parts or places aforesaid or that shall or doe at any time hereafter inhabite within the same according to such lawes orders ordinances direccons and instruments as by our said dearest brother or his assignes shall be established and in defect thereof in cases of necessity according to the good direccons of his deputyes commissioners officers or assignes respectively as well in all causes and matters capitall and criminall as civill both marine and others soe alwayes as the said statutes ordinances and proceedings be not contrary to but as neare as conveniently may be agreeable to the lawes statutes and government of this our realme of England and saving and reserving to us our heires and successors ye receiving hearing and determining of the appeal and appeales of all or any person. . . . " (*Id.* at p. 1638).

This grant comprised the territories which became the colonies or provinces of New York and New Jersey. Actually, of course, this charter was granted at a time when New Amsterdam was still held by the Dutch. The capitulation did not take place until August, 1664. (For

737 the 'intrusions' of the Dutch upon English territory see *CSP, Col., 1661-1668,* Nos. 510, 622.) (Maine et al. Exhibit No. 240, pp. 147, 177-8).

Later, in 1673, New York or New Amsterdam was recaptured by the Dutch and then ceded to the English by treaty. This led to the second charter to the Duke of York dated June 29, 1674 (Maine et al. Exhibit No. 68), which contained provisions virtually identical with those set forth above. (For the reasons behind the second charter see Robert Ludlow Fowler, "Organization of the Supreme Court of Judicature of the Province of New York," 19 *Albany L.J.* 66, 68-69 (1879) (Maine et al. Exhibit No. 254).)

Under the provisions of both of these charters the Duke of York, in my opinion, had rights to the seabed identical with those possessed by the crown in England with respect to the realm. While the charter language, "all other royaltyes proffitts commodityes and heraditaments" (Maine et al. Exhibit No. 67, p. 1638) is somewhat attenuated in comparison with the usual language in letters patent, there is a further grant, not usually included, of "all our [the King's] right title interest and benefitt advantage claime and demand of in or to the said lands and premises or any part or parcel thereof." (*Id.*) In general, historians
738 have regarded the New York patents as constituting very liberal grants; after all, it would scarcely be expected that rights granted to others somewhat routinely would be denied the King's brother.

The Duke of York's 1674 commission to Edmund Andros to be governor of New York recited the grant from the King, including specific reference to the grant of all royalties, profits, commodities and hereditaments, and authorized Andros to perform and execute all powers granted under the letters patent. (Maine et al. Exhibit No. 255).

The same format was followed in the 1682 commission to Thomas Dongan to be governor of New York. (Maine et al. Exhibit No. 256).

When James, Duke of York, became James II of England in 1685 the 1674 charter (Maine et al. Exhibit No. 68), to the extent that it covered New York, was merged in the crown. As a consequence New York became a royal province. Where did this leave the province with respect to ownership of the soil of the adjacent seas? Are we dealing with the situation of a conquered infidel country or a conquered Christian country? The first charter, that of 1664 (Maine et al. Exhibit No. 67), apparently was based on the theory that Charles II was disposing of a "conquered infidel kingdom." It could scarcely be said to deal with a "conquered Christian kingdom" when it was granted
739 prior to the capitulation of New Amsterdam. (The English apparently chose to ignore the presence of the Dutch and considered themselves to have captured New York directly from the Indians.) In the case of the second charter, since there had been a re-conquest of New Amsterdam, it could be said that there had been a conquest of a Christian kingdom and then Dutch law would prevail – unless altered by the King. (For the "conquered people" view see *CSP, Col., 1689-1692,* No. 289.) (Maine et al. Exhibit No. 253, p. 103.) However, whatever the Dutch law on the subject of the soil of the adjacent seas, the second charter in its grant to the Duke of York of various royalties, profits, commodities and hereditaments in effect suspended it. In terms of *Calvin's Case* the King by the second charter to the Duke of York altered and changed the Dutch law with respect to the seabed, if it was consistent with English law. The merger of the charter into the crown in 1685 did not serve to revive Dutch law; the same English rule was applicable as under

the two royal charters to the Duke of York.

After New York became a royal colony, the short-form commission previously utilized by the Duke of York was replaced by the standard form of commission used for governors in the royal provinces. Among the
740 powers granted was "full power and authority" with the advice and consent of the Council to grant to the inhabitants such lands, tenements and hereditaments as it was in the governor's power to dispose. (Maine et al. Exhibits Nos. 257-264.)

James, Duke of York, on June 24, 1664, a few months after receiving the March 1664 royal grant from his brother, Charles II, noted above, entered into an indenture with John Lord Berkeley and Sir George Carteret by which he granted, bargained, sold, released and confirmed

"all that tract of land adjacent to New England, [within defined limits later known as New Jersey] . . . and also all rivers, mines, mineralls, woods, fishings, hawking, hunting, and fowling, and all other royalties, profits, commodities, and hereditaments whatever, to the said lands and premises belonging or in any wise appertaining: with their and every of their appurtenances, in as full and ample manner as the same is granted to the said Duke of York by the before-recited letters patents; and all the estate, title, interest, benefit advantage, claim and demand of the said James Duke of York, of in or to the said [blank] and premises or any part or parcel thereof, and the reversion and reversions, remainder and remainders thereof." (Maine et al. Exhibit No. 69, p. 2534).

THE SPECIAL MASTER: I have a question at this
741 point. Does this charter include what is now all of New

Jersey, or only east Jersey?

THE WITNESS: I believe this included –

THE SPECIAL MASTER: All of West Jersey?

THE WITNESS: I believe this first one includes both.

THE SPECIAL MASTER: Both east and west?

THE WITNESS: Yes.

THE SPECIAL MASTER: All right.

THE WITNESS: Ten years later, after James had received a second confirming royal grant, following the recapture of New Amsterdam by the Dutch, he entered into a further indenture dated July 29, 1674, with Sir George Carteret, his heirs and assigns for the territory lying north of a line connecting Barnegat Bay on the ocean with Pennsauken Creek on the Delaware, with language similar to that just quoted. (Maine et al. Exhibit No. 72, p. 2547).

THE SPECIAL MASTER: That would be East Jersey?

THE WITNESS: That would be East Jersey, Your Honor.

John, Lord Berkeley had in the meantime, on March 18, 1673/4, sold his joint but as yet undivided interest in New Jersey to John Fenwick, in trust for Edward By-
742 llynge. The indenture of bargain and sale granted, bargained, sold and conveyed to John Fenwick

"all that the moiety or half part of him the said John Berkeley of and in the said tract of land and premises so to be or then called by the names of New Caesarea or New Jersey: And also all that his moety or half part of all rivers, rivelets, mines, minerals, quarries, woods, fishings, hawkings, huntings, fowlings, and all other royalties, profits, forts, franchises, liberties, governments, powers, priviledges, commodities, hereditaments and immunities whatsoever, to the said land and premises belonging; with their and every of their appurtenances, in as full, ample and

beneficial manner to all intents and purposes as the same was granted to the said John Lord Berkeley and the said Sir George Carteret, their heirs and assigns, by him his said Royal Highness the said James Duke of York." (Maine et al. Exhibit No. 74, p. 2554).

In February 1674/5 by several instruments Fenwick and Byllynge conveyed their moiety of the premises granted to Berkeley and Carteret to William Penn, Gawn Lowry and Nicholas Lucas, so that Penn and his associates became tenants in common with Carteret. (*Id.* at pp. 2554-55). On July 1, 1676 Carteret, Penn, Lowry, Lucas and Byllynge entered into a quintipartite deed for the partition of the
743 lands granted to Berkeley and Carteret with Carteret taking premises to be known as East New Jersey and Penn and his associates taking premises to be known as West New Jersey. Penn and his associates bargained, sold and conveyed all their interests east of the partition line to Carteret with all and every the isles, islands, rivers, mines, minerals, woods, fishing, hawkings, huntings, and fowlings and all other royalties, governments, powers, forts, franchises, harbors, profits, commodities and hereditaments whatsoever belonging or appertaining to the said eastern part. A similar conveyance was made by Carteret to Penn and his associates with respect to the western part of the lands. (Maine et al. Exhibit No. 74). On August 6, 1680 the Duke of York by indenture in effect confirmed the grant of the soil and government of West New Jersey to Penn and others. The indenture contained the following description

"all that part, share and portion, and all those parts, shares and portions of all that entire tract of land and all those entire premises so granted by his said Royal Highness unto the said John Lord Berkley, and Sir George Carteret, and their heirs as aforesaid, as in, by, and upon the said partition aforesaid, was and were vested in the said William Penn, Gawen Lawry, and Nicholas Lucas, and their heirs;

744 and then agreed to be called by the name of West New Jersey, together with all islands, bays, rivers, waters, forts, mines, quarries, royalties, franchises, and appurtenances whatsoever, to the same belonging, or in any wise appertaining. And all the estate, right, title, interest, reversion, remainder, claim and demand whatsoever, as well in law as in equity, of him the said James Duke of York, of into, and out of the same, or any part or parcel of the same; as also the free use of all bays, rivers and waters, leading unto or lying between the said premises, or any of them in the said parts of America, for navigation, free trade, fishing or otherwise . . . ." (Maine et al. Exhibit No. 265, p. 2564).

It further provided that

"for the better enabling the said Edward Byllynge, his heirs and assigns, to improve and plant the said premises with people, and to exercise all necessary government there, whereby the said premises may be the better improved and made more useful to him, his heirs and assigns, and to the King's Majesty, his said Royal Highness hath likewise given, granted, assigned and transferred, and doth by these presents give, grant, assign, and transfer unto the said Edward Byllynge, all and every such the same powers, authorities, jurisdictions, governments, and other matters
745 and things whatsoever, which by the said respective Letters Patents, or either of them, are and were granted, or intended to be granted, to be exercised by his said Royal Highness, his heirs, assigns, deputies, officers, or agents, in upon, or in relation unto the said premises hereby confirmed, or intended to be confirmed, and every of them, in case the same were now in the actual seizen of his said Royal Highness, to be held, enjoyed, exercised and executed by him the said Edward Byllynge, his heirs and assigns, and by his deputies, officers, agents and commissioners, as fully and

amply to all intents, constructions and purposes as his said Royal Highness, or his heirs, might, could or ought to hold, enjoy, use, exercise or execute the same, by force and virtue of the said several and respective and before recited Letters Patents, or either of them, or of any thing in them, or either or any of them conteyned or otherways however." (*Id.* at pp. 2564-65).

THE SPECIAL MASTER: I don't quite understand something in this. You say there was a conveyance or a confirmation by the Duke of York to Penn and his associates. Yet it recites conveyance and assurance to Edward Byllynge who had previously had already conveyed his interest to Penn and associates. In other words, Byllynge conveyed to Penn and his associated in February
746 1674/5, and this is in 1680. That is sort of an assurance to the former grantor was to perpetuate the title which he had already conveyed. I am not sure whether you claim that at this point, but I would like to know if you might.

MR. CLAGETT: Perhaps I can check it out in the recess and have it straightened out.

THE SPECIAL MASTER: It may not be of any importance.

Very well, you may proceed.

THE WITNESS: On December 5, 1678 Sir George Carteret devised East New Jersey to certain trustees to sell for the payment of his debts and legacies; he died shortly thereafter. The trustees in 1681 put the province of East New Jersey up for sale. It was purchased at auction by a group of twelve persons headed by William Penn, the indentures of lease and release being executed on February 1 and 2, 1681/2. The aforesaid indentures granted and conveyed "all the said premises called East New Jersey, together with all isles, islands, rivers, mines, minerals, woods, fishings, hawkings, huntings, fowlings, and all other royalties, privileges,

franchises, forts, harbours, profits, commodities, and hereditaments whatsoever, thereunto belonging." (Maine et al. Exhibit No. 75, p. 2571). All twelve proprietors, with one
747 exception, were Quakers. The purchase of East New Jersey was, in part, an extension of Penn's interest in establishing a haven for persecuted Quakers. In August 1682 the new proprietors agreed that each would take a partner in the venture, thus bringing the number to twenty-four.

On March 14, 1682/3, a new indenture of confirmation was entered into between the Duke of York and the twenty-four East New Jersey proprietors. (Maine et al. Exhibit No. 75). This indenture granted, bargained, sold, released and confirmed to the twenty-four proprietors the province of East New Jersey, as bounded in the partition of 1676, "together with all islands, bays, rivers, waters, forts, mines, minerals, quarries, royalties, franchises and appurtenances whatsoever" (*Id.* at p. 2572), as well as "all the estate, right, title, interest, reversion, remainder, claim and demand whatsoever, as well in law as in equity," (*id.*) of the Duke of York to the same or any part thereof, as also the free use of all bays, rivers and waters for navigation, free trade, fishing or otherwise. (*Id.*) Also granted to improve and plant the province and to exercise the necessary government, were the same powers, authorities, jurisdictions, governments and other matters and things whatsoever which by the royal letters patent were granted to the Duke of York as fully and amply as the Duke might use,
748 exercise or execute the same by force of the several royal patents. (*Id.* at p. 2573).

On November 23, 1683, some questions having arisen as to the propriety of the Duke of York's grants of government, Charles II by royal letter charged and commanded planters and inhabitants of the Province of East New Jersey that "they do submit and yield all due obedience to the laws and government of the said grantees, their

heirs and assigns, as absolute Proprietors and Governors thereof, (who have the sole power and right derived under his Royal Highness from his said Majesty, to settle and dispose of the said Province upon such terms and conditions as to them shall seem good) . . . " (Maine et al. Exhibit No. 77, p. 2583).

However, the efforts of the proprietors of the two Jerseys to govern their respective provinces encountered many obstacles, and by 1688 some proprietors favored surrender to the crown of the rights of government. Under William and Mary opposition to chartered governments in general intensified in English administrative circles. As to the Jerseys the King was advised that the proprietors had no right to, nor could they exercise, any of the governmental powers granted by the Duke of York, that it belonged to the King in the right of the crown of England to constitute governors in the two provinces and to give
749 directions for governing the inhabitants thereof. Finally, on April 15, 1702 the proprietors of the two provinces by deed surrendered to Queen Anne their powers of government, which were described at some length in the document of surrender. There was no surrender of any proprietary rights or any rights to the lands or soil of either province. (Maine et al. Exhibit No. 78).

As part of the surrender transaction the crown agreed that certain instructions would be included in those issued to the royal governor. Among them was an instruction to propose to the General Assembly the passing of an act or acts whereby the right and property of the proprietors to the soil of the province might be confirmed to them according to their respective rights and titles, together with such quit rents as had been reserved or became due to the proprietors from the inhabitants of the province and all such privileges as were expressed in the conveyances made by the Duke of York, excepting only the right of government

which remained in the crown. (Maine et al. Exhibit No. 80, p. 517; No. 82, p. 49; No. 83). No such act was ever passed.

The deed of surrender made no specific references to the relinquishment of *jura regalia* not in the nature of governmental rights. (Maine et al. Exhibit No. 78). This uncertainty later gave rise to a series of cases in the Supreme Court of the United States and in the New Jersey courts dealing with the rights of the proprietors in the soil under tidal rivers and bays. *Martin v. Lessee of Waddell*, 41 U.S. (16 Peters) 367 (1842); *Arnold v. Mundy*, 6 N.J.L. 1 (Sup. Ct. 1821); *Bell v. Gough*, 23 N.J.L. 624 (E. & A. 1852); *Stevens v. Paterson and Newark R. Co.*, 34 N.J.L. 532 (E. & A. 1870); *Schultz v. Wilson*, 44 N.J. Super. 591 (Sup. Ct. App. Div., 1957). A diversity of views appears in the various opinions in these cases: (1) the Duke of York had no right to transfer *jura regalia* and thus the proprietors never had any right to the soil under tidal rivers or bays; (2) the surrender to the crown in 1702 included *jura regalia* such as the soil under tidal rivers and bays; (3) in any event the rights of the proprietors passed to the State at the Revolution; and (4) the proprietary rights survived both the act of surrender and the Revolution. While the cases concerned the beds of tidal rivers and bays, there are scattered dicta indicating no cleavage in judicial treatment of the soil under the adjoining sea as opposed to the soil under tidal rivers and bays.

My own opinion is that the Duke of York did make a valid grant of *jura regalia* to the proprietors of both Jersey provinces. Certainly in the case of East New Jersey, as we have seen, the grant was ratified by the crown, if
751 such an act were necessary to validity, and the proprietors *de facto* did govern and administer East New Jersey and West New Jersey for a number of years. I find it hard to

construe the act of surrender, on its face, as passing *jura regalia.* It seems probable, however, that later in the colonial period the surrender was construed by the crown representative and the General Assembly as including *jura regalia* such as the right to the soil under the sea, arms of the sea and tidal rivers. In any event, on the Revolution I am of the opinion that the right to the soil of the adjoining sea, whether belonging to the crown or proprietors, passed to the State of New Jersey.

* * * * *

After obtaining his charter for Pennsylvania in 1681 William Penn wanted to secure for his province a clear and certain route to the sea. This meant access to Delaware River and Bay and also conflict with the boundaries of Maryland and the pretensions of the Duke of York. He commenced negotiations with the Duke of York, who was in possession of the territory along the western shore of
752 the Delaware as part of the spoils of the 1664 campaign against the Dutch, with the knowledge and consent of his brother, Charles II, but without a royal patent. (*See CSP, Col., 1677-1680,* Nos. 1403, 1409, 1565, 1599) (Maine et al. Exhibit No. 248, pp. 553-4, 555, 623 and 633-4). The Duke of York, prior to this date and through his representatives, had made a substantial number of grants of land to settlers west and south of Delaware River and Bay. See *Original Land Titles in Delaware Commonly Known as the Duke of York Record, 1646 to 1679* (undated, Wilmington, Delaware).

The negotiations in 1682 resulted in four documents, two deeds of feoffment and two leases for 10,000 years. One set of documents granted and leased all land below the southern border of Pennsylvania and within a 12-mile

circle including the town of Newcastle. The other set of documents and leases granted all the land south of the 12-mile circle extending down to Delaware to Cape Henlopen, including the Whorekill (Maine et al. Exhibit No. 266, pp. 587-88.)

The first deed of feoffment, dated August 24, 1682, granted

"all that the town of New Castle, otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the same, situate, lying
753 and being upon the River Delaware, in America, and all islands in the said River Delaware, and the said river and soil thereof, lying north of the southern-most part of the said circle of twelve miles about the said town, together with all rents, services, royalties, franchises, duties, jurisdictions, liberties, and privileges thereunto belonging; and all the estate, right, title, interest, powers, property, claim and demand whatsoever, of his said royal highness, of, in, or to the same, or any part or parcel thereof . . . " (*Id.* at p. 588).

The deed of feoffment also contained the following grant and covenant by the Duke of York:

"And his said royal highness, for himself, his heirs and assigns, doth covenant and grant, to and with the said William Penn, his heirs and assigns, by these presents, that his said royal highness, his heirs and assigns, will at any time or times hereafter, during the space of seven years next ensuing the date hereof, upon the request, and at the costs and charges in the law of the said William Penn, his heirs and assigns, do make and execute, or cause or procure to be made, done, and executed, all and every such further act and acts, conveyances and assurances in the law whatsoever for the further conveying and assuring the said town and circle of twelve miles of land about

754 the same, and islands, and all other the premises, with the appurtenances, unto the said William Penn, his heirs and assigns for ever, as by the counsel learned in the law of the said William Penn, his heirs or assigns, shall be reasonably devised, advised, or required." (*Id.* at p. 589).

The second deed of feoffment, also dated August 24, 1682, granted:

"all that tract of land upon Delaware River and Bay, beginning twelve miles south from the town of New Castle, otherwise called Delaware, and extending south to the Whorekills, otherwise called Cape Henlopen, together with free and undisturbed use and passage into and out of all harbours, bays, waters, rivers, isles, and inlets, belonging to or leading to the same, together with the soil, fields, woods, underwoods, mountains, hills, fens, isles, lakes, rivers, rivulets, bays and inlets, situate in or belonging unto the limits and bounds aforesaid, together with all sorts of minerals; and all the estate, interest, royalties, franchises, powers, privileges, and immunities whatsoever, of his said royal highness therein, or in or unto any part or parcel thereof; . . . ." (*Id.* at p. 591).

The second deed of feoffment contained a grant and covenant similar to that in the first deed:

755 "And his said royal highness, for himself, his heirs and assigns, doth covenant and grant, to and with the said William Penn, his heirs and assigns, by these presents, that his said royal highness, his heirs and assigns, will at any time or times hereafter, during the space of seven years next ensuing the date hereof, upon the request, and at the costs and charges in the law of the said William Penn, his heirs and assigns, do, make, and execute, or cause or procure to be made, done, and executed all and every such further act and acts, conveyances and assurances in the law whatsoever, for the further conveying and assuring the said tract of land, and all and singular other the

premises, with the appurtenances, unto the said William Penn, his heirs and assigns for ever, as by the counsel learned in the law of the said William Penn, his heirs or assigns, shall be reasonaly devised, advised, or required." (*Id.* at p. 592).

The language in the corresponding lease varies somewhat. The Duke of York bargained, sold and let: "All that tract of land upon Delaware River and Bay beginning twelves miles south from the town of Newcastle otherwise called Delaware, and extending south to the Whore Kills, otherwise called Cape Henlopen, together with free and undisturbed use and passage into and out of all harbours, bayes, waters, rivers, isles and inlets belonging to or leading to the same, together with the soil, fields,
756 woods, underwoods, mountains, hills, fens, lakes, rivers, rivulets, bays and inlets, situate in or belonging unto the limits and bounds aforesaid, together with all sorts of minerals; and all the estate, interest, royalties, franchises, powers, priviledges and immunities whatsoever, of his said royal highness therein, or in or unto any part or parcel thereof." (*Id.* at p. 591).

I should comment that at the time of the several grants to William Penn by the Duke of York the present Cape Henlopen, at the southern extremity of Delaware Bay, was known as Cape Cornelius and that what was then designated "Cape Henlopen" was located some 20 miles south at Fenwick's Island, now the southern boundary of the State of Delaware. Later this was thoroughly canvassed in the famous suit of Penn against Lord Baltimore in the High Court of Chancery in England.

When he arrived in America William Penn promptly took possession of the lands covered by the two deeds of feoffment by ceremonies of livery of seisin, as contemplated in the deeds.

Some months later, on 22 March 1682/3, Charles II granted to the Duke of York

"All that the Towne of Newcastle otherwise called Delaware and fort therein or thereunto belong scituate lying and being between Maryland and New Jersey in America And all that Tract of land lying within the Compasse or
757 Circle of twelve miles about the said Towne Scituate lying and being upon the River of Delaware and all Islands in the said River of Delaware and the said River and Soyle thereof lying North of the Southernmost part of the said Circle of twelve miles about the said Towne and all that Tract of Land upon Delaware River and Bay beginning twelve miles South from the said Towne of Newcastle otherwise called Delaware and extending South to Cape Lopen together with all the lands Islands Soyle Rivers Harbors Mines Mineralls Quarries Woods Marshes Waters Lakes fishingg hawkings hunting and fowlings and all other Royalties Proviledges profitts Comodities and Hereditamts to the said Towne fort Tracts of land Islands and premisses or to any or either of them belonging or apperteyning with their and every of their appurtenances Scituate lying and being in America. And all our estate right title interest benefitt advantage Clayme and demand whatsoever of in or to the said Towne fort lands and prmisses or any parte or parcell thereof." (Maine et al. Exhibit No. 102, pp. 1-2).

In view of the covenants by the Duke of York contained in the two deeds of feoffment of August 24, 1682, one might have expected to find a confirmatory grant or deed from the Duke of York to William Penn following the March 22, 1682/3 royal grant. However, for reasons not now apparent, the March 22, 1862/3 charter was not
758 entered in the patent rolls in the usual manner (the document itself seems to have been turned over to William Penn or his representative), and the Duke of York sought

to surrender said charter and secure a further, and presumably more favorable, grant from Charles II. In any event, it seems likely that because of a complaint or petition by Lord Baltimore as to possible conflicts with the Maryland charter, no further grant of Delaware lands to the Duke of York passed the great seal and that the March 22, 1682/3 charter was never surrendered. (*CSP, Col., 1681-1685*, Nos. 1440, 1442.) (Maine et al. Exhibit No. 267, p. 562).

While the various grants from the Duke of York to William Penn and from Charles II to the Duke may have left something to be desired from the standpoint of the art of conveyancing, it is my conclusion that William Penn, as proprietor, was granted and possessed of the same rights to the bottom of the sea off the Three Lower Counties as were possessed by the crown with respect to the realm.

While New Hampshire became a royal province in 1679 there were a number of earlier grants covering New Hampshire lands, among others, from the Council of New England to John Mason.

A March 9, 1621/2 charter from the President and
759 Council of New England to John Mason granted Cape Anne or Mariana (later part of Massachusetts Bay) in the following terms:

"All that part of the Sea Coast of New England being a great headland or Cape & lying in ye Northernmost parts of the Massachusetts Country & to ye Northeastwards of the Great River of the Massachusetts Stretching it Self out into ye Sea Eastwards five Leagues or thereabouts and lying betwixt ye Lat. of 42 & 43 Degr. or thereabouts; & comonly called or knowne by the Names of Cape Frabigzand or Cape Anne with the North South & East Shoares & Coasts thereof the back bounds thereof towards the Maine Land to begin at the head of the Next Great River to the Southwards of the said Cape

wch runns upwards into the Country of the Main Land westward and Supposed to be called Naumkeck or by what other Name or Names the Said River is or may be called & soeforth Eastwards into ye Sea & to ye uttermost part of ye Said headland or Cape & round about the Same to ye Northwards and from thence along the Sea Coast to the Next Great River wch runns up into the Maine Land Westwards & Supposed to be called Merimack or by what other Name or Names the said River is or may be called & lying to the North westwards of the said Cape & to the farthest head of the Said river from wch period to Crossover land to ye head
760 of the other Great River wch lyes Southwards of ye aforesaid Cape where the perambulacon began & halfe way over that is to Say to ye Midst of either of ye Said two Rivers wch bounds or limits the aforesaid lands both on ye North & South thereof togeather wth the Great Isle or Island henceforth to be called Isle Mason lying Neere, or before the Bay Harbor or ye river of Aggawom *togeather alsoe wth all the Seas Isles or Islands adjoining to any part of ye precincts of the Lands aforesaid or lying wth in 3 Miles of any parte of ye same,* as alsoe all ye Lands Soyle Grounds havens Ports Rivers Mines Mineralls pearls & pretious Stones woods Quarreys Marshes Waters Lakes fishings hunting hawking ffowling Com'odityes & hereditamts whatsoever wth all & Sing'ler their appurtenances togeather wth all prerogatives rights royaltyes jurisdictions priviledges francheses p'heminences libertyes Marine power as alsoe ye Escheats and casualtyes thereof, wth all ye State right title interest claime & demand whatsoever wch the Said president & Councill & their Successors of right ought to have or claime in or to the Said porc'ons of land & other ye premises as is aforesaid by reason or force of his Highness Said Letters Patents in

as free large ample & beneficiall Manner to all intents
construc'ons & purposes whatsoever as in & by ye Said
761 Letters Patents the Same are amongst other things granted
to ye Said president & Councill aforesaid." (Maine et al.
Exhibit No. 12, pp. 20-21; Emphasis added). This char-
ter specifically includes "Seas" along with "Isles or Is-
lands" within three miles of any part of the mainland
grant.

In my opinion the charter language gave Mason the right to the soil under the sea for a distance of at least three miles from the coastal area granted, including the Isle Mason.

A further indenture between the President and Council of New England and John Mason, dated November 7, 1629, made the following grant:

"All yt part of ye Maine land in New England lying upon ye sea Coaste beginning from ye Middle part of Merrimack River & from thence to proceed Northwards along ye Sea coaste to passcattaway river & soe forwards up within ye sd river & to ye furthest head thereof & from thence Northwestwards untill Threescore miles be finished from ye ffirst entrance of passcattaway river & also from Merrimacke through ye sd River & to ye furthest head thereof & soe forward up into ye land Westwards untill Threescore miles be finished and from thence to cross over land to ye Threescore miles end accounted from passcattaway river together wth all Islands & Isletts within five leagues
762 distance of ye premises & abutting upon ye same or any parte or parcell thereof as also all ye lands soyle grounds havens ports rivers mines Mineralls pearles pretious stones woods quarreys marshes waters fishings hunting hawking fowling & other commodityes & hereditamts wt soever wth all & singular their appurten'ces together wth all prerogatives rights royaltyes Jurisdicc'ons priviledges franchises rights royaltyes Jurisdicc'ons priviledges franchises

libirties preheminences marine power *in & upon ye sd Seas & rivers* as allso all escheats & casualtyes therof as flotson Jetson lagon with anchorage & other such dutyes im'unityes sects isletts & appurten'ces wt soever wch [with] all ye estate right title interest claime & demand wt soever wch ye sd president & Councell & their Successors of Right ought to have or Claime in or to ye sd porc'ons of lands rivers & other ye premises as is aforesd by reason or force of his high'ss sd letters patents in as free large ample & beneficiall man'er to all intents construcc'ons & purposes wtsoever as in & by ye sd Letters pattents ye same are amongst other things granted to ye sd president & Councell aforesd." (Maine et al. Exhibit No. 13, pp. 2434-35; emphasis added).

In my opinion this indenture gave Mason the right to the soil beneath the seas for a distance of at least five leagues from the coastal area granted, including Isle
763 Mason. My conclusion rests upon the language of "together with all Islands and Isletts within five leagues distance of the premises and abutting upon the same or any part of parcel thereof," plus the grant of all prerogatives, rights, royalties, jurisdictions, privileges, franchises, liberties, pre-eminences and marine power in the "said Seas and Rivers." In addition, the grant included whatever rights the Council of New England claimed. It certainly claimed the rights to the sea and its soil to a distance of more than five leagues from the mainland.

A November 3, 1631 indenture between the President and Council of New England and Sir Ferdinando Gorges, Captain John Mason and others granted what was known as the Piscataway area in the following terms:
"All that house and chiefe habitacon situate and being at Pascataway al's Pascataquack al's Pascequacke in New England aforesaid, wherein Capt Walt; Neale and ye

Colony wth him now doth or lately did reside together wth the Gardens and Cornegrounds occupied and planted by the s^d^ Colonie, and the Salt workes allready begun as afores^d^ And also that procon of Land lying w^th^in the precincts hereafter menc'oned, beginning upon the Sea-coast 5 miles to the W^t^ward of or from the s^d^ chiefe Habitacon or Plantation now possessed by the s^d^ Capt Walter Neale for ye use of the Adventurers to Licona
764 (being in the latitude of 43 degr' or thereabouts in the Harbour of pascataquack al's Pascataquack al's Pascataway, and so forth from ye s^d^ beginning Eastw^d^ & Northeastw^d^ and so proceeding Northw^ds^ or North Westw^ds^ into ye Harbour and River along the Coasts & Shoares thereof including all the Islands and Isletts lying w^th^in or neere unto the same upwards into the head land opposite unto the plantacon or Habitacon now or late in the Tenure or Occupation of Edwd Hilton, & from thence, W'w^ds^ & South W'w^ds^ in y^e^midle of the River and through the middle of ye Bay or lake of Boquacack al's Boscaquack or by what other name or names it hath towards the bottome or Westermost part up ye River called Pascassockes to the falls thereof, and from thence by an Imaginary Line to pass over, and to the Sea, where the pambulacon begann Togeather w^t^h all ye Lands, Soyle, Ground Wood, Quarries, Mines, ffishing, Hunting Hawking, ffowling, Comodities and Hereditam 's whatsoever, Togeather also wth all p'rogatives, Jurisdicc'ons Royallties, privileidges, ffranchises and preheminences w^th^in ye precincte of Land conteined w^th^in ye limits or bounds aforese'd. And also the Isles of Shoales, and ye ffishings thereabouts – And *all the Seas w^th^in 15 miles of the foresd Sea Coasts,* And also all the Sea Coasts and Land lying on ye East and Northeast side of the Harboure and River of Pascataway afores^d^

765 and opposite to the bounds above menc'oned beginning 15 miles to ye S: eastwards of ye Mouth or first entrance and beginning of the said Harboure, and so upp to ye falls and into the ponds or Lakes that feed the s^d ffals, by the space of 30 miles including the s^d ponds or Lakes and the Shoares thereof, and so crossing into the Landward, at a right angle by the space of 3 miles the whole length thereof from ye s^d mouth or first entrance from the Sea *and Eastwds into ye Sea, wch s^d 3 Miles shalbe allowed for ye breadth of ye s^d land last menc'oned both upon ye land and Sea.* As also all ye Land Soyle Ground Woodes, Quarries Mines, fishings Hunting Hawking ffowling Commodities and Hereditam^s whatsoever, togeather wth all prerogatives Jurisdicc'ons, Royalties, Privileidges, ffranchises and p'heminences wth in the p'cincts of Land lasst menc'oned conteined. (Maine et al. Exhibit No. 16, pp. 41-42; emphasis added).

In my opinion this indenture gave the grantees the right to the soil under the seas for a distance of at least fifteen miles from the coast of the first area bounded and for a distance of at least three miles from the coast of the second area bounded.

The Council of New England by an April 22, 1635, indenture granted two areas to John Mason, one to be
766 known as New Hampshire, the other as Masonia. The indenture, in the nature of a deed of feoffment as to New Hampshire, granted as follows:

"All that part pupart & por'con of ye Maine land of New England aforesaid [within defined limits] . . . & also that the South Half of the Isles of Shoulds together with all other Islands, & Isletts as well imbaid as within 5 Leagues distance from the premisses & abuting upon the same or any part or parcell thereof not otherwise granted to any by Speciaall Name All which part & porc'on of

Lands Islands and premises are from henceforth to be called by the Name of New Hampshire." (Maine et al. Exhibit No. 19, pp. 2443-44).

The second area granted, to be known as Masonia, consisted of 10,000 acres "Lying on [the] South east part of the river of Sagadahock in New England aforesaid at the mouth or entrance thereof." (*Id.* at p. 2444).

The indenture then went on to provide

"And moreover the Said Councill for ye considerac'ons aforesaid have given granted bargained Sold enfeoffed & confirmed & by these p'sents doe give grant bargaine Sell enfeoffe & confirme unto ye said Captaine John Mason his heires & assignes together wth the said bargained p'mises all ye firme Lands Soyles Grounds havens
767 Ports Rivers waters ffishings Mines and Mineralls as well Royall Mines of Gold & Silver as other Mines & Mineralls pretious Stones quaryes & all & Singular other Com'odityes Jurisdictions Royaltyes priviledges ffranchises & preheminences both wthin the Said Tracts of Lands upon the Maine and alsoe *with ye Isiands & Seas adjoyning."* (*Id.*; emphasis added.)

In my opinion this indenture vested in John Mason the right to the soil beneath the seas for a distance of at least five leagues from the coast of the area designated as New Hampshire. In the case of Masonia, the extent of "seas adjoining" would presumably be measured as in the case of the seas adjoining the realm. Another indenture, in the nature of a bargain and sale, of the same date between the same parties is to the same effect. (Maine et al. Exhibit No. 18, pp. 2441-42).

Another indenture (a 3000 year lease), entered into a few days before the April 22, 1635, indenture above, between the Council of New England and John Wollaston, Mason's brother-in-law, in trust for Mason, contained

the same language with respect to the same land areas. (Maine et al. Exhibit No. 17, pp. 2437-38). These several indentures marked a division of lands and confirmation of others shortly before the Council of New England surrendered its charter to the King.

In May 1675 the crown law officers reported to the
768 Committee of Plantations that Robert Mason, the son and heir of John Mason, through the several grants from the Council of New England had good and legal title to lands called New Hampshire. (*CSP, Col., 1675-1676,* No. 563) (Maine et al. Exhibit No. 263, p. 233). Although Mason's rights to New Hampshire as against the pretensions of Massachusetts Bay were upheld, Robert Mason offered to surrender his right to government in 1678; and in July 1679, the King having determined to take all the towns and province of New Hampshire into his own care, the Lords of Trade and Plantations proposed a form of government. The Council, governing with the President, were to administer justice, civil and criminal, according to the laws of England, as far as circumstances permitted. (*CSP, Col., 1677-1680,* Nos. 342, 343, 356, 587, 1045, 1058) (Maine et al. Exhibit No. 248, pp. 118-120, 127-28, 211-12, 386, 390-91). Several years earlier, in 1674, William Dyer, in a petition to the king urging the purchase of New Hampshire and Maine, pointed out that "if the king purchased Maine and New Hampshire, he would have absolute dominion over those seas [the adjoining seas previously described] and might settle a duty on all fisheries there, and might reduce those of Massachusetts to a ready sub-
769 jection." (*CSP, Col., 1669-1674,* No. 1279) (Maine et al. Exhibit No. 269, pp. 579-82).

New Hampshire was established as a royal province in 1680 by means of a commission constituting a President and Council for the Province, John Cutt being named as

President. (Maine et al. Exhibit No. 25). The commission commenced by reciting that the Massachusetts Bay colony, without any legal right or authority, had taken upon themselves to exercise a government and jurisdiction over the inhabitants in the towns of Portsmouth, Hampton, Dover, Exeter, and all other towns and lands in the Province of New Hampshire lying and extending from three miles northward of the Merrimack River, or any part thereof, to the Province of Maine. The commission thereupon inhibited and restrained the jurisdiction. After reciting that "[the] government of [that] part of the said Province of New-Hampshire, so limited and bounded as aforesaid hath not yet bin granted unto any person or persons whatsoever but [the] same still remains & is under Our immediate care & protection" (*id.* at p. 2446), the commission erected, constituted and appointed a President and Council to order, rule and govern the Province and the planters and inhabitants thereof. (*Id.*)

Although no mention is made in the Commission of the adjacent seas in the description of the Province, under orthodox theory the crown would still have whatever right to the seabed was inherent in the assumption by the crown of sovereignty over what at this time was probably still regarded as a "conquered" country. The exact extent of this right, as noted earlier, was not defined in English law, but its existence was clear. By establishing New Hampshire as a royal province the crown retained the right to the soil of the adjoining seas rather than granting this right to a patentee by means of a royal charter, as in the cases we have been considering. The royal governor, as representative of the crown on the spot, would, of course, be authorized to exploit this right. The Cutt Commission, of course, contained no reference

770

to boundaries. At first reliance must have been placed upon grants from the Council of New England which I have just reviewed. However, although these grants may have been important in asserting so-called Masonian claims against settlers in private litigation, by the 1700's the King and Council and others took the view, particularly in the boundary disputes with Massachusetts Bay, that New Hampshire never had a charter, *i.e.*, a royal charter (*CSP, Col.; 1733,* No. 116 and *Id., 1737,* No. 288) (Maine et al. Exhibit Nos. 334 and 335). This is not entirely accurate in view of the 1620 grant to the
771 Plymouth Company which encompassed what was later to become New Hampshire. However, the position of the crown seems to have been that it was entitled to the government of New Hampshire from the time of the surrender of the Council of New England's charter. In any event there can be no doubt that at independence New Hampshire succeeded to seabed and subsoil rights as measured by the common law of England.

In the 1697 commission to the Earl of Bellomont as Governor of New Hampshire we find, for the first time, a grant of "full power & Authority by and with the Advice of our Said Councill to agree with the Inhabitants of our Province and Territories aforesaid for Such Lands Tenements and hereditaments as now are or hereafter shall be in our power to dispose of and them to grant to any person or persons for such Tearmes and under Such Moderate Quitt rents Services and acknowledgm'nts to be thereupon reserved unto us as you by and with the Advice aforesaid shall thinke fitt . . . ." (Maine et al. Exhibit No. 31, p. 619). The same provision was contained in all subsequent gubernatorial commissions until the Revolution.

After the 1629 royal charter to the Massachusetts

Bay Company had been vacated in a *scire facias* proceeding in the High Court of Chancery in England, the col-
772 ony was made part of the Dominion of New England and governed by Sir Edmund Andros under several commissions granted to that royal official. As part of the American counterpart or aftermath of the Glorious Revolution in England, Andros was ousted from his position in April, 1689 by the colonists, confined and then sent back to England. From the date of the ousting of Andros to the grant of a new charter on October 7, 1691, the constitutional status of Massachusetts Bay under what amounted to a provisional government is vague and confused. In some respects, at least, the colonists acted as if the 1629 charter was still in effect.

However, after intensive lobbying in England a new charter was granted by William and Mary. This charter erected, united and incorporated into one "reall" [royal] province, to be known as the "Province of the Massachusetts Bay in New England," the colony of Massachusetts Bay, the colony of New Plymouth, the province of Maine, the territory called Acadia or Nova Scotia and all the tract of land lying between Nova Scotia and Maine (now known as New Brunswick). (Maine et al. Exhibit No. 44, p. 1876). This charter of October 7, 1691, plus an explanatory royal charter of 1725, constituted the frame of government for Massachusetts Bay until the American Revolution.

773 The charter started out with lengthy recitals of the 1620 grant to the Council of New England, the 1628 deed from the Council of New England to Sir Henry Rosewell and others, the 1629 royal letters patent to the Governor and Company of the Massachusetts Bay in New England and the 1684 *scire facias* proceedings by the crown in the High Court of Chancery vacating

and cancelling the aforesaid letters patent of 1629. The letters patent then set forth the following recitals of the events leading to the granting of the charter and the reasons for the crown's action:

"severall persons employed as Agents in behalfe of Our said Collony of the Massachusetts Bay in New England have made their humble application vnto Vs that Wee would be graciously pleased by Our Royall Charter to Incorporate Our Subjects in Our said Collony and to grant and confirme vnto them such powers priviledges and Franchises as [in] Our Royall Wisdome should be thought most conduceing to Our Interest and Service and to the Welfare and happy State of Our Subjects in New England and Wee being graciously pleased to gratifie Our said Subjects And alsoe to the end Our good Subjects within Our Collony of New Plymouth in New England aforesaid may be brought vnder such a forme of Government as may put them in a better Condicon of defense and considering aswell the granting vnto them as vnto Our Subjects in the said Collony of
774 the Massachusetts Bay Our Royall Charter with reasonable Powers and Priviledges will much tend not only to the safety but to the Flourishing estate of Our Subjects in the said parts of New England and alsoe to the advanceing of the ends for which the said Plantancons were at first encouraged of Our especiall Grace certaine knowledge and meer Mocon have willed and ordeyned and Wee doe by these presents for Vs Our Heires and Successors Will and Ordeyne that the Territories and Collnyes comonly called or known by the Names of the Collony of the Massachusetts Bay and Collony of New Plymouth and Province of Main the Territorie called Accadia or Nova Scotia and all that Tract of Land lying betweene the said Territories of Nova Scotia

and the said Province of Main be Erected Vnited and Incorporated." (*Id.* at pp. 1875-76).

The letters patent went on to define the province or territory in the following manner:

"all that parte of New England in America lying and extending from the greate River comonly called Monemack als Merrimack on the Northpart and from three Miles Northward of the said River to the Atlantick or Western Sea or Ocean on the South part. And all the Lands and Hereditaments whatsoever lying within the limits aforesaid and extending as farr as the Outermost Points or Promontories of Land called Cape Cod and Cape Mallabar North and South and in Latitude Breadth and in Length and Longitude of and within all the Breadth and Compass aforesaid throughout the Main Land there from the said Atlantick or Western Sea and Ocean on the East parte towards the South Sea or Westward as far as Our Collonyes of Rhode Island Connecticut and the Narragansett Countrey all alsoe all that part or porcon of Main Land beginning at the Entrance of Pescata way Harbour and soe to pass vpp the same into the River of Newickewannock and through the same into the furthest head thereof and from thence Northwestward till One Hundred and Twenty Miles be finished and from Piscata way Harbour mouth aforesaid North-Eastward along the Sea Coast to Sagadehock and from the Period of One Hundred and Twenty Miles aforesaid to crosse over Land to the One Hundred and Twenty Miles before reckoned vp into the Land from Piscataway Harbour through Newickawannock River and alsoe the North halfe of the Isles and Shoales together with the Isles of Cappawock and Nantuckett near Cape Cod aforesaid and also [all] Lands and Hereditaments lying and being in the Countrey and Territory commonly called Accadia or Nova Scotia. And

all those Lands and Hereditaments lying and extending betweene the said Countrey or Territory of Nova Scotia and the said River of Sagadahock or any part thereof
776 And all Lands Grounds Places Soiles Woods and Wood grounds Havens Ports Rivers Waters and other Hereditaments and premisses whatsoever lying within the said bounds and limitts aforesaid and every part and parcell thereof and alsoe all Islands and Isletts lying within tenn Leagues directly opposite to the Main Land within the said bounds and all Mines and Mineralls aswell Royall Mines of Gold and Silver as other Mines and Mineralls whatsoever in the said Lands and premisses or any parte thereof." (*Id.* at pp. 1876-77).

This charter is atypical in that it does not contain the usual language granting "lands, soils, grounds, woods, havens, ports, rivers, waters," etc. Nor does it contain the usual phraseology with respect to jurisdictions, rights, royalties, liberties, freedoms, immunities, privileges, franchises, pre-eminences, hereditaments, etc. However, there is nothing in the charter which can be construed as depriving the inhabitants of the province, the grantees under the letters patent, of the right to the soil under the sea below the low-water mark to the extent provided in earlier grants. The crown did specifically limit some rights existing or claimed to exist under former grants. Admiralty jurisdiction was specifically vested in the crown, probably as the result of the charges by Edward Ran-
777 dolph of widespread evasion of the Acts of Trade in the Massachusetts Bay colony. An appeal to the King in Council from the provincial courts in judicial matters was provided for and regulated. A procedure for the disallowance or confirmation of acts of the General Assembly was inserted in the charter. The fishing rights of subjects, other than the inhabitants of Massachusetts Bay, were reserved, as in the 1629 charter.

As far as rights to the soil were concerned the tenor of the charter was to enlarge or at least preserve such rights. First, added to the bounds of the 1629 patent were the Plymouth colony, the province of Maine, the territory of Nova Scotia and the lands lying between Maine and Nova Scotia. Secondly, the inclusion of all islands and islets lying within ten leagues directly opposite to the mainland not only clarified the limits of the 1629 grant but also enlarged the former boundaries of Maine from five to ten leagues.

In addition, the charter contained a saving clause that "Provided neverthelesse and Wee doe for Vs Our Heires and Successors Grant and ordeyne that all and every such Lands, Tenements and Hereditaments and all other estates which any person or persons or Bodyes-Politique or Corporate Townes Villages Colldges or Schoolss doe hold and enjoy or ought to hold and enjoy within the bounds a-
778 foresaid by or vnder any Grant or estate duely made or granted by any Generall Court formerly held or by vertue of the Letters Patents herein before recited or by any other lawfull Right or Title whatsoever shall be by such person and persons Bodyes Politique and Corporate Townes Villages Colldges or Schoolss their respective Heires Successors and Assignes for ever hereafter held and enjoyed according to the purport and Intent of such respective Grant vnder and Subject neverthelesse to the Rents and Services thereby reserved or made payable any matter or thing whatsoever to the contrary notwithstanding." (*Id.* at p. 1877).

The tenor of this provision was to preserve the *status quo* under the 1629 letters patent insofar as Land grants are concerned.

That there was no appropriation to the crown of any

rights to land or soil appears from the following charter provision:

"Provided alsoe that it shall and may be Lawfull for the said Governor and Generral Assembly to make or passe any Grant of Lands lying within the Bounds of the Colonys formerly called the Collonys of the Massachusetts Bay and New Plymouth and province of Main in such manner as heretofore they might have done by vertue of any former Charter or Letters Patents which grants of lands
779 within the Bounds aforesaid Wee doe hereby Will and ordaine to be and continue for ever of full force and effect without our further Approbation or Consent." (*Id.* at p. 1883).

Taking into consideration all the above factors, I am of the opinion that under the 1691 charter to Massachusetts Bay the right to the soil under the sea for a distance of at least ten leagues off the coast was vested in the inhabitants of the province. Certainly nothing in the "legislative history" of the charter indicates any intent to deprive the province of any rights to the seabed below the low water mark (*CSP, Col., 1689-1692,* Nos. 1276, 1277, 1440, 1572, 1573, 1574, 1606, 1650, 1665, 1669, 1670, 1724, 1731, 1738, 1744, 1745, 1753, 1758, 1759 and 1760). (Maine et al. Exhibit No. 253, pp. 375, 423, 470-71, 479, 509, 511-13, 527-31, 533, 535, 542-43).

In *CSP, Col., 1700,* No. 641 iii, there is a reference by the Governor, Council and Assembly of Massachusetts Bay to "the undoubted right and privilege of your Majesty's subjects to fish in the seas on the whole Eastern coast, conformable to your Majesty's right of Sovereignty over the seas." (Maine et al. Exhibit No. 270, p. 419).

* * * * *

780 Q. Professor Smith, would you care to answer the question that the Special Master put to you this morning

about some of the New Jersey documents? A. This regards the Edward Byllynge situation that you asked me about this morning, Your Honor.

THE SPECIAL MASTER: Yes.

THE WITNESS: I checked out the two documents involved here, which is 74, and the second document, 265, Exhibit 265. I think I probably could have improved my prose in the first place by mentioning there was a claimed equitable interest, although there was a conveyance of a legal title. Apparently Byllynge retained or claimed he retained an equitable interest in the particular land. Now, that is played down in document No. 74, and there it is only called the claimed equitable interest. But when we come to the second document, the 265, which is later, then apparently something must have happened in the meantime. Now he is recognized as the real party in interest I think by this particular document. So, I don't know, I can find out, but I don't know why Byllynge's status, it seems changed between the two. That's the reason why the different approach between the two documents. I don't know why that was so. I don't have the full explanation.

THE SPECIAL MASTER: Obviously Byllynge was claiming some interest at this point.

THE WITNESS: That's right, Your Honor.

THE SPECIAL MASTER: And the crown was giving him a confirmation of some kind.

THE WITNESS: I gather the crown believed him rather than the other people involved.

THE SPECIAL MASTER: All right.

BY MR. CLAGETT:

Q. Are there further 17th and 18th century charters, other than those directly affecting the nine common-counsel states, which you believe pertinent? A. Yes. For

their cumulative effect and for what they show as to the exercise of the royal prerogative I would like to refer to several other royal charters of the 17th and 18th centuries, namely, the Heath patent for the Bahamas and Carolina, the later Carolina patent, the Connecticut and Georgia patents, and the Newfoundland and Nova Scotia patents.

The October 30, 1629 letters patent to Sir Robert Heath, granted by Charles I, described the region to be
782 granted as

"[Y]et hitherto untild, neither inhabited by ours [or] the subjects of any other Christian king, Prince or state But some parts of it inhabited by certain Barbarous men who have not any knowledge of the Divine Dietye." (Maine et al. Exhibit No. 271, p. 69).

The letters patent gave, granted and confirmed "all" that River or Rivelett of St Matthew on the South side & all that River or Rivelett of the great passe on the North side, & all the lands Tenements & Hereditaments lying, beeing & extending within or between the sayd Rivers by that draught or Tract to the Ocean upon the east side & soe to the west & soe fare as the Continent extends itselfe with all & every their appurtenances & alsoe all those our Islands of beayus Bahama & all other Isles & Islands lying southerly there or neare upon the foresayd continent all which lye inclusively within the degrees of 31 & 36 of Northerne latitude;
And all & singular the ports & stations of shippes & the Creeks of the sea belonging to the Rivers, Islands & lands aforesaid; with the *fishings of all sorts of fish, whales, sturgeons & of other Royaltyes in the sea* or in the rivers moreover all veines, mines or pits either upon or conceald of Gold, Silver Jewells & precious stones & all other things
783 whatsoever, whither of stones or metalls or any other thing or matter found or to be found in the Region Territory Isles or limitts aforesaid. And furthermore the

patronages and advowsons of all churches which shall happen to be built hereafter in the said Region Territory & Isles and limitts by the increase of the religion & worship of Christ Together with all & singular these & these soe amply, Rights Jurisdictions, priviledges prerogatives Royaltyes libertyes immunityes with Royall rights & franchises whatsoever *as well by sea as by land,* within that Region Territory Isles & limitts aforesaid To have exercise use & enjoy in like manner as any Bishop of Durham within the Bpricke or County palatine of Durham in our kingdome of England ever heretofore had held used or enjoyed or of right ought or could have hold use or enjoy." (*Id.* at p. 70. Emphasis added).

In my opinion this patent granted, for the several geographic areas named, rights to the seabed and subsoil of the adjoining seas of the same nature as that possessed by the King with respect to the realm. I rely primarily upon the reference to "fishings of all sorts of fish . . . & of other Royalties in the sea" and the reference to royalties, etc. "as well by sea as by land."

The Connecticut charter of April 23, 1662, granted by Charles II, commenced with a recital that the colony
784 consisted in part of purchased and in part of conquered lands. (Maine et al. Exhibit No. 272, p. 529). It gave, granted and confirmed to the Governor and Company and their successor:

"all that Part of Our Dominions in New-England in America, bounded on the East by Narraganset-River, commonly called Narraganset-Bay, where the said River falleth into the Sea; and on the North by the Line of the Massachusetts-Plantation; and on the South by the Sea; and in Longitude as the Line of the Massachusetts-Colony, running from East to West, That is to say, From the said Narraganset-Bay on the East, to the South Sea on the

West Part, with the Islands thereunto adjoining, together with all firm Lands, Soils, Grounds, Havens, Ports, Rivers, Waters, Fishings, Mines, Minerals, precious Stones, Quarries, and all and singular other Commodities, Jurisdictions, Royalties, Privileges, Franchises, Preheminences, and Hereditaments whatsoever, within the said Tract, Bounds, Lands, and Islands aforesaid, or to them or any of them belonging." (*Id.* at pp. 535-536).

Also contained in the charter was a caveat that "these Presents shall not in any Manner hinder any of Our loving Subjects whatsoever to use and exercise the Trade of Fishing upon the Coast of New-England, in America, but they and every or any of them shall have
785 full and free Power and Liberty, to continue, and use the said Trade of Fishing upon the said Coast, in any of the Seas thereunto adjoining, or any Arms of the Seas, or Salt Water Rivers where they have been accustomed to fish, and to build and set up on the waste Land belonging to the said Colony of Connecticut, such Wharves, Stages, and Work-Houses as shall be necessary for the salting, drying, and keeping of their Fish to be taken, or gotten upon that Coast, any Thing in these Presents contained to the contrary notwithstanding." (*Id.* at p. 535).

In my opinion these letters patent granted the Governor and Company of Connecticut rights to the seabed and subsoil of the adjoining sea of the same nature as that possessed by the King with respect to the realm. I regard these rights as royalties belonging to the grant of the mainland and the islands thereunto adjoining.

The letters patent of March 24, 1662/3, for Carolina, described as "parts of America not yet cultivated or planted, and only inhabited by some barbarous people, who have no knowledge of Almighty God," (Maine et al.

Exhibit No. 273, p. 2743) granted the patentees, the Earl of Clarendon and others,

"all that territory or tract of ground, scituate, lying and being within our dominions of America, extending from
786 the north end of the island called Lucke island, which lieth in the southern Virginia seas, and within six and thirty degrees of the northern latitude, and to the west as far as the south seas, and so southerly as far as the river St. Matthias, which bordereth upon the coast of Florida, and within one and thirty degrees of northern latitude, and so west in a direct line as far as the south seas aforesaid; together with all and singular ports, harbours, bays, rivers, isles and islets belonging to the country aforesaid; and also all the soil, lands, fields, woods, mountains, fields, lakes, rivers, bays and islets scituate or being within the bounds or limits aforesaid, with the fishing of all sorts of fish, whales, sturgeons, and all other royal fishes *in the sea, bays, islets and rivers within the premises,* and the fish therein taken; and moreover all veins, mines, quarries, as well discovered as not discovered, of gold, silver, gems, precious stones, and all other whatsoever, be it of stones, metals, or any other thing whatsoever, found or to be found within the countries, isles and limits aforesaid . . . . together with all and singular the like, and as ample rights, jurisdictions, priviledges, prerogatives, royalties, liberties, immunities and franchises of what kind soever, within the countries, isles, islets and limits aforesaid." (*Id.* at p. 2744. Emphasis added.)

787 These letters patent, in my opinion, granted rights to the seabed and subsoil of the sea adjoining the mainland and islands of the same nature as that possessed by the crown with respect to the realm. The grant of royalties relates to the sea within the premises or limits of the charter.

The June 9, 1732 charter to a company organized by James Oglethorpe for the colonization of a province to be called Georgia, then waste and desolate lands, granted to "The Trustees for establishing the colony of Georgia in America" "all those lands, countrys and territories, situate, lying and being in that part of South Carolina, in America, which lies from the most northern part of a stream or river there, commonly called the Savannah, all along the sea coast to the southward, unto the most southern stream of a certain other great water or river called the Alatamaha, and westerly from the heads of the said rivers respectively, in direct lines to the south seas; and all that share, circuit and precinct of land, within the said boundaries, *with the islands on the sea, lying opposite to the eastern coast of the said lands, within twenty leagues of the same,* which are not inhabited already, or settled by any authority derived from the crown of Great-Britain; together with all the soils, grounds, havens, ports gulfs and bays, mines, as well royal mines of gold
788 and silver, as other minerals, precious stones, quarries, woods, rivers, waters, fishings, *as well royal fishings of whale and sturgeon as other fishings, pearls, commodities, jurisdictions, royalties, franchises, privileges and preeminences within the said frontiers and precincts thereof and thereunto in any sort belonging or appertaining,* and which we by our letters patent may or can grant, and in as ample manner and sort as we may or any of our royal progenitors have hitherto granted to any company, body politic or corporate, or to any adventurer or adventurers, undertaker or undertakers, of any discoveries, plantations or traffic, of, in, or unto any foreign parts whatsoever; and in as large and ample manner, as if the same were herein particularly mentioned and expressed . . . ." (Maine et al. Exhibit No. 274, p. 771. Emphasis

added).

By this charter, in my opinion, the patentees were vested with the rights to the soil of the adjoining seas to a distance of at least twenty leagues from the granted coastal area. This charter is significant as demonstrating that the 18th century did not witness a diminution of the royal prerogative with respect to new settlements.

It is interesting that when the Lords Proprietors of the Bahamas, holding under letters patent granted by Charles
789 II, surrendered their civil and military powers of government in the islands, they saved and excepted "all and singular the ports harbours bays and rivers to the abovemenconed Island and Isletts belonging and appertaining with the fishing of all sorts of fish whales sturgeon and all other royall fishes in the seas bays islands and rivers within the abovemenconed premisses and the royall fish and others therein taken together with the royaltye of the sea upon the coast within the limitts aforesaid . . ." (*CSP, Col., 1717-1718,* No. 176) (Maine et al. Exhibit No. 275, pp. 85-87).

Professor Horwitz, in his testimony, referred briefly to the Charter of 1611 from James I to the Newfoundland Company which, after defining the portion of Newfoundland conveyed, continued: "together with the seas and islands lying within ten leagues of any part of the sea coast of the country aforesaid." (Maine et al. Exhibit No. 179, p. 53). The grant then continued with the familiar language:

"And also all the lands soil grounds havens ports rivers mines, as well royal mines of gold and silver as other mines, minerals pearls and precious stones woods quarries marshes waters fishings huntings hawkings fowlings commodities and hereditaments whatsoever, together with all prerogatives jurisdictions royalties privileges franchises

and preeminences within any the said territories and the
790 precincts thereof whatsoever and thereto or thereabouts *both by sea and land being or in any sort belonging or appertaining* and which We by our Letters Patents may or can grant, and in as ample manner and sort as We or any of our noble Progenitors have heretofore granted to any company body politic or corporate or to any adventurer or adventurers undertaker or undertakers of any discovery plantation or traffic of in or unto any foreign parts whatsoever, and in as large and ample manner as if the same were herein particularly mentioned and expressed: . . . ." (*Id.* Emphasis added).

This charter, indeed, opened with a "whereas" clause indicating that rights in the sea were the essential purpose of the grant:

"*Know ye whereas* divers our loving and well-disposed subjects are desirous to make plantation to inhabit and establish a colony or colonies in the southern and eastern parts of the country and isle or islands commonly called Newfound Land, unto the coast and harbours whereof the subjects of this our Realm of England have for the space of fifty years and upwards yearly used to resort in no small numbers to fish, intending by such plantation and inhabiting both to secure and make safe the said trade of fishing to our subjects for ever, and also to make
791 some commendable benefit for the use of mankind by the lands and profits thereof which hitherto from the beginning (as it seemeth manifest) hath remained unprofitable, and for better performance of such their purpose and intentions have humbly besought our regal authority and assistance . . . ." (*Id.* at p. 51).

The charter also provided for reserved fishing rights in the area conveyed on the basis of established custom. (*Id.* at p. 53).

Plainly there can be no doubt that this charter conveyed both the sea and the seabed adjacent to Newfoundland at least out to 10 leagues.

A patent of Nova Scotia granted on July 27, 1662 to Sir Thomas Temple similarly conveyed an area extending by express definition 30 leagues into the sea. (*CSP, Col., 1661-1668,* No. 340) (Maine et al. Exhibit No. 240, pp. 101-02).

Q. What conclusions do you draw from this survey of the charters? A. When the various colonial charters are read cumulatively they indicate that the crown claimed and granted to, or made effective for, the American dominions of the crown the same sort of rights in the adjoining Atlantic as it claimed in the English seas. Since the precise extent of the claim in English waters
792 was undetermined, the opportunity was taken to particularize the limits in certain of the colonial charters, though these limits varied from one charter to another. Given the very limited means of technological exploitation at the time, the charters were extremely far sighted when they did set limits, almost as if they were anticipating modern technological developments. The result of all this is perhaps not too far from the modern continental shelf doctrine that the coastal state has exclusive rights as far out as there are practical possibilities of exploitation, so long as the seabed in question can still be regarded as adjacent to the coast. Seen in this light, the specific limits, where they are stated, might not be regarded as fixed and final, but rather as indications of how far out the practical interests of the coastal dominion were considered to extend at the time of grant.

Be that as it may, in the light of the charter provisions I have surveyed it is clear beyond dispute that in 17th and 18th century English law, sovereignty or

dominion over a territory with a sea coast was regarded as carrying with it rights over the adjacent sea, seabed and subsoil, and that the crown quite consciously conveyed such rights in the various colonial charters.

793 Q. Do you know of any evidence, besides that which you have already discussed, which indicates that the American colonists or colonial governments believed that their charters conferred jurisdiction or rights over the marginal sea and seabed or that they actually exercised such jurisdiction and rights? A. I have not made a systematic study of this area and cannot deal with it with any degree of comprehensiveness. Much if not most of the relevant material would be scattered in libraries and archives throughout the states in question, and I have not examined it. I expect that there would be some evidence of the type you suggest, but on the whole I believe that it would be rather limited in extent, for at least two reasons. First, because of the technological impediments to exploitation of seabed and subsoil resources in the marginal sea during the period we are discussing, the occasions on which practical possibilities of exploitation would arise would be few and far between. That is not at all inconsistent with a quite general awareness that the exclusive right of exploitation was vested in the adjacent sovereign, which would exercise it on the rather infrequent occasions when the possibility arose. Second, it must be remembered that during the colonial period the great preponderance of ambitions and expec-
794 tations for economic expolitation were directed westwards, toward the vast body of land beyond the narrow strip of coastal settlement, whose resources, once discovered, could be exploited far more readily and profitably than those of the seabed and subsoil. For that reason one would expect to find fewer instances of actual

exploitation, and of the exercise of regulatory power by the coastal governments, on this side of the Atlantic during the period we are discussing than in Europe. But as I say, I have not studied the subject systematically so I really cannot say how much material there may be.

Professor Flaherty, who I understand will be appearing as a witness for Virginia, has studied this sort of material as it relates to Virginia. The evidence he has found confirms me in my belief that there was a general recognition and awareness during the colonial period that the coastal state had exclusive rights of exploitation and regulation in the marginal sea and would exercise them whenever the occasion arose.

Beyond that answer, I will mention only a few isolated examples that have come to my attention.

In 1715 the New York government adopted an act to entitle Garret de Graeuw and his Assigns to the Fishery of Porpoises during the Term of Seven years. (Maine et
795 al. Exhibit No. 276, p. 839). The act gave de Graeuw the exclusive right to fish for porpoises "in the seas, Harbours, Rivers and other Waters within this Colony."

In 1715, 1730 and twice in 1737 the New York government adopted statutes regulating the raking of oysters. (Maine et al. Exhibits Nos. 277, 278, 279 and 280). The first three of these acts are not limited in their scope to the boundaries of any counties, or to harbors, rivers, bays, etc., and certainly deal with oyster beds below low water mark in the sea. The last-mentioned statute deals specifically with oyster beds "lying at & near Richmond County, within this Colony." This implies a distinction similar if not identical to that in English law: the "body of a county" ended at low water mark but the sovereign's jurisdiction and prerogative extended much farther into the sea.

In 1692 Governor Copley of Maryland appointed Edward Greene of Somerset County (the only county of the colony with an Atlantic coastline) as officer to salvage all "drifts wastes and wrecks," including whales, "as shall be driven or cast on shoar or be found floating within the limits and bounds aforesaid" (Maine et al. Exhibit No. 374). The reason for the appointment was stated to be incursions of Pennsylvanians and other for-
796 eigners "upon and within the limits and bounds of this Province at the Seaboard Side" to take drift whales. (*Id.*)

In 1712 the Maryland legislature enacted a statute prohibiting the striking or shooting of fish "within the Precincts of this Province." (Maine et al. Exhibit No. 325). It was provided that the statute should not extend to the striking of fish "upon the Sea-side," *id.* at 199, thus limiting the effect of the statute to the Chesapeake Bay and its tributaries, which is obviously where the legislature considered that the striking of fish was leading to the depletion of resources. The express exclusion of the sea fisheries from the effect of the statute implies that without such an exclusion they would have been considered covered by the statute as being "within the Precincts of this Province."

A New Jersey statute of 1718 restricted to certain times of the year the raking of oysters from the "Oyster-beds within this Province." (Maine et al. Exhibit No. 326).

In 1693 the Pennsylvania government adopted a statute (Maine et al. Exhibit No. 281) providing for the payment, by all foreigners, of a royalty of ten percent of oil and bone for the killing of any whale within Delaware Bay.

797 A Pennsylvania law of 1698 (Maine et al. Exhibit No. 282, pp. 268, 273) levied fees for permits to carry tobacco

"to & fro within this River of [*sic;* should be *or*] bay of Delaware."

In 1682 William Penn chartered the Free Society of Traders, granting to them a manor of 20,000 acres (Maine et al. Exhibit No. 283). Included in the grant was "free fishing of whales, sturgeon, and all royal and other fishes in the main sea and bays of the said province, and in the inlets, waters, and rivers within or adjoining to" the manor. (Id. at p. 549).

In 1700 William Penn found himself embroiled in a controversy with the authorities in England, who were attempting to deny him the admiralty jurisdiction to which he believed himself entitled. The subject of admiralty jurisdiction is enormously complicated, and I have not dealt with it in this testimony. However, it is interesting that Penn based his assertion of admiralty jurisdiction on his belief, which he seems to have assumed would be unquestioned, that he owned the marginal sea. In a letter of December 10, 1700, to the Lords of the Admiralty (Maine et al. Exhibit No. 284), Penn wrote: "nothing can appear more unreasonable or absurd to me than that this country being granted me by the King's Letters Patent, both soil and government, with the royalties of both land and water . . . my power should be disputed of appointing an officer, that most mayors or ports in England, if I mistake not, have the privilege of . . ." (*Id.* at p. 349). In another letter of the same year (Maine et al. Exhibit No. 285), Penn protested, "to have 300 miles of water and yet no power to serve a Writt on it, is to grant a country without a way to it . . . . 'Tis a great Affront & Injustice that my Waters should be under another Vice Admiralty; to talk of a Country and no waters, property or palatine & no vice admiralty, nor to be Lord of ye Waters, has a contradiction in it . . . ." (*Id.* at pp. 140-41. (Contractions expanded).

As I have said, these examples are merely a few fragments of a general awareness which I believe existed.

Q. Do you know of any other evidence indicating colonial ownership of the marginal sea or seabed? A. In April, 1700 during negotiations for settlement of the French and English boundaries in North America in the region of Nova Scotia the French ambassador made the following proposal:

"As to fishing, since all commerce between the two nations in the colonies is forbidden, and since, under pretence of fishing, there would not fail to be contra-
799 band traffic, it is thought that in accordance with the custom already established in those parts, fishing should be forbidden out of sight, fixing the distance at eight leagues, and that for the same reasons the islands included in that space should belong to the nation to whose coast they are nearest." (*CSP, Col., 1700,* No. 368) (Maine et al. Exhibit No. 270, pp. 213-14).

Several items collected from the *Calendar of State Papers, Colonial,* with respect to royal colonies in the 17th century, show clear recognition of the crown's rights to the seabed below the low water mark.

In the West Indies the seabed under shallow coastal waters was converted into salt ponds or salt pans and the salt collected therein was of economic significance. Although these ponds were beyond the low water mark the crown obviously asserted ownership.

In 1662 one Henry Janson complained to the king that there had of late been encroachments made upon the sea about the coast of Barbados contrary to the limits of the first plantation. He also prayed and received a warrant for a grant under the Great Seal of all the waste grounds in and about the island of Barbados not legally granted earlier or prescribed for by the limits

and bounds of the first plantation. The grant issued but was obstructed by some of the planters in the island. Janson later (1663) surrendered the granted waste lands to save the king from importunities of the planters but sought compensation for his losses. (*CSP, Col., 1661-1668,* Nos. 275, 276, 431, 509, 511) (Maine et al. Exhibit No. 240, pp. 85, 127, 147).

In 1670 Sir Thomas Modyford, Governor of Jamica, wrote that 5000 acres of waste land by the sea side, mostly covered with salt water, had been granted to Captain John Noy and that there was "a very hopeful work begun for salt." Thomas Tothill, the Receiver General, reported that three salt ponds, containing upwards of 4000 acres, under the management of Noy had yielded 10,000 bushels, Noy asserting he could have made as many tons if a market had been available. (*CSP, Col., 1669-1674,* Nos. 270, 271) (Maine et al. Exhibit No. 269, pp. 98-105).

It should be noted that an earlier proclamation of Oliver, Lord Protector, dated October 10, 1655, gave encouragement to such as should transport themselves to Jamaica. These persons, among other things, were to hold and enjoy all fishings "within their [land grant] bounds." (*CSP, Col., 1675-1676,* No. 229) (Maine et al. Exhibit No. 268, pp. 97-8). This is a clear indication that the bounds of the island were certainly not the low water mark.

Passing references to salt ponds in St. Christopher's in the Leeward Islands appear in the *Calendar of State Papers, Colonial.* For a time in the 17th century this island was held in part by the French. In 1679 Governor Stapleton complained that the French had seized a vessel which "rode at the great Salt Ponds upon St. Christopher's, which is as much His Majesty's property as any part of the Island." (*CSP, Col., 1677-1680,* No. 1137) (Maine et al. Exhibit

No. 248, p. 424). In 1691 Governor Christopher Codrington in a long report advised that the salt ponds should be reserved to the King. (*Id., 1689-1692,* No. 1,756B) (Maine et al. Exhibit No. 253, pp. 540-41).

In New York in 1687 Governor Dongan was accused of giving certain waste ground to the Mayor and Corporation of New York to the detriment of the inhabitants. The waste land in question was a dock reclaimed from the sea by the inhabitants themselves. (*CSP, Col., 1687,* Nos. 334 (p. 334), 1250) (Maine et al. Exhibit No. 286, pp. 334, 367).

Another significant incident is to be found in Jamaica, where in 1676 the bounds of the parish of St. Dorothy were changed to include a portion of the high seas on which an interloper on the Royal African Company's slave
802 trade monopoly had been seized. In the prosecution in the local Court of Admiralty objection was made based upon Stat. 15 Richard II, c. 3, that the seizure was *infra corpus comitatus* (within the body of a county). The Governor and Assembly were severely criticized by the Lords of Trade and Plantations for passage of the act and a royal instruction issued directed against further encroachments on the rights of the Admiralty. However, there is no suggestion whatsoever denying the rights of the crown to the seabed of the high seas. (*See CSP, Col., 1675-1676,* Nos. 972, 976, 987, 989 (Maine et al. Exhibit No. 268, pp. 418-19, 425, 429-31); *id., 1677-1680,* No. 1571 (Maine et al. Exhibit No. 248, pp. 1624-5); *id., 1681-1685,* Nos. 227, 367 (Maine et al. Exhibit No. 267, pp. 113-14, 183-84); *id., 1693-1696,* No. 1930 (p. 528) (Maine et al. Exhibit No. 287, p. 528); Labaree, 1 *Royal Instructions to British Colonial Governors, 1670-1776,* No. 659 (Maine et al. Exhibit No. 288).

Q. You have already touched on the earliest stage of

the evolution of legal doctrine regarding the status of English law, and particularly the royal prerogative in the American dominions of the crown. In the later colonial period, did that doctrine develop further so as to confirm crown and proprietary rights to the seabed and sub-
803 soil of the continental shelf? A. Yes. I have been considering thus far the royal right to the soil under the adjoining seas in the context of express and specific grants of prerogative rights by various provisions in colonial charters. But the prerogative rights of the crown were part and parcel of a larger body of law – the common law of England. We must ask whether as an element of this law, the common law of England, did the prerogative principle with which we are concerned become established in the American colonies prior to the Revolution?

In a sense, the answer to the question becomes of importance only if there is no applicable charter, commission, proclamation, etc., which establishes the right to the soil under the adjoining seas either in a general way (as in the case of the realm) or for a specific distance measured in leagues or miles.

In the first place, can the various charters, in and of themselves, be construed as in effect extending the laws of England, including the common law, to the various plantations for which charters were granted?

None of the colonial charters provided explicitly and in so many words that all the laws of England were to be in effect in any colony, plantation or province. The
804 charter granted to William Penn in 1681 for Pennsylvania is exceptional in that it did provide that designated portions of the laws of England were to be in force in the province until changed by local laws. (Maine et al. Exhibit 95). Under the learning of *Calvin's Case* (Maine

et al. Exhibits Nos. 243-244), if, in the case of a conquered Christian kingdom, the King put into effect the laws of England for the government of that country, no succeeding King could alter them without an act of Parliament. While the colonies generally were considered as conquered infidel kingdoms rather than conquered Christian kingdoms, the same principle might be applicable and the King would be inhibited in the exercise of his prerogative. This may have deterred the crown in dealing directly with the problem.

However, despite the absence of specific language in the charters the colonists from time to time seized upon various provisions of the several charters to support contentions that these letters patent extended the laws of England, particularly the common law, to the plantations or to a particular plantation.

The charters in making grants of legislative powers and ordinance-making powers restricted the exercise of such powers to the making of acts or ordinances which were
805 not contrary or repugnant to the laws of England. The exact language varied somewhat from charter to charter. It was argued by some colonists that this limitation indicated an assumption or understanding that the laws of England were in effect in the colonies to which charters were granted.

The charters invariably provided that the lands granted be held as of the manor of East Greenwich or Windsor or some other royal manor in England. The exact meaning and effect of this provision was a matter of some dispute. (See Viola Francis Barnes, "Land Tenure in English Colonial Charters of the Seventeenth Century" in *Essays in Colonial History Presented to Charles McLean Andrews by His Students* (1931) pp. 4-40; E. P. Cheney, "The Manor of East Greenwich in the County

of Kent," 11 *American Historical Review* 29 (1905); C. T. Carr, "Our Manor of East Greenwich," 29 *Law Quarterly Review* 349 (1913); 1 C. M. Andrews, *The Colonial Period of American History*, 86-87 (1934); J. Hurstfield "The Greenwich Tenures of the Reign of Edward VI," 65 *Law Quarterly Review* 72 (1949). Among other things, it was contended by some that this clause indicated an intention by the crown to have the laws of England extend to the granted territories.

Some charters specifically provided that the Statute of *Quia Emptores* (1292) should not be applicable in the case of land grants by the patentee. In other words, if Lord Baltimore, holding the province of Maryland under royal letters patent, granted the manor of St. Gabriel to Richard Roe in fee simple, said Roe would not then hold directly of the King as he would if the Statute of *Quia Emptores* were considered applicable. Some colonists raised the point that if the laws of England did not extend to the colonies, why was it necessary to exclude or interdict the operation of *Quia Emptores*.

* * * * *

BY MR. CLAGETT:

Q. What do you conclude from this review? A. I conclude that by the eve of the American Revolution there was general recognition that the common law of England was in force in the North American colonies. While certain points of law, involving particularly individual liberties, were at times in dispute between the crown and the colonies, no such dispute existed concerning crown rights in the seabed. Those rights, therefore, existed as fully on this side of the Atlantic as they did in English waters. With respect to royal colonies those rights remained vested in the crown itself and were delegated to the royal governments. In the case of charter

colonies, corporate or proprietary, seabed rights had been conveyed in whole or in part to such governments. I believe, in conclusion, that the accepted status of English law in this country on the eve of the Revolution confirms and strengthens the specific evidence from the charters
837 that seabed rights were recognized here in the colonial period.

Q. How did American independence affect the situation? A. Once independence was achieved or contemplated the whole problem of the reception of the laws of England entered into a new phase. The question now was how much of the colonial law should be received as the law of the individual states, for no state contemplated that with independence all their corpus of law vanished or should vanish leaving a *tabula rasa*. The instruments of transition, for the most part, were so-called "reception provisions" in either state constitutions or statute.

There was some variance but in general the common law of England was one of the elements received.

* * * * *

845 I have not made a systematic search to ascertain whether every state adopted such a statute or constitutional provision. Such statutes and provisions obviously simply confirmed what would have been the effect of independence in any event, that is, the succession by the new sovereign to the regality *in dominio*, including rights to the seabed of the marginal sea.

American independence was of course confirmed by the Peace of Paris of 1783, 8 Stat. 80. By Article I Great Britain acknowledged the United States, which are enumerated, as "free, sovereign and independent States." Article II provides that the boundaries of the United States are to include "all islands within twenty leagues of any

part of the shores of the United States." While there is no language, such as we have found in most of the colonial charters, referring to such regalities within these limits as waters, seas, mines, fishings, etc., it is my opinion that in the light of the long history of such charter provisions
846 it was well understood at the time that language granting islands within a certain distance of the coast also granted the intervening sea and seabed, out to at least that distance. Thus it is my opinion that the Peace of Paris included an acknowledgment by Britain that all crown rights in the marginal sea off the North Atlantic coast, at least out to 20 leagues, had passed to the states, and to the states individually.

In my opinion it is perfectly clear that the language quoted *must* have been intended to have this meaning. There is no doubt that at this period the crown claimed sovereignty over the marginal sea and seabed, and if the language quoted did not convey that sovereignty then from the British point of view the marginal sea and seabed immediately off the coast of the United States would have continued to belong to the crown of England. I think we can be confident that this absurd result was not intended.

This conclusion is graphically confirmed by a map (Maine et al. Exhibit No. 327) which was owned and closely studied by King George III. This is a copy of a map illustrating "The British Colonies of North America" published by John Mitchell in 1755. King George's copy of the map includes inserted lines which do not appear on the original. These lines extend into the sea. One of
847 them is variously labeled "Boundary of Nova Scotia by the Treaty of Utrecht," and "line expressing the exclusive Right of the Fishery Reserved to Great Britain by the Treaty of Utrecht, extending 30 leagues from the land."

The other line in the sea, extending all the way along the coast of the present United States north of Florida, is labeled "Boundary as described by Mr. Oswald." Richard Oswald was the principal negotiator for Britain of the Peace of Paris of 1783. The line was obviously intended to demarcate a boundary in the sea 20 leagues from the coast of the United States. It plainly represents a contemporaneous British interpretation that the language of the Peace of Paris quoted above was intended and understood to confirm to the United States – individually, not collectively – not only islands at least within 20 leagues of the coast but also the sea and seabed within that distance.

Moreover, an American copy of the same map, used by John Jay at the peace negotiations, shows a very similar boundary in the sea (Maine et al. Exhibit No. 339). Thus the parties were agreed on the construction to be given the treaty language.

For a complete description of the various copies of Mitchell's map and their significance for the Peace of Paris, see 3 Miller, *Treaties and other International Acts*
848 *of the United States of America,* 319-56, especially pp. 328-49. (Maine et al. Exhibit No. 355).

Q. The Federal Government argues that, even if the colonies owned the continental shelf during the colonial period, that ownership somehow passed to the federal government in the process of the formation of the Union. Do you have an opinion as to what the historical evidence indicates concerning the contemporary intent and understanding on this point? A. Yes. I think that on the basis of the historical evidence, so far as the intent and understanding of the framers is concerned, the argument you refer to is entirely without foundation. Indeed, there is overwhelming evidence that throughout the period of

the formation of the Union, up to and including the drafting and ratification of the Constitution of 1787, the states intended to preserve to themselves individually all ownership and territorial rights except those which were expressly transferred to the federal Government. No one, I believe, would contend that there was ever any express transfer of the rights of the states to the seabed of the continental shelf. It follows that, so far as the intent of the framers is concerned, there was no transfer at all, since the historical evidence conclusively negatives the idea of a transfer by implication.

849 Q. Please discuss the historical evidence which has led you to these conclusions. A. To begin with the Declaration of Independence, it of course declared "That these United Colonies are, and of Right ought to be Free and Independent States." Not one state, but states. I do not believe it has ever been, or can be, seriously questioned that the signers believed they were creating thirteen independent and sovereign states, and that each of those states succeeded individually to all sovereign, territorial and ownership rights which had previously been vested either in the British Crown or in the colonial government. The Supreme Court so held in a number of very early decisions.

Some delegates in Congress had argued that the colonies should confederate first and declare independence only afterwards. *The Constitution of the United States of America (Annotated)*, Senate Document No. 39, 88th Cong., 1st Sess. (1964) at 26. But this proposal was rejected. The Articles of Confederation were not adopted by the Congress until November 17, 1777, and came into effect only in 1781.

Q. What evidence, if any, is there bearing on the question whether the Articles of Confederation were intended to accomplish any transfer of any territorial or ownership

850 rights, such as rights to the seabed of the continental shelf, from the states to the confederation government? A. There is considerable evidence, and all of it is inconsistent with the notion of such a transfer.

First, the provisions of the Articles themselves. Article II provides that "each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." Article IV characterized the confederation as a firm league of friendship among these sovereign and independent states.

Article IX set up, in great detail, an elaborate procedure for the arbitration of disputes between two or more states concerning "boundary, jurisdiction or any other cause whatever," and contained the express proviso "that no state shall be deprived of territory for the benefit of the United States." It is hard to imagine any language which could more conclusively or expressly negative any notion of an implied transfer of territorial rights.

It is well known that one of the principal political issues, if not the principal issue, during the confederation period was whether, and on what terms, the states possessing territories west of the Appalachians by virtue of their
851 colonial charters would give up those territories. The whole history of the western lands question demonstrates a recognition that the states preserved all their territorial and ownership rights until and unless express cessions were made. This was a matter of paramount importance. Indeed, the reason the Articles of Confederation did not become effective until 1781 was that Maryland refused to ratify them until it was satisfied that the western lands of the larger states would be ceded.

New York ceded its western lands in 1781 (Maine et al. Exhibit No. 328, 3-5). Virginia in 1783 (*id.* at pp.

6-9), Massachusetts in 1785 (*id.* at pp. 10-12), Connecticut in 1786 (*id.* at pp. 22-24), and South Carolina in 1787 (Maine et al. Exhibit No. 370). The legal nature of these cessions, some of which contain conditions, was that of compacts between the ceding states and the other states, which explicitly accepted them through their delegates in Congress.

Virginia's cession, which covered the entire Northwest Territory, was conditioned among other things on the undertaking that the territory ceded should be formed into new states to be admitted into the federal Union (Maine et al. Exhibit No. 328, pp. 6-9). The Northwest Ordinance of 1787 recognized that certain provisions thereof would require the consent of Virginia because they were not wholly consistent with the conditions in Virginia's act of cession. (Ordinance of 1787, Article V. See footnote to 1 Stat. 51, 53).

The Articles of Confederation contained no express provision permitting the acquisition or government of territory by the confederation, and for that reason the policy adopted is sometimes said to have been illegal. The problem was resolved by the doctrine that the conferdation government could acquire territory and govern it temporarily, until new states could be organized. This idea was put forward by Maryland as early as 1779. 14 *Journals of the Continental Congress, 1774-1789*, pp. 619-22 (Ford ed.) As I have mentioned, the Virginia act of cession, by far the most important, contained the obligation to create new states as an express condition. The Northwest Ordinance fully implemented that condition. Historians are nearly unanimous that from the beginning the purpose of the territorial system was the admission of new states into the Union. See, *e.g.*, Carter, "Colonalism in the Continental United States," *S. Atlantic Quarterly* 26 (1948); Burnett, *The Continental Congress* 222 (1941); 1 Willoughby,

The Constitutional Law of the United States 332 (1910); Langdell, "The Status of Our New Territories," 12 *Harv. L. Rev.* 365, 371 (1899).

853 Thus the development under the Articles of Confederation shows two things. First, the states were recognized as retaining all their territorial and ownership rights except insofar as they expressly ceded them, conditionally or unconditionally. Second, while no express provision in the Articles permitted the acquisition and government of territory by the confederation, the doctrine that the confdederation might acquire and govern territory *temporarily* pending its erection into new states won acceptance.

The converse of these propositions is, first, that no state could lose territorial or ownership rights by implication, without an express cession, and second, that there was no concept of *permanent* ownership by the confederation of territory or ownership for any purpose other than erection into states. The concept of a permanent federal domain outside state boundaries, whether on land or in the seabed of the continental shelf, was wholly foreign to the thinking of the confederation leaders.

On the latter point, one need not go so far as to say – though such a statement would probably be correct – that the framers intended that the confederation (and later the federal) government would be without the constitutional power to acquire and hold territory for any
854 purpose other than the erection of new states. The point is that it was generally – if not universally – considered during the period of the formation of the Union, and long afterwards, that that was the only purpose for which the United States should and would acquire territory. This militates heavily against the notion that any one intended or understood that during this same period the United States, implicitly, covertly, and without a word of discussion

or comment, was acquiring from the states exclusive rights to a vast subsea domain which it would hold forever.

Q. What, if any, changes in the situation you have described were brought about by the adoption and ratification of the Constitution of 1787? A. In my opinion none, although of course the constitution worked profound changes in many other respects.

In view of the long and critical debate over cessions during the confederation period, and the full awareness by all participants of cession and territorial questions, it is inconceivable that any of the framers believed that territorial or ownership rights were being ceded implicitly and without discussion.

At one point during the Constitutional Convention Rufus King of Massachusetts suggested that, if the debts of the states were to be assumed, then in return all unallocated lands of the states should be given up to the federal government. 2 Farrand, *Records of the Constitutional Convention* 328 (1911). But, signficiantly, this proposal received almost no support among the delegates and was never even seriously considered.

Article IV, Section 3 of the Constitution provides, of course, that new states may be admitted to the Union by Congress, but that no new state shall be formed within the jurisdiction of any other state or states without the consent of those states. It is interesting to note that Roger Sherman of Connecticut opposed this provision as unnecessary; to him it was self-evident that "the Union cannot dismember a State without its consent." *Id.* at 455. However, the representatives of Maryland vigorously urged that the provision be deleted for the opposite reason, namely that Congress *should* have the right to dismember the larger states without their consent. *Id.* at 461-62. There was a full debate on this question and the provision was

retained by a vote of 8 to 3. *Id.* at *462.* Again Maryland attempted to delete the provision, *Id.* at 463-64; and again the proposal was rejected by the same vote. *Id.* at 464.

Immediately after the adoption of the first clause of Article IV, Section 3 as it still remains, Charles Carroll of Maryland moved to add that nothing in the Constitution should be construed to affect the claim of the United States to vacant lands (*i.e.*, lands not within any state boundary) ceded to them by the Treaty of Peace. *Id.* at 465. James Madison thought such a provision unnecessary but harmless, but proposed that "to make it neutral and fair, it ought to go farther & declare that the claims of particular States also should not be affected." *Id.* The debate resulted in the adoption of what became the second clause of Article IV, Section 3 of the Constitution:

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"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any Claims of the United States, or of any particular State."

Also of paramount importance in ascertaining the intent of the framers is the provision of Article I, Section 8 of the Constitution, giving Congress legislative powers over a federal district for the seat of government and over all places purchased for the erection of forts, magazines, arsenals, dockyards and other needful buildings. The section expressly provides that the federal district and the other places mentioned may be acquired only with the consent of the legislatures of the states in question. The clause as first proposed, while providing that federal district could be acquired only by the cession of

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particular states, did not require the consent of the state legislatures for the purchase of places for forts, etc., over which federal legislative authority was to be exercised. This omission was promptly pointed out by Gerry of Massachusetts, who contended that "this power might be made use of to enslave any particular State by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the Genl. Government." Farrand, *supra*, at p. 510. The matter was immediately resolved by the addition of the words "by the Consent of the Legislature of the State," after which the clause was adopted unanimously.

In my opinion the constitutional provisions I have mentioned, and the debates leading to their adoption, are inconsistent with any notion that the framers intended that the adoption of the Constitution involved the implicit transfer by the states to the federal government of any territorial or ownership rights whatever, whether in the seabed of the continental shelf or elsewhere. Where such rights were to be transferred, express language was drafted to provide therefor and to require the consent of the states that would be affected. Article IV, Section 3 expressly protected the states against dismemberment and provided that nothing in the entire Constitution should be so construed as to prejudice any territorial or property claim of any state. It is difficult to imagine how the intent could be more clear.

I might add that, soon after ratification of the Constitution, there were a number of express state cessions affecting properties in offshore waters. The ninth statute to be enacted by the First Congress, on August 1, 1789, assumed federal responsibility for maintenance and repairs "of all lighthouses, beacons, buoys and public piers

. . . at the entrance of, or within any bay, inlet, harbor, or port of the United States," but provided that this responsibility should continue for one year only unless meanwhile these aids to navigation were ceded to the United States by the states owning them. Act of August 7, 1789, Ch. 9, 1 Stat. 53; *History of the Formation of the Union Under the Constitution* 451 (Bloom ed. 1941). The various state legislatures promptly enacted such acts of cession. *Id.* The Virginia act of cession, adopted November 13, 1789, specifically provided that the conveyance did not include any fishing rights. All this, again, is inconsistent with the notion of implied transfers.

Q. Was there any change after the adoption of the Constitution in the doctrine or assumption that (aside
859 from the federal district and forts, etc.) the federal government could hold territory only temporarily, for the erection of states, and not as a permanent federal domain? A. In my opinion this doctrine or assumption remained vital after the adoption of the Constitution. This is the consensus of historians, such as Carter, Willoughby and Langdell, whom I have mentioned previously. In the *Dred Scott* decision, whatever the defects of other aspects of that decision may have been, Chief Justice Taney expressed the long-standing and virtually unanimous constitutional understanding when he wrote that territory "is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority; and as the propriety of admitting a new State is committed to the sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a State upon an equal footing with the other States, must rely on the same discretion." *Scott v.*

Sandford, 60 U.S. (19 How.) 393, 447 (1856). The post-Civil War Supreme Court similarly considered that "this discretion in Congress [to govern territories] is limited by the obvious purposes for which it was conferred, and that those purposes are satisfied by measures which prepare the people of the Territories to become States in the Union . . . ." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

Two of the states, North Carolina and Georgia, had not ceded their western lands at the time the Constitution went into effect. North Carolina's act of cession was adopted on December 22, 1789 (Maine et al. Exhibit No. 329, pp. 3-8); Georgia's act of cession was not adopted until April 24, 1802 (Maine et al. Exhibit No. 330, pp. 142-146). Both of these post-Constitution acts of cession contained, as had Virginia's earlier cession, a condition providing that the territories ceded should be formed into states. The United States accepted both these acts of cession. Further, the First Congress re-enacted the Northwest Ordinance with only minor changes (Act of August 7, 1789, Ch. 8, 1 Stat. 50), thus honoring the commitment to Virginia and confirming the policy that territories would remain such only temporarily until they could be erected into states.

For about a century after the adoption of the Constitution the policy that territories were temporary only was faithfully followed. The territories acquired by the Louisiana Purchase, the purchase of Florida from Spain, the annexation of Texas and the Mexican War were all erected into new states either immediately or as soon thereafter as their conditions of settlement and population made statehood practically possible. It was only in the late 19th century, with the acquisition of territories outside the continental United States, that the possibility of permanent national territories began to be

discussed. That this represented a major new constitutional development is shown by the great debate at that time over whether "the Constitution follows the flag." See, *e.g.*, 3 *Selected Essays on Constitutional Law*, Ch. 5 (1938).

I might add that Article II of the Georgia act of cession of 1802 (Maine et al. Exhibit No. 330, p. 45) also contained an express cession by the United States of any claim, right or title they might have "to the Jurisdiction or Soil of any Lands lying within the United States, and out of the proper Boundaries of any other State" within the state of Georgia as it remained after the cession. The United States accepted this provision, which is wholly inconsistent with the notion that any territorial or ownership rights had passed by implication on the adoption of the Constitution.

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878 DIRECT EXAMINATION OF DAVID H. FLAHERTY

BY MR. BALILES:

Q. Will you please state your name and describe your background and experience? A. My name is David H. Flaherty. I am an Assistant Professor of History at the University of Virginia. I am currently on leave from the University of Virginia for the academic year 1971-72 as a Fellow in Law and History at the Harvard Law School, a Charles Warren Research Fellow in American History at Harvard University, and a Fellow of the American Coun-
879 cil of Learned Societies. I am devoting the current year to study and research in connection with my interests in American Legal History.

I graduated with an Honors B.A. from McGill University in 1962. From 1962 to 1965 I was in residence at Columbia University as a graduate student in early American

history. I studied under two of the leading experts in early American legal history, Professor Richard B. Morris of the History Department and Professor Joseph H. Smith of the Columbia Law School. I also worked as a research assistant to Professor Alan F. Westin of the Department of Public Law and Government at Columbia on a project sponsored by the Special Committee on Science and Law of the Association of the Bar of New York City to study the impact of modern technology on personal privacy. I received a Ph.D. in history from Columbia in 1967 for a thesis on the origins of the right of privacy in early America. This will be published in 1971 as *Privacy in Colonial New England* by the University Press of Virginia.

From 1965 to 1968 I was an instructor in history at Princeton University, where I first taught a course in the history of early American law. In 1968 I was appointed as an assistant professor at the University of Virginia to teach American legal history and to establish and direct a Joint Program in American and English Legal History between the Law School and the History Department. This program, the first of its type to be created in the United States, is now in existence. I teach a full year lecture course on the history of American law to an enrollment of graduate students, law students, and undergraduates. I direct theses in legal history by graduate history and law students at both the Masters and doctoral levels.

I am a member of the American Society for Legal History, am on the editorial board of the *American Journal of Legal History*, and am a member of the Program Committee for the 1972 annual meeting of the American Society for Legal History.

In addition to the book on *Privacy in Colonial New*

England previously mentioned, I have recently published an extensive essay titled "Law and the Enforcement of Morals in Early America." The essay appeared in an annual volume published by the Charles Warren Center, Harvard University, titled *Perspectives in American History*, as well as in a volume titled *Law in American History*, to be published by Little Brown.

In 1969 I edited a volume titled *Essays in the History of Early American Law*, which contains essays by the leading experts on the subject. My contribution to the volume was titled "*An Introduction to Early American Legal History.*" I also prepared in 1969 an edition of the first
881 laws drawn up for the colony of Virginia between 1609 and 1612. These appeared as: *For the Colony in Virginia Britannia. Lawes Divine, Morall and Martiall,* comp. William Strachey. My introduction is titled, "The First Laws of English America." I have also published several essays in the *American Journal of Legal History.* I have delivered a number of papers to conventions, including the American Historical Association and the recent Conference on American Legal History at the Harvard Law School.

For the academic year 1970-71 I was a Visiting Lecturer at the Judge Advocate General's School of the United States Army in Charlottesville, Virginia and taught a course in American Legal History to members of the Advanced Class.

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Q. Professor Flaherty, the Commonwealth of Virginia is one of the defendant states in the matter now before this court. Would you please state briefly your under-
882 standing of the basic issues involved? A. The Commonwealth of Virginia is a defendant in *United States v.*

Maine, et al.[1] The United States claims it is entitled, to the exclusion of Virginia and the other states along the Atlantic coast, "To exercise sovereign rights over the seabed and subsoil underlying the Atlantic Ocean, lying more than three geographical miles seaward from the ordinary low-water mark and from the outer limit of inland waters on the coast, extending seaward to the outer edge of the continental shelf, for the purposes of exploring the sea and exploiting its natural resources . . . ."[2]

Virginia disputes the claim of the United States, and, by way of affirmative defense, asserts a claim over the seabed one hundred miles from its coastline in the Atlantic Ocean: ". . . Virginia alleges that as successor in title to the Virginia Company grantees of King James I of England, by letters patent dated May 23, 1609, Virginia is now, and ever since its admission to the Union has been, entitled to exercise dominion and control over the exploitation and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line to the limit of one hundred miles to the exclusion of any other political entity whatsoever, including the plaintiff (subject, however, to the limits of the National Seaward Jurisdiction established by the plaintiff). . . . "[3]

Q. Do you have an opinion whether the royal charters issued to the Virginia Company authorized the assertion of authority and jurisdiction over the marginal sea, the seabed, and the resources thereof, by the colony

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[1] No. 35 Orig., Oct. Term 1969.

[2] Complaint para. VI.

[3] Answer of Virginia.

of Virginia and if so, would you state your opinion and the reasons for it? A. Since the royal charters to the Virginia Company established the historic claims of the colony and State of Virginia to ownership over the marginal sea and the seabed within one hundred miles of the Virginia coast, the boundary provisions of these early charters require considerable attention in my testimony. King James I of England granted a charter for the colony of Virginia to the Virginia Company by letters patent dated April 10, 1606. The charter responded to their request to settle the territory "scituate lying and being all along the sea Coastes betweene fower and Thirtie degrees of northerly latitude from the equinoctiall lyne and Fyve and Fortie degrees of the same latytude and in the
884 mayne lande betweene the same Fower and Thirtie and Fyve and Fourtie degrees and the Ilandes thereunto adjacente or within one hundred myles of the Coaste thereof. . . ."[4] The charter directed that the petitioners from the Virginia Company "shall and may begynne theire saide firste plantacion and seate of theire firste abode and habitacion at anie place

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[4] The Jamestown Voyages Under the First Charter, 1606-1609 24 (P. L. Barbour ed. 1969). (Hereinafter cited as Jamestown Voy.) The most recent and most accurate printing of the First Charter is in *Id.* 24-34.

Quotations from primary sources in the text of this memorandum retain original spelling and punctuation, except that "i" and "j" and "u" and "v" have been silently transposed to correspond to modern usage.

All dates cited in the memorandum before 1752 are Old Style, except that in the dating of years before 1752, January 1 has been taken as the beginning of a new year instead of March 25. March 12, 1722/23 thus becomes March 12, 1723.

upon the said Coaste of Virginia or America where they shall thincke fytt and conveniente betweene the saide fower and thirtie and one and Fortie degrees of the saide latitude And that they shall have all the landes woodes soyle Grounde-
es havens portes Ryvers Mynes Myneralls Marshes waters Fyshinges Commodities and hereditamentes whatsoever from the said first seate of theire plantacion and habytacion by the space of Fyftie miles of Englishe statute
885 measure all alongest the saide Coaste of Virginia and America towardes the Weste and southeweste as the Coaste lyeth with all the Islandes within one hundred myles directlie over against the same sea Coaste And alsoe all the landes soyle Groundes havens portes Ryvers Mynes Myneralls woodes Marrishes waters Fyshinges Commodities and hereditamentes whatsoever from the saide place of theire firste plantacion and habitacion for the space of Fiftie like Englishe miles all alongest the saide Coast of Virginia and America towardes the Easte and Northeast as Coaste lyeth together with all the Islandes within one hundred Miles directlie over againste the same sea Coaste . . . ."[5] Charles M. Andrews, one of the leading authorities on early American history, has commented that the territorial boundaries set forth in the Virginia charter of 1606 "formed a section of land, which according to the wording of
886 the patent was to extend . . . one hundred miles out to sea."[6] The charter then included a specific grant of mineral rights in any part of the territorial property of the

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[5] *Id.* 25-26; also 1 W.W. Hening, The Statutes at Large: Being a Collection of All the Laws of Virginia, from the First Session of the Legislature in the Year 1619 (1819-1823) 59 (hereinafter cited as Hen. Stat.) The latitudes noted herein only include the area granted to the Virginia Company.

[6] 1 C. M. Andrews, *The Colonial Period of American History* 84 1934-1938). (Hereinafter cited as Andrews, *Col. Per.*)

colony: "And moreover wee doe graunte and agree for us our heires and successors that the saide severall Counsells of and for the saide severall Colonies shall and lawfully may by vertue hereof from tyme to tyme without interupcion of us our heires or successors give and take order to digg myne and searche for all manner of Mynes of Goulde Silver and Copper aswell within anie parte of theire saide severall Colonies as of the saide Mayne landes on the backeside of the same Colonies . . . ."[7] The Crown reserved to itself a specific portion of the discovered minerals. It also empowered the colony to defend itself "aswell by sea as by lande," and to control those trading with the colony.[8]

On November 20, 1606 the English Crown issued a set of instructions for the government of the colony of Virginia. These established a Council in London "for ye good Government of ye people to be planted in those part(s) and for the good ordering and disposing of all causes happening within ye same . . . ." This Council had responsibility "for all matters, which shall heppen in Virginia or any the Territories of America between 34 and 45 deg: from ye aequinoctial line northward, and the Islands to
887 the several Colloniies limitted, and assigned . . . ."[9] A royal Ordinance and Constitution of March 9, 1608 enlarging the Council basically repeated this earlier grant of jurisdiction, including "the Islandes to the severall Collonies limitted and Assigned . . . ."[10]

For purposes of reorganization and the revitalization of its settlement efforts, the Virginia Company secured a second

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[7] 1 Jamestown Voy. 28.

[8] Id. 29, 30.

[9] Id. 35.

[10] *Id.* 74.

charter from the crown by letters patent dated May 23, 1609. It defined the jurisdiction of the colony over the marginal sea, the seabed, and the resources thereof in even more precise terms than the first charter. The Company received: "All those lands, countries, and territories, situate, lying, and being, in that part of America called Virginia, from the point of land, called Cape or Point Comfort, all along the sea coast, to the northward two hundred miles, and from the said point of Cape Comfort, all along the sea coast to the southward two hundred miles . . . . and also all the islands, lying within one hundred miles, along the coast of both seas of the precinct aforesaid; together with all the soils, grounds, havens, and ports, mines, as well royal mines of gold and silver, as other minerals, pearls and precious stones, quarries, woods, rivers, waters, fishings, commodities, jurisdictions, royalties, privileges, franchises and preheminences, within the said territories, and the precincts thereof, whatsoever, and thereto and thereabouts, both *by sea* and land, being or in any sort belonging or appertaining . . . ."[11] This specific provision of the charter grant neatly made clear the inclusion within the confines of Virginia of the marginal sea and the seabed. The Council of the Virginia Company in London was also granted powers of government "not only within the precincts of the said Colony, but also upon the seas in going and coming, to and from the said Colony,

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[11] 1 Hen. Stat. 88 (emphasis added). The location of Point Comfort, which is at the mouth of the James River in Chesapeake Bay, on the seacoast was typical of contemporary georgraphic uncertainty on such matters; but the reference may have been to what came to be called Cape Henry.

. . . ."[12] The 1609 Charter further reaffirmed the Company's privilege of mining in Virginia: "to dig and to search for all manner of mines of gold, silver, copper, iron, lead, tin, and all sorts of minerals, as well within the precinct aforesaid, as within any part of the main land, not formerly granted to any other; . . ."[13] As thus defined in the charter, the precincts of Virginia included both the main land and the marginal sea, with
889 territory as yet unknown and ungranted on the mainland the only area capable of future expansion.

This Charter of 1609 also included a rule of construction that may be employed to resolve any ambiguities as to whether the marginal sea and the seabed to a distance of one hundred miles from the coast were within the boundaries of the Virginia Colony: "Our will and pleasure is, that in all questions and doubts, that shall arise, upon any difficulty of construction or interpretation of any thing, contained either in this, or in our said former letters patents, the same shall be taken and interpreted, in most ample and beneficial manner for the said treasurer and company, and their successors, and every member thereof."[14]

The Virginia Company secured a third charter from the Crown dated March 12, 1612. Its primary purpose was the extension of Virginia's seaward boundaries to include the Bermudas, which lie just under six hundred miles off Cape Henry. Since the settlement of Virginia had not yet been commercially successful, the Bermudas presented an attractive additional area for exploitation by the Company. The Crown was given to understand:

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[12] 1 Hen. Stat. 92.

[13] 1 Hen. Stat. 93.

[14] 1 Hen. Stat. 97.

"that in those seas, adjoining to the said coast of Virginia, . . . and yet not far distant from the said colony in Virginia, there are, or may be, divers islands, lying desolate and uninhabited, some of which are already made known and discovered, by the industry, travel and expences of the said company and others also are supposed to be and remain, as yet, unknown and undiscovered, all and every of which it may import the said colony, both in safety and policy of trade, to populate and plant, in regard whereof, as well for the preventing of peril, as for the better commodity and prosperity of the said colony, they have been humble suitors unto us, that we would be pleased to grant unto them an enlargement of our said former letters patents, *as well for a more ample extent of their limits and territories into the seas adjoining to and upon the coast of* Virginia, . . ."[15]

The last clause makes perfectly clear that the Crown understood the boundaries and jurisdiction of Virginia already extended into the marginal sea and the seabed.

The third charter proceeded to extend the boundaries of Virginia to include "all and singular those Islands whatsoever, situate and being in any part of the ocean seas bordering upon the coast of our said first colony in Virginia, and being within three hundred leagues of any the parts heretofore granted to the said treasurer and company, in our said former letters patents, ..."[16] The grant further included "all and singular soils, lands, grounds, havens, ports, rivers, waters, fishings, mines, and minerals, as well royal mines of gold and silver, as other mines and minerals, pearls, precious stones, quarries, and all

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15 1 Hen. Stat. 99-100 (emphasis added).

16 1 Hen. Stat. 100.

and singular other commodities, jurisdictions, royalties, privileges, franchises and preheminences, both within the said tract of land upon the main, and also within the said Islands *and seas* adjoining, whatsoever, and thereunto or thereabouts, both by sea and land, being or situate; . . . ."[17] In Quo Warranto proceedings before the Court of King's Bench from November 4, 1623 to May 24, 1624, the Virginia company in its brief summarized why it had obtained the 1612 charter and the meaning of its provisions. The section of the 1612 charter just quoted was restated by the Company in language that further made clear Virginia's jurisdiction over the marginal sea and seabed. The grant included "all and singular the soil, ground, land, harbors, rivers, waters, fisheries, mines and minerals, pearls, precious stones, quarries, and all and singular commodities, jurisdictions, regalities, privileges, franchises, and pre-eminences both being and situated in the aforesaid tract of land upon the mainland, and in any of the aforesaid islands *and seas* adjacent whatsoever, and near to the same and around them both *by sea* and by land, ..."[18]

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Although the innumerable islands of the Bermudas had been the main inspiration for the extension of seaward boundaries in the 1612 charter of the Virginia Company, these specific islands soon passed into other hands. In November, 1612 this Company sold its title and rights in Bermuda to a new group, who remained dependent upon the Virginia company's charter. In November, 1614 the Bermuda group surrendered these acquired rights to the Crown. In turn the King issued a royal charter dated June 29, 1615 to the "Governour and Company of the

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17 1 Hen. Stat. 100 (emphasis added).

18 4 Records of the Virginia Company of London (S.M. Kingsbury ed. 1906-1935) 376 (emphasis added). (Hereinafter cited as Rec. Va. Co.)

City of London for the Plantation of the Somer Islands.'[19] The Bermuda charter made clear that the Virginia company had only sold and given up the Bermudas or Somer Islands out of the total grant of territory it had received in 1612.

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An examination of the successive charters of the Virginia Company from 1606 to 1612 makes plain that the marginal sea and the seabed within one hundred miles of the sea coast were included in the territory granted to the Company by the Crown. One might have assumed that the grant of offshore jurisdiction over islands implied jurisdiction over the marginal sea surrounding the islands, but in the charters Virginia's authority over the marginal sea and the seabed was made specific. Virginia's chain of title to boundaries extending one hundred miles into the marginal sea dates back to these original charter grants from the Crown.

These charters were the first letters patent issued by the Crown to colonizing or commercial ventures that had to attempt to define territorial boundaries in the New World being settled and explored. Although the fifty year old Muscovy Company and the infant East India Company served as prototypes for the organization of the Virginia Company, they could not fill this role with

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[19] Craven, An Introduction to the History of Bermuda, 17 William and Mary Quarterly, Second Series 195 (1937). The Bermudas were also known as the Somers Islands. The Bermuda Charter of 1615 is printed in 1 J. H. Lefroy, *Memorials of the Discovery and Early Settlement of the Bermudas and Somers Islands, 1515-1685* 84-98 (1877). It outlined the basic sequence of events described in this paragraph, dating from the 1612 charter of the Virginia Company. The latter's part in the affair is related in *Id.*, 84-85.

respect to the definition of boundaries. The earlier companies had been founded for trade and not settlement purposes. Thus the question of territorial limits for settlement attracted the careful attention of those drafting the first Virginia charter. The inclusion of the marginal sea within the boundaries of Virginia must be viewed as the result of conscious effort. The Virginia charters were drawn up by royal officials closely associated with the Crown in response to the petitions of some of the leading citizens of the realm. The historian Andrews has pointed out that before the first charter of the Virginia Company passed the royal seals "the text was undoubtedly scrutinized by Attorney General Coke and Solicitor General Dodderidge and had the great seal affixed by Lord Chancellor Ellesmere, the three men who, with Popham, were the greatest lawyers of the day."[20] Such individuals knew what they were doing in terms of the jurisdiction and expansive boundaries granted to the Vir-
898 ginia Company. The process of obtaining a royal charter in the seventeenth century was not a haphazard business, but an established procedure with a great deal of careful scrutiny built into the system.[21] Nor was the Company's acquisition of seaward jurisdiction a secret from contemporaries. The Spanish Ambassador to London wrote to Philip III on January 24, 1607 about the plans for the settlement of Virginia, including the information that the English Crown had given "them permission to occupy any

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20 1 Andrews, *Col. Per. 85.*

21 See the careful process described in 3 H.L. Osgood, The *American Colonies in the Seventeenth Century* 19 (1904-1907).

island within a hundred leagues from shore . . . ."[22] Emanuel van Meteren, consul to the Antwerp merchants in London, and a principal foreign observer there, printed a summary of the 1606 charter in 1608, which included the information that the Virginia Company's territories included the islands within one hundred miles of the seacoast.[23] Captain John Smith's map of Virginia in 1612 showed the extensive ocean off the Virginia seacoast under the title of "The Virginian Sea." Smith made this comment about Virginia's eastern boundary: — "The bounds thereof on the East side are the great Ocean."[24] Smith was familiar with the boundary provisions of the Virginia
899 charters. His lack of precision concerning the exact location of Virginia's boundary in the ocean was typical of many such incidental descriptions in the seventeenth and eighteenth centuries. No one disputed Virginia's territorial claims to the east in contrast to the boundary disputes that persisted in all other directions during the colonial era. Commentators rarely made the effort necessary for precision concerning Virginia's one hundred mile jurisdiction into the marginal sea.

Research has uncovered additional explicit recognitions that the Virginia charter grants did include parts of the Atlantic ocean and its appurtenances. The Privy Council ended several years of debate between the Virginia and New England Companies over freedom of the seas with respect to fishing rights by an order regarding freedom of fishing dated June 18, 1621, declaring that "the said

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22 1 Jamestown Voy. 70

23 *Id.* 271.

24 *Id.* 334. The 1612 map is opposite 374.

Colonies should fish att Sea within the Limitts and bounds of each other reciprocally . . . ."[25] This made clear that each colony did have an expanse of ocean within its boundaries. Again, in 1626 the King of England directed Attorney General Heath to prepare letters patent for a group of subjects to establish a colony on the Amazon River in America, to include such provisions "as have bene heretofore
900 graunted to any others uppon the like undertakings . . . ." The grant of territorial boundaries was to extend "from east to west throughout the continent from sea to sea, and all islands and terrytaries within twenty myles adjacent."[26] This was obviously designed in imitation of the Virginia charters, except that the latter had provided for one hundred miles into the marginal sea. In 1688 James II informed the governor of Virginia of the appointment of Sir Robert Holmes as royal coordinator of a drive against pirates. The king had granted Holmes for a three year period all the goods belonging to or having been seized by pirates "upon the Land in any part or parts of America, or any the Islands or Sea limits or Territorys thereof."[27] In an episode involving Virginia in 1719 there was another explicit recognition of the concept of ownership of the marginal sea based on charter grants. A pirate seized a
901 ship east of Bermuda, and brought it to North Carolina where he burnt it on shore. A Virginia vessel captured

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[25] 3 Rec. Va. Co. 459-460

[26] 1 A. W. McDonald, Transcript Chiefly Concerning the Boundary Line Between Maryland and Virginia 283-284 (hereinafter cited as McDonald Transcr.) These transcripts were made from the original documents in the Public Records Office, London for the State of Virginia around 1860. Five manuscript volumes of these transcripts now exist in the Virginia State Library, Richmond.

[27] 7 McDonald Transcr. 282

the pirate there and seized the accompanying goods. Controversy ensued between Virginia and North Carolina over the rights to these pirate goods. As Governor Spotswood of Virginia explained the situation in a letter to the Lords of Trade on May 26, 1719, the government of North Carolina claimed the captured goods, because these were seized "within *the Seas of the Soil* of the Lords Proprietors..."[28] In an important opinion written in 1823 Chief Justice John Marshall of the United States Supreme Court discussed the scope of the early Crown charters, especially those to Virginia; "These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. A charter intended to convey political power only, would never contain words expressly granting the land, the soil and *the waters.*"[29]

902 The explanations for why Virginia received ownership and jurisdiction over the islands off the seacoast and the marginal sea and seabed in its charters need not be sophisticated. Knowledge about the geography of the area that became the colony of Virginia was not extensive in 1606. The instructions of the London Council in the fall of 1606 to those about to settle the colony made clear that they did not really know very much as yet about Chesapeake Bay. The first settlers were instructed to find a safe port in the entrance of a navigable river on the seacoast of Virginia, but a little inland. It was also thought possible that the first habitation might have to be an island off the coast of Virginia that was fortified and protected by nature.[30] The

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[28] 2 The Official Letters of Alexander Spotswood, Lieutenant Governor of the Colony of Virginia, 1710-1722, 324 (emphasis added) (R. A. Brock ed. 1933). (Hereinafter cited as Spotswood)

[29] Johnson and Graham's Lessee v. William M'Intosh, 21 U.S. 580 (8 Wheat. 580) (emphasis added).

[30] 1 Jamestown Voy. 49-50

discovery of numerous islands in the marginal sea in the first explorations of Virginia after 1606 only reinforced the importance of including islands discovered and undiscovered in the charter grants. Captain John Smith reported in 1608 that in the ocean off the Eastern Shore there were "many Isles both great and small, some woody, some plain, most of them low and not inhabited."[31] Eventually at least twenty islands were discovered off the Eastern Shore
903 of Virginia north of Cape Charles. The Eastern Shore comprised more than three-quarters of the Virginia seacoast. In the seventeenth century these islands off the Eastern Shore were coveted and rapidly patented by residents of Virginia concerned with raising cattle and horses.[32] The sea-fenced, grass-covered islands served as excellent ranges for livestock.

The prospect of important offshore islands being discovered loomed large in the minds of the leaders of the Virginia Company. It reinforced their desire for offshore jurisdiction not only over islands, but over the seas that might contain some of the fabled riches of the New World. The first maps of Virginia in the seventeenth century by modern standards much exaggerated the size of the islands off the Eastern Shore.[33] This only encouraged and symbolized the commercial ambition of the investors in the Company. They wanted their charters to provide carefully for every possible right in the event that something might prove commercially exploitable. The grants of jurisdiction over the marginal sea and the seabed, which became typical of many other colonial charters, also furnished protection for
904 the future interests of the Company in admiralty cases and

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[31] Quoted in S. M. Ames, *Studies of the Virginia Eastern Shore in the Seventeenth Century* 3 (1940).

[32] See *Id.* 32-35.

[33] See Verner, The First Maps of Virginia, 1590-1673, 58 Virginia Magazine of History and Biography 3-15 (1950).

droits and assured it of some control over fishing and fishermen.[34]

Q. Do you have an opinion whether the annulment of the Virginia Company's charter in 1624 had any implications for Virginia's territorial boundaries in the marginal sea and if so, would you please state your reasons for it?

A. In July, 1623 the Privy Council decided to seek an annulment of the charter of the Virginia Company that would bring the colony directly under royal control. It drafted a plan of reorganization designed to prevent the seeming mismanagement of the affairs of the colony that was occurring under Company rule. The Privy Council submitted this plan to the Virginia Company on October 8 in the hope of securing a voluntary surrender of the charter. The Company refused to comply on October 20. The court of King's Bench issued a writ of Quo Warranto against the Company on November 4, 1623. By its decision of May 24, 1624 on the quo warranto proceeding confirming the action of the Privy Council, the charter of the Virginia Company was annulled. Since Virginia's jurisdiction over the marginal sea, the seabed, and the resources thereof had depended upon the charter grants, the actual
305 implications of the annulment of the charter in 1624 must be examined.

THE SPECIAL MASTER: I wonder whether you don't mean by its decision, referring to the court's decision, because you hadn't mentioned the decision before.

THE WITNESS: I am not sure I understand – oh, by this decision.

THE SPECIAL MASTER: You hadn't mentioned any decision prior to that point. But you mentioned the

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[34] See Helen J. Crump, Colonial Admiralty Jurisdiction in the Seventeenth Century 33-34 (1931).

proceedings begun in the court by quo warranto. I think you are going into a subsequent decision of the court in the quo warranto decision.

THE WITNESS: Do you want –

THE SPECIAL MASTER: I think you mean by the decision of the court of May 24th.

THE WITNESS: Yes, Your Honor.

THE SPECIAL MASTER: All right, proceed.

THE WITNESS: The distinguished historian and lawyer Philip A. Bruce has well expressed the prevailing interpretation by historians of what happened in 1624 in terms of the issues that concern your question: "The substance of the change was that the Crown and not a corporation was
906 to exercise the direct controlling power."[35] Another leading authority, Herbert L. Osgood, wrote that "the province thenceforth stood in immediate, instead of mediate, relation to the Crown. The territory within its bounds, so far as it had not already been granted to private parties, became again a part of the royal domain."[36] The changes in 1624 primarily represented an alteration in the form or method of government in Virginia. This occurrence did not affect the boundaries or jurisdiction of the colony over its territory.

A variety of statements by the Crown and its agents in these years made the nature of the changes in 1624 perfectly clear. When the Virginia Company was debating the request of the Privy Council in October, 1623 that it surrender its charter in return for a new one, the Company received reassurances "that in the same [new] Charter his Majestie purposeth to make the like graunte as well of lande

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[35] 2 P. A. Bruce, *Institutional History of Virginia in the 17th Century* 259 (1910).

[36] 3 Osgood, *Amer. Col. 17th Century* 72; see also *Id.* 52, 58.

as of fraunchises and other benefits and thinge as were graunted in the former Charter with Declaration that for the setlinge and establishinge of private intereste of all men
907 this newe Companie shall confirme or newly graunt unto them the like interest as they enjoy by graunt order or allowance of the former Companie: . . . ."[37] On October 20, 1623, the Privy Council further held a meeting to squelch rumors concerning the implications of the impending demise of the Virginia Company:

"Whereas their Lordships were this day informed that there is a great discouragement amongst many adventurers of the Plantation in Virginia by reason of the intended reforminge and chaunge of the Government, whereupon they are fearefull to prosecute their adventures, so as it may occasion some stopp of those Shipps which are nowe ready fraughted and bound for that Country; . . . . for the better satisfyinge of those, who either through error or mistakinge or through the untrue suggestions of others have conceaved any such feare or discouragement, their Lordships do thinke fitt hereby to declare againe that there is no other intention theen meerely and onely the reforminge and chaunge of the present Government, whereof his Majestie hath seen so many bad effecte as wilbe to the endangeringe of the whole plantation, if it continue as it is; . . . ."[38]

On May 13, 1625 the newly crowned Charles I issued a royal proclamation concerning Virginia wherein he affirmed that his only aim in having the charter judicially repealed
908 and adjudged void was "to reduce that government into such a right course as might best agree with that form which was held in the rest of his royal monarchy; . . . ." The

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[37] 2 Rec. Va. Co. 469.

[38] 2 Rec. Va. Co. 476.

proclamation that Virginia was now a royal colony, included a confirmation of its charter boundaries: "We hold these territories of Virginia and the Summer Islands, as also that of New England . . . and within the limits and bounds whereof our late dear father, by his letters patents, under his great seal of England, remaining of record, hath given leave and liberty to his subjects to plant and inhabit, to be a part of our royal empire, ..."[39] The Crown had no intention of altering the previously established boundaries of the colony when it replaced the Virginia Company with royal rule.

The meaning of the 1624 action by the Crown with respect to the charter of the Virginia Company has been considered in litigation before the United States Supreme Court In the celebrated case of *Johnson v. McIntosh* in 1823, a series of facts were set forth. The first cited the Virginia charter of 1609 and its grant of jurisdiction over islands within one hundred miles of the seacoast, as well as rights in the soil and ground in the various territories. The fourth
909 fact was as follows:

"4th. That in the year 1624, this corporation was dissolved by due course of law, and all its powers, together with its rights of soil and jurisdiction, under the letters patent in question, were revested in the crown of England; whereupon the colony became a royal government, with the same territorial limits and extent which had been established by the letters patent, and so continued until it became a free and independent state; except so far as its limits and extent were altered and curtailed by the treaty of February 10th, 1763, between Great Britain and France, and by the

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[39] M. Jensen ed. *American Colonial Documents to 1776* (English History Documents, IX) 235-236 (1955) (hereinafter cited as Jensen, *Amer. Col. Doc.)*

letters patent granted by the King of England for establishing the colonies of Carolina, Maryland, and Pennsylvania."[40]

In the course of his opinion Chief Justice Marshall took specific notice of the Virginia 1609 charter: "This charter, which is a part of the special verdict in this cause, was annulled, so far as respected the rights of the Company, by the judgment of the Court of King's Bench on a writ of *Quo Warranto;* but the whole effect allowed to this judgment was to revest in the crown the powers of government, and the title to the land within its limits."[41]

The significance of the 1624 action of the Crown against the Virginia Company with respect to the territorial claims of the colony and state became a subject of debate in the United States Congress in the early 1840's. While the ultimate concern was the legitimacy of continuing land claims by Virginia veterans of the Revolution, the issue was joined on the question of whether or not Virginia had been entitled in the first place to the Western lands that the state claimed during the Revolutionary era. A report to the House of Representatives in 1842 revived an old and discredited argument by an examination of the charters to Virginia.[42] According to this line of reasoning, Virginia could not claim its ancient boundaries after 1624 because its charter had been revoked. Congressman Edmund W. Hubard of Virginia responded to this attack by preparing a new report for the Committee on Public Lands that was

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[40] Johnson & Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat. 544) 545-546.

Justice Joseph Story quoted an extensive segment of this opinion in the first chapter of his first volume 1 *Commentaries on the Constitution of the United States* 8-20 (1833).

[41] Id. 21 U. S. (8 Wheat. 578) 578.

[42] H. R. Rep. No. 1063, 27th Cong., 2d Sess. 49-63 (1842).

911 presented to the House on May 2, 1844.[43] Hubard sought to explain how the colonists "considered a charter as the sure foundation of all their rights, and as the palladium of their liberties; and why, until 1776, they always referred to their charters (although revoked by the grantor) as an ever-enduring guaranty to them and their posterity of their rights to life, liberty, and property; . . . ." Despite some impassioned rhetoric concerning the solemn and perpetual nature of a charter issued by a king to his free subjects, the report of the committee also addressed itself to some more specific considerations:

"A very large portion of that space included within the circuit of not less than twelve of our present counties, is still claimed and held under patents granted by the London Company during the legal existence of that corporation, and any lawyer will tell this author [of the 1842 report] that titles so derived were as valid and sacred after the charters were annulled, as they had been before; and that they continue as valid at this day, as any titles derived under grants of the Crown before the Revolution, although such grants may be under the great seal of England, as the manner is, au-
912 thenticated *per ipsum regem.*"

The Hubbard Report then addressed itself to the issue of what had actually occurred in 1624:

"It is apprehended, that if the details of that controversy, and the judgment pronounced in it, were examined, it would be found that the judgment only took away the monopoly, and the power of government over the colony,

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[43] H.R. Rep. No. 457, 28th Cong., 1st Sess. (1844). The House agreed to print two thousand extra copies of the Hubard Report. (Hereinafter cited as Hubard Report, 1844). The Bill accompanying the Report, H.R. No. 352 was given a first and second reading on May 2 and then sent to the Committee of the whole House on the State of the Union.

(Quotations below from *Id.* 18-19, 20-21, 23, 24.

which were vested in the company by the charter, wihout affecting at all the territorial limits, or other rights of the colony itself; that the only change was from the proprietary government of a trading company to a royal government, over the same dominion and colony. It is sufficient to state that it was so understood at the time, and ever afterwards."

The Report concluded that with respect to the effect of the actions in 1624 on the territorial limits of Virginia, "the same title to the lands within its limits, which the charter had vested in the company, was revested in the Crown. The charter, so far from being annihilated, was recognized. The vacant lands in the colony were thenceforth crown lands in the king's dominion of Virginia, and the extent of that dominion was only to be ascertained by the territorial limits described in the charter."

13 The colonists in Virginia generally approved of the demise of the Virginia Company, although in the first years after 1625 they made some efforts toward securing a new royal charter to confirm the privileges they had previously held. On March 2, 1624 the Virginia Assembly wrote to England that they were "given to understand that his Majestie hath signified his gratious pleasure for the universal good of this plantation . . . to institute another forme of Government, whereby this worke may be upheld and better prosper in time to come, and to that end hath required surrender of the present Pattents, declaring nevertheless his Majesties Royall resolution of assuring unto the perticular members of the Company such lands and priviledges in the said Countrie, as according to the proportion of each mans adventure and proper interests do now belong unto them; . . . ."[44] The Assembly thanked the Crown for its

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[44] 1 McDonald Transcr. 86-87; see also 1 Andrews, *Col. Per.* 176 note.

care and submitted to the royal will. A month after the final overthrow of the Company, the Crown ordered the Privy Council to establish a committee to oversee the governance of Virginia. The directive made clear that "His Majesty resolved to renew a Charter with the former Priviledges and with Amendment of such imperfections as concern ye Government of ye Plantation and Colony."[45] The
914 death of James I on March 27, 1625 ended any plans for the renewal of a charter for Virginia and temporarily pushed the whole issue of this colony to the background. On May 13, 1625 Charles I did declare his firm intention not to revive the Virginia Company.[46] In the next few years thereafter, the Crown recurrently confirmed the colonists in their lands and privileges, such as in the instructions of September, 1628 to Governor John Garvey, but a new charter did not appear.[47]

The Commissioners appointed by the Privy Council to oversee the governance of Virginia after 1625 seem to have attempted to secure a new charter for the colony of Virginia in 1631. This effort was interesting, not because it succeeded, but because it indicated a continuing understanding that the colony still enjoyed its boundaries as established by the charters and deserved to have these formally renewed. On March 2, 1631 the Commissioners wrote to the Attorney General that the Virginia adventurers (probably a reference to the remnants of the Virginia Company in London rather than to actual colonists) had responded favorably to the king's willingness,

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[45] 1 McDonald Transcr. 366-367 (June 24, 1624).

[46] See 1 Andrews, *Col. Per.* 191-192, 194.

[47] 2 McDonald Transcr. 49 (Sept. 12, 1628); see also 2 Bruce, *Institutional History* 260, 262.

915 "In profering unto them a new charter of restitution of a Company, with confirmation of all their ancient Territories, Landes, llandes, Rights and Priviledges whatsoever; point of Government only with some few other reservations excepted. It is (on their behalf) ordered: that Mr. Attorney Generall bee desired to pass no Grant or Patent unto any Person or Corporation, but with proviso or exception of all territories etc formerly granted to the late Company of Virginia, by all or any the severall grants of his now Majesties' late royal father King James."[48]

On May 24, 1631 the King appointed a commission under the direction of the Earl of Dorset to investigate the Virginia situation. Their report later in 1631 recommended a reincorporation of the Virginia Company retaining only the power of government in the hands of the Crown: "And further that this Company may have granted unto them by this Charter the ancient territories, land, and islands of and belonging to Virginia in as ample manner as the same were bounded and graunted unto the late Company, by all or any the several graunts or letters patents whatsoever of your Majesties late Royall Father King James of blessed memory."[49] On November 25, 1631, Dorset wrote on
916 behalf of the king to a person who was familiar with the former proceedings of the colony of Virginia and who possessed drafts of its former charters, asking that he assist in the preparation of a new patent for the colony.[50] Yet despite these high powered efforts, a new charter did not appear. There exists a long memorandum of anonymous

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48 2 McDonald Transcr. 65-66.

49 The recommendation to the Crown was probably made in November, 1631. 2 McDonald Transcr. 90-91.

50 2 McDonald Transcr. 95.

considerations against giving Virginia a new charter that makes a very strong case in favor of royal rule.[51] The author intimated that the desire for a new charter was inspired by the old adherents of the Virginia Company who had infiltrated the group of commissioners appointed to run the colony.

Virginia over the years has vigorously asserted its view that the actions of 1624 did not affect the territorial limits and other rights of the colony and state, particularly in the course of its boundary controversies with Maryland.[52] Maryland has argued that the 1624 action abrogated all claims, territorial and governmental, of Virginia. It has based its claims in these disputes on its own interesting charter of June 20, 1632, which included:

917 ". . . All islands and islets within the limits aforesaid, all and singular the islands, and islets, from the eastern shore of the aforesaid region, towards the east, which had been, or shall be formed in the sea, situate within ten marine leagues from the said shore; with all and singular the ports, harbours, bays, rivers, and straits belonging to the region or islands aforesaid, and all the soil, plains, woods, mountains, marshes, lakes, rivers, bays, and straits, situate, or being within the metes, bounds, and limits aforesaid, with the fishings of every kind of fish, . . . in the sea, bays, straits, or rivers within the premises, and the fish there taken; and moreover all veins mines, and quarries, as well opened as hidden already found, or that shall be found within the region, islands, or limits aforesaid, of gold, silver,

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51 2 McDonald Transcr. 97-102 (1631?); see also 1 Andrews, *Col. Per.* 201-202.

52 See L.N. Whealton, *The Maryland and Virginia Boundary Controversy (1668-1894)* 8-9 (1904).

gems and precious stones, and any other whatsoever. . . ."[53] The Maryland charter obviously represented a serious challenge to the integrity of Virginia's territorial borders as established by the original charters. The colony lodged a vigorous protest with the royal authorities against this dismemberment of their colony, arguing that the grant to Lord Baltimore was an infringement upon their charter and an intrusion into their territory.[54]

The Crown referred the matter to the court of Star Chamber in June, 1633, and the court handed down its decision on July 3: their Lordships "did think fit to leave the Lord Baltimore to his Patent, and the other partys to the course of law according to their desire."[55] This was not a legal ruling against the validity of Virginia's claim, but rather a simple refusal to intervene on the basis of the Virginia petition. Charles M. Andrews has suggested that the legal advisor to the Privy Council agreed that the Maryland charter infringed on Virginia's rights, but that the Privy Council "could do no more than accept a situation which had arisen too late to be remedied . . . . It finally decided

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53 Jensen, *Amer. Col. Doc.*, 85-86. The extensive grant of jurisdiction to Maryland in this charter over the marginal sea, the seabed, and the resources thereof, is useful confirmation of the interpretation earlier in this testimony of the meaning of the several Virginia charters.

54 See the anonymous "Considerations upon the Patent to Lord Baltimore" that cites the Virginia charters and is generally hostile to the Lord Baltimore grant in 2 McDonald Transcr. 127-131. The date assigned to this document in the transcripts, June 20, 1632, seems impossible; a later date in 1632 is more likely.

55 2 McDonald Transcr. 136; also Report and Accompanying Documents of the Virginia Commissioners Appointed to Ascertain the Boundary Line between Maryland and Virginia, appendix 94-95 (1873).

to leave Baltimore in full possession of his patent and advised the remonstrants to follow any course of law they desired."[56] The Hubard Report to the House of Representatives in 1844 argued that although the Star Chamber refused to assist Virginia, "here was an act of Virginia, certainly, if there was not also an act of the Crown, recognizing the existence of the charter under which Virginia claimed."[57] The colonists obviously believed that the royal charters to the Virginia Company still established their territorial boundaries and were prepared to defend these against competing claims and grants.

The immediate royal response to the first Virginia-Maryland boundary controversy was of considerable interest. The Privy Council wrote to the Governor and Council in Virginia on July 22, 1634, informing them "that 'tis not intended that interests which men have settled when you were a Corporation should be impeached, that for the present they may enjoy their Estates and Trades with the same Freedome and Privilege as they did before the recalling of
920 their Patents, . . ." [58] Andrews noted that this letter did "not say that Virginia had a right to all the land named in the charter of 1612, an assertion that no English authority could possibly have made at this time, when the crown was disposing as it pleased of lands north of the Potomac."[59] In fact the Hubard Report in 1844 rightfully pointed out that "the precedent of the charter of Maryland, in effect, established the right of the Crown to dismember from Virginia any part of her territory, at its discretion, without

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56 1 Andrews, *Col. Per.* 284-285.

57 *Hubard Report, 1844,* 25.

58 1 McDonald Transcr. 367-368.

59 2 Andrews, *Col. Per.* 305 note.

her consent; but it in no wise affected the right of Virginia to such territory within her ancient limits, as had not been dismembered from her."[60] A twentieth century authority on the history of Virginia concluded that "the revocation of the charter in 1624 did not change the boundaries, but after that time the King was able to change them at pleasure."[61] The subsequent charters to Lord Baltimore, William Penn, and the Carolina proprietors obviously represented such alterations in the northern, western, and southern boundaries of Virginia at the pleasure of the Crown. But otherwise, and especially in terms of the eastern boundary of the colony in the Atlantic ocean, the boundaries of Virginia remained the same down to the outbreak of the American Revolution.

The lack of a formal charter unquestionably remained a cause of some insecurity to the colonists. As the leading authority on early seventeenth century Virginia, W.P. Craven, has stated, "the colonists had no charter, visible evidence of rights conceded and bulwark for their defense in the courts. Instead, public authority, . . . rested on custom and usage sanctioned merely by the more mutable forms of royal consent."[62] But confirmations of colonial rights, privileges, and territories in Virginia multiplied rapidly in the 1630's and 1640's.[63] The concern of the colonists was of course much less with such matters as

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60 *Hubard Report, 1844* 25; see also 3 Osgood, *Amer. Col. 17th Century* 92.

61 T.P. Abernethey, *Western Lands and the American Revolution* 362 (1937).

62 W.F. Craven, *The Southern Colonies in the Seventeenth Century* 226 (1949).

63 *Id.* see 153, 174-175, 176.

boundaries to the east and maritime jurisdiction than to their right to enjoy a substantial degree of self-government through an elected local Assembly; they took these other matters almost for granted. By April, 1642, the Grand Assembly of Virginia felt confident enough to enact a strongly worded statute opposing the restoration of the Virginia Company and expressing their satisfaction with
922 the status quo.[64] On July 5, 1642 the Crown acknowledged their desire for immediate royal rule and assured the colonists that no changes in the currently successful form of government were anticipated.[65] Virginia's self-confidence received another reinforcement during the Interregnum, after the realities of the situation finally forced royalist Virginia to surrender to Parliament on March 12, 1652. The Articles of Agreement between Virginia and the Commonwealth guaranteed "that Virginia shall have and enjoy the antient bounds and lymitts granted by the charters of the former Kings, And that we shall seek a new charter from the parliament to that purpose against any that have intrencht upon the rights thereof."[66]

Q. In your opinion, what was the significance, if any, of the Arlington-Culpeper grant of the 1670's as it related to the Virginia Colony's assertion of territorial boundaries in the marginal sea?

923 A. On February 25, 1673 Charles II granted the whole of his royal colony of Virginia "as far as soil and regalties were concerned," to the Earl of Arlington and Thomas

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64 1 Hen. Stat. 230-236.

65 1 McDonald Transcr. 389.

66 1 Hen. Stat. 364. Virginia did not receive a new charter from Parliament, and, of course, this agreement had no validity after the restoration of the Stuart monarchs in 1660.

Lord Culpeper for a thirty-one year period.[67] This grant primarily conveyed the power to receive quit-rents and to control the granting of land. The Crown did not ostensibly intend to remove the powers of the Virginians to govern themselves. Charles M. Andrews has concluded that there was "no intention in the mind of the king of removing the territory from under the control of the colony's government, . . . but the extensive powers named in the patent promised to make trouble."[68]

The details of the Arlington-Culpeper grant are initially valuable in conveying a sense of the territorial extent Virginia was then thought to encompass, and to illustrate that jurisdiction over the marginal sea, seabed, and its resources was not an unusual concomitant of a royal grant. The eastern jurisdiction of the Arlington-Culpeper grant was to include: . . . all that entire tract territory region and dominion of land *and water* commonly called Virginia together with the territory of Accomack, and all that part of the bay of Chespeake, that lyeth betweene the same, or any part thereof and all other the rights members jurisdictions and appurtenances thereof, situate lying and being in America adjoining to the colony and dominion of Maryland towards the north, to the great ocean, towards the east, ... as also all those other tracts regions dominions and territories of land *and water,* situate lying and being beyond the uttermost adjacient limitts of Carolina aforesaid , . . as also all islands whatsoever with all or any the limits and precincts aforesaid or within ten leagues of any the coastes of any of the said territories, together with the soyle of all and singular the premises, and all woods . . .

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[67] 2 Andrews, *Col. Per.* 234-235.

[68] *Id.* 235.

waters rivers . . . pooles, ffishings, havens, ports harbours, bays, creeks, *wrecks of sea, flatson jetson and lagon,* with all sorts of fish whatsoever as well whales, sturgeons and all other royal ffishes as *all others whatsoever in the said seas,* bayes, lakes, rivers and waters . . . and all royal mines and other *mines* whatsoever, which now are or at any time or times hereafter shall be had found or taken *within the limitts precints or places aforesaid,* together with the royalty of the said seas and bays afore granted. . . .[69]

The Crown would not have allocated any territory to Arlington and Culpeper that was not within the established boundaries of the royal colony of Virginia. Thus this grant evidenced royal recognition that the marginal sea (in this
925 instance restricted to a distance of thirty to thirty-five miles offshore) and the seabed were within the traditional domain of the colony of Virginia.

In September 1674 the Grand Assembly of Virginia prepared an address to Charles II expressing its fears about the new lord patentees, asking the Crown to revoke the recent grant and requesting a confirmation of their "liberties priviledges, immunities, rights and properties," by a new royal charter to Virginia.[70] The Virginia agents sent to England for this purpose presented certain propositions to the Crown in June, 1675. The agents referred to the episode whereby the charters of the Virginia Company were recovered in 1624: "Yet did the said king forthwith promise and declare, that a charter should be renewed with the former privileges to the planters, at whose instance and for

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[69] 2 Hen. Stat. 570-571 (emphasis added).

[70] 2 Hen. Stat. 311-314; see Lovejoy, Virginia's Charter and Bacon's Rebellion, 1675-1676, *Anglo-American Political Relations,* 1675-1775 37-39 (Olson and Brown ed. 1970.)

whose sake the former charter was called in." Virginia basically sought "a confirmation, by charter, of the authority of the grand assembly consisting of governor, council and burgesses."[71] The rights at issue in this entire episode were primarily political and governmental.[72] The Lords of the Commission for Foreign Plantations referred the whole matter to the Attorney-General and solicitor-general. The latter's favorable report to the king in council in October 1675 was adopted by the royal authorities in November.[73] Twice thereafter the Crown ordered the letters patent to be passed under the great seal as a new charter. In April, 1676 the Virginia agents had to petition for the second directive, making mention of the previous order to prepare a bill for the great seal: "That when they came to pass the same there was a stop put to it, but for what cause they knew not, That they had long since sent a Copy of the Order in Council into Virginia for passing the said bill . . . ."[74] But on May 31, 1676 the Crown issued a further order-in-council that the "Lord High Chancellor of England do forbear putting the Great Seal of the Patent concerning Virginia notwithstanding the late order of the

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71 2 Hen. Stat. 526.

72 The eight provisions that the Virginia colonists wanted in a new charter are reprinted from the manuscript source in Sister Joan de Lourdes Leonard, Operation Checkmate: The Birth and Death of a Virginia Blueprint for Progress, 1660-1676, 24 *William and Mary Quarterly*, Third Series 70note (1967). The petition was received and read June 23, 1675.

73 See 5 McDonald Transcr. 8-11, 12-16 for the report of the legal advisors on October 12, 1675, and the royal approval for the preparation of new letters patent on November 19. See also 2 Hen. Stat. 527, 531.

74 5 McDonald Transcr. 26-27 (April 19, 1676).

18th of April last past."[75] Bacon's Rebellion had so recently erupted in Virginia that it could not have been directly responsible for the order of May 31, but the eventual arrival of the news of the disturbances in the next few months definitely ended the movement for a new charter.[76]

Thus the charter of 1676 never did pass the great seal and did not become official. The draft charter was of course primarily a political and constitutional document that said nothing about such matters as boundaries and seaward jurisdiction.[77] The fact that no one found it necessary in 1676 to include a restatement of the boundaries of Virginia in the proposed charter suggests that both the colonists and the Crown believed that the early charters still established the boundaries of the colony, except to the extent that these limits had been adjusted by subsequent royal grants to other colonies. Osgood has also said of the
928 Virginia agents that "though their effort to procure a charter failed, they helped to save the territorial integrity of Virginia, and it was never again imperilled."[78] This did not mean that the Virginia colonists could rest secure in their existing boundaries after 1676. Vigilance against territorial encroachments was the order of the day in a colonial era of expansive settlement and competing charter grants. A petition from the Virginia Council to the Crown in May, 1683 furnished an early and typical illustration of

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[75] 5 McDonald Transcr. 28.

[76] For a discussion of the reasons for the failure of the movement for a new charter, see Lovejoy, *supra* note 70, 40-42.

[77] See the Virginia Charter of 1676, 56 *Virginia Magazine of Hist. and Biog.* 263-266 (1948).

[78] 3 Osgood, *Amer. Col. in 17th Century*, 253.

the colony's continuing concern for its territorial integrity: "That noe incroachment may bee on the bounds and limits of this His Majesty's Colony of Virginia, which we have too great reason to apprehend the Government of Carolina designes by pretence having extended their bounds beyond the limits of their first Grant. . . . Neither are our Northern Bounds less encroached on by the Lord Baltimore by an unfair Line run from the pretended point of Land called Watkin's Point East to the Sea, by which (as is supposed) there is at least fifteen miles north lost from Virginia. Its therefore proposed that His Majesty may bee humbly supplicated to command and direct the bounds of both Provinces to bee justly ascertained, by which means our vicinity will within its due bounds bee entirely kept and for ever ban any pretences of future encroachments." [79]

Perhaps the Virginia colonists took some comfort in the obvious impossibility of encroaching upon their eastern boundary in the marginal sea.

The Virginia colonists were more fortunate in the ultimate disposition of the Arlington-Culpeper grant than they had been in their search for a new charter. In 1681 Arlington conveyed all his rights and interests derived from this patent to Culpeper, who by this time was in Virginia, having added the governorship to his financial interests. In 1683 Culpeper left for England without royal permission and was relieved of his office. Culpeper then sold all his rights in Virginia, except for the Northern Neck, back to the Crown in May, 1684.[80] The end of this episode left Virginia's territories and jurisdiction intact.

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[79] 6 McDonald Transcr. 219-220.

[80] 2 Hen. Stat. 521-522.

Q. What additional evidence exists of the prevailing views in the colonial era concerning the boundaries and jurisdiction of Virginia, especially to the eastward?

A. The period between the Glorious Revolution in America and the eventful years of the Revolutionary era were quiescent ones with respect to the eastern boundary and
930 jurisdiction of the colony of Virginia. There were no major constitutional crises and no new grants to royal favorites that threatened the integrity of the colony's territory to the eastward. These years furnish an opportunity to describe briefly some aspects of prevailing colonial views concerning Virginia's boundaries and jurisdiction, issues that will be developed in greater detal later in my testimony.

The first significant native historian of Virginia, Robert Beverley, published his *History and Present State of Virginia* in London in 1705. His collective comments on Virginia's boundaries made plain that he included the marginal sea within the domain of Virginia. Beverly followed prevailing practice by describing Virginia's borders as described in the first charters. "The least Extent of Bounds in any of the Grants made to Virginia, since it was settled, and which we find upon Records there, included 'the Islands on both Seas, within an Hundred Miles of the Main.'" The early Virginia charters also included "all the lands within an Hundred Miles directly over-against the same Sea-Coast, and also back into the Main-Land One Hundred Miles from the Sea-Coast. . . ."

Beverley placed the eastern boundary in the Atlantic ocean: Virginia was bounded "on the East by the main Ocean, called the Virginia Seas . . . ." His references to the ocean
931 coast of Virginia evidenced the appreciation and recognition by Virginians' of the value of their seacoast: "The Coast is a bold and even Coast, with regular Soundings, and is open all the year round: . . . . A bolder and safer

Coast is not known in the Universe; to which Conveniences, there's the Addition of good Anchorage all along upon it, without the Capes."[81]

A second major Virginia historian of the colonial era, the Reverend William Stith, published his *History of the First Discovery and Settlement of Virginia* in 1747 in Williamsburg. Its main value for our present concerns was the evidence it included that the Virginians were well aware of their earliest charters. An appendix to the volume reprinted the three charters to the Virginia Company, copies of which Stith had found among public papers in the colony. "I thought the Publication of these Charters the more proper, as I conceive, that they have never been legally revoked, and as they contain things of very great Consequence and Concern."[82] Stith's history of the Company period demonstrated an awareness in the mid-eighteenth century of the seaward jurisdiction conferred in the early charters. Stith noted, for example, that the Virginia
932 Company's purpose in securing the 1612 charter was to include the Bermudas, because "by their former Letters-patent, they were only entitled to the Islands within an hundred miles of their coast. . . ."[83]

Some references to the continued validity of the early Virginia charters in the 1710's suggested a state of English and colonial knowledge of the early history of Virginia, whereby both sides operated on the assumption that these

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81 See R. Beverley, *The History and Present State of Virginia* 117, 118, 27, 118 (Wright ed. 1947).

82 W. Stith, *The History of the First Discovery and Settlement of Virginia* appendix III-IV (Williamsburg, 1747). According to 1 Andrews, *Col. Per.* 82 note, the charters had never before been printed.

83 Stith, *Id.* 126-127.

charters still set forth basic guidelines on a great many matters. A letter of July 20, 1713 from the Lords of Trade to Governor Spotswood recognized the continued existence of the charter, but argued that royal instructions to a Virginia governor were of equal validity: "Comment on the unreasonableness of the Assembly in rejecting a law made out of the 84th Article of his Instructions, which latter it is but just he should strictly adhere to and which are and ought to be deemed by them as valid as their charter."[84] In another episode William Byrd II referred to
933 the Virginia charter as part of an argument with the Lords of Trade in 1718. Byrd had been trained at the Inns of Court and was a prominent member of the Virginia Council at the time. The dispute involved the power of the governor to appoint judges for Courts of Oyer and Terminer. Byrd wrote from London to the Lords of Trade on February 24, 1718: "Having been convinced by the Attorney General's opinion that His Majesty's Governor of Virginia hath power by the Royal Instruction to appoint Courts of Oyer and Terminer in that Colony notwithstanding the Laws and the Charter which seemed to confine Criminal Causes to the General Court," he proceeded to argue against the practice on other grounds.[85] The draft charter of 1676, which never became official, did not include treatment of such specific matters, so Byrd had to be referring to one of the Virginia Company's charters.

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[84] 8 Sainsbury Abstracts 421. William Noel Sainsbury made these abstracts for the Virginia State Library from original documents in the Public Record Office, London, around 1873. There are currently twenty manuscript volumes of these abstracts in the Virginia State Library, Richmond. (Hereinafter cited as Sainsbury Abstracts).

[85] 3 Sainsbury Abstracts 686.

By the early eighteenth century these charters seemed to have acquired almost the status of constitutional documents that served as sources of first resort on any kind of issue.

The correspondence of the royal governors of Virginia that is now readily available included some references to the boundaries of Virginia. The Lords of Trade asked Governor Spotswood on August 7, 1718 for information about the boundaries of the colony and any current encroachments on them by foreign princes.[86] It is suggestive that the Board itself, which even requested the best available map of the Virginia boundaries, was not more fully informed and aware of Virginia's existing boundaries. Spotswood replied on May 20, 1720, with a brief reference to a copy of the 1609 charter: "I find here a Charter granted by King James ye 1st, dated ye 23d of May, in the 7th year of his Reign, whereby there is given to the Company of Adventurers for ye Colony of Virginia, all that Tract of Land from Cape Comfort, two hundred Miles Northward along the Sea Coast, and extending from Sea to Sea. . . ."[87] The subsequent discussion in the letter paid no further attention to the eastern boundary, since this was not an area of encroachment. Yet by reading the whole of the charter Spotswood was no doubt reminded of the extent of Virginia's jurisdiction into the marginal sea and its appurtenances as described in the 1609 charter.

A report of Governor Dinwiddie to the Lords of Trade in January, 1755 was also illustrative of contemporary knowledge concerning Virginia's borders:

"The Boundaries of the Dom'n of Virg'a, as they were first established'd by the Charter of King James the 1st,

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86 3 Sainsbury Abstracts 795.

87 2 Spotswood 336.

935 Anno. 1606, were from Cape Comfort, now called Cape Henry, 200 Miles North along the Sea Coast, and the same Distance South from the same Cape, and West to the So. Sea, together with all Islands in both Seas, lying within 100 Miles of the Main Land; in w'ch Tract is comprehended great Part of y't w'ch is now called No. Carolina, all the Province of M'yl'd, and part of Pennsylvania. But the Boundaries of Virg'a, as it is now circumscribed, are to the East and So. East, the Main Atlantick Ocean . . . . and on the No., a Line from the Sea, thro' y't Isthmus called the E. Shore . . . . And then Virg'a resumes its ancient Breadth, and has no other Limits to the West y'n y't its first Royal Charter assigned it. . . . ."[88]

Several implications of this statement to the imperial authorities are worth noting. Although Dinwiddie was understandably vague about the current extent of Virginia's jurisdiction into the main ocean, he did not establish the eastern boundary as starting at the seacoast or seashore. Secondly, the governor still considered the original charters, less subsequent specific royal grants to other colonies, to be of binding force in establishing Virginia's claim to ter-
936 ritory. Thirdly, the governor did not note any real losses of territory or jurisdiction toward the east, which in part accounts for his slight attention to this issue. Virginia had no claimants competing for territory on the east. Much more precision was necessary in references to the northern and southern boundaries of Virginia because of the rival charter grants and competitive claims of Maryland and the Carolinas.

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[88] 1 The Official Records of Robert Dinwiddie, Lieutenant-Governor of the Colony of Virginia. 1751-1758 380-381 (1933) (hereinafter cited as Dinwiddie).

On January 30, 1763 Governor Fauquier of Virginia faced a similar task of responding to the queries of the Commissioners for Trade and Plantation Affairs: "Query 2d. What are the Boundaries? Have those Boundaries been settled and ascertain'd, and by what Authority?" Fauquier's interesting response began with the fairly unspecific comment that "Virginia is bounded on the East by the great Atlantic Ocean . . . ."[89] After referring to the Potomac river as the northern boundary with Maryland, Fauquier added that this Boundary is fixed by the Royal Charters . . . . ,"; it was apparent from his response to the entire question that Fauquier had used the early Virginia and indeed Maryland charters as the starting points for framing a response , only taking into account later adjustments by royal authority. Obviously no such adjustment had occurred in terms of the Eastern boundary of Virginia, leaving the colony with a claim to territory stretching one hundred miles out into the Atlantic.

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The statements by Governors Dinwiddie and Fauquier evidenced a general situation in which Virginians were not much concerned about their eastern boundary and did not have to be. As early as 1663 the Grand Assembly passed "an act concerning the bounds of this colony on the Eastern shore."[90] It only concerned the northern limit of Virginia's jurisdiction on the Eastern Shore. The colony had no doubt whatsoever about the extent of its seaward boundary, nor were these eastern boundaries involved in any contemporary dispute. In the seventeenth century Virginia had to defend its northern and southern boundaries, while

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89 Colonial Office 5/1330, ff. 261-284. Public Record Office, London. I am indebted to Mr. George Reese of the University of Virginia for a transcript of this document.

90 2 Hen. Stat. 183-184.

in the eighteenth century the western boundary and the extension of the northern and southern boundaries into the western territory were subjects of continuing concern and controversy. The much different situation with respect to actual knowledge of the western boundary of Virginia was well illustrated by the statement of Governor Dinwiddie to the Lords of Trade in 1755 that "the Western Boundary as yet is not well known, nor can it be ex-
938 pected to be fully known for some Ages."[91] Even on the eastern seacoast and marginal sea, efforts to secure accurate maps of the Virginia coast, including soundings and depths near the shore, never really succeeded in the colonial era.[92] The many maps then in existence seem remarkably imprecise by modern standards concerning the geography of the entire Virginia region and were largely unconcerned with hydrography. None of the original maps of colonial Virginia examined for the purposes of my testimony indicated where the eastern boundary of Virginia was specifically located in the seventeenth and eighteenth centuries, other than by a general inclusion of the marginal sea on the face of the maps. In fact, the main value of contemporary maps may well be to suggest the inevitability with which Virginians expected the marginal sea to be included within their territorial limits. At a later

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91 1 Dinwiddie 381.

92 See R.P. Stearns, *Science in the British Colonies of America* 698 (1970); 4 Executive Journals of the Council of Colonial Virginia, 1680-1775 253 (H.R. McIlwaine and W. L. Hall ed. 1925-1945); (hereinafter cited as Exec. J. Council); A.P. Middleton, *Tobacco Coast: A Maritime History of Chesapeak Bay in the Colonial Era* 72-77 (1953). In 1726 Governor Drysdale emphasized the prohibitive cost of preparing a complete map of the colony. Drysdale to Lords of Trade, June 29, 1726, 9 Sainsbury Abstracts 204-205.

period in American history, one is accustomed to thinking of Virginia on a north-south rather than an east-west axis. But as one colonial map, Virginia Exhibit No. 1, suggests,[93]
939 the colonists and English authorities and traders conceived of the territory of Virginia as one approached it from the Atlantic. One arrived in Virginia when one began to enter the Virginian Sea. Inclusion of a specified area of the marginal sea within the boundaries of the colony seemed an obvious and inevitable precondition for the colony's continued existence.

Colonial Virginians turned more and more to a study of their original charters as innumerable matters of controversy arose in the decade preceding the outbreak of the Revolution. In terms of the territorial boundaries of the colony, Virginians recognized that the early charters to the Virginia Company constituted the basis of their territorial claims and boundaries. The charters revealed that the seaward boundary of Virginia, prior to and at the time the colony became a member of the Union, and as established by the charters, extended one hundred miles into the Atlantic Ocean. Col. Richard Bland's *An Inquiry into the Rights of the British Colonies* in 1766 well illus-
940 trated the degree of contemporary knowledge of the history of the Virginia charters. Bland was a lawyer and antiquarian. Thomas Jefferson and other leading Virginians considered Bland the most learned authority in the colony on its constitutional history.[94] Bland's *Inquiry* included

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93 This section of a map of Virginia, Maryland, Pennsylvania, and East and West New Jersey was published under the imprint of John Thornton and Will Fisher in London sometime in the period 1689-1704. The insert is a photostat of a copy in the Virginia State Library, Richmond.

94 1 J.P. Boyd, ed. The Papers of Thomas Jefferson 165note (1950-) (Hereinafter cited as Jeff. Papers).

an accurate survey of the history of the Virginia charters, of the significance of the annulment in 1624, of subsequent royal renewals of colonial rights and privileges, of the colony's opposition to a new Virginia Company charter in 1644, and the agreement of Virginia with the Parliamentary commissioners in the early 1650's.[95] The leading Virginians were well aware of the fundamental importance of the charters to Virginia.[96]

941 George Mason, another prominent Virginian, carried out the most extensive analysis of the meaning and significance of the Virginia charters on the eve of the American Revolution. Mason's personal papers contain extensive annotated extracts from the Virginia charters that he made in 1773 in connection with his interests in Western lands. Although not a practicing lawyer, Mason had received some education in the law from his uncle, John Mercer. Robert Rutland, the editor of the recently published *Papers of George Mason*, states that Mason, because of his familiarity with the various Virginia charters, was a "recognized expert."[97] In 1782 Mason wrote to Edmund Randolph, then the Attorney General of Virginia, and made a reference to the need to consult the original charters of 1606 and 1609:

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[95] Col. R. Bland, *An Inquiry into the Rights of the British Colonies* 16-20 (Williamsburg, 1766).

[96] On April 30, 1775 Thomas Jefferson encouraged E. Hazard of New York, who was preparing a collection of documents concerning the history of the American colonies: "I will direct office copies of our charters, resolutions of assembly etc. and of our treaty with the commonwealth of England to be immediately made out, and will forward them by the best means I can." 1 Jeff. Papers 164.

[97] 1 R. Rutland ed. The Papers of George Mason 731note (1970). (Hereinafter cited as Mason Papers).

"The Charters I presume may all be found in the House of Delegates's Office: I had them all in my possession (made up in one bundle) when I was formerly appointed to settle some Matters of Jurisdiction in Chesapeake Bay and Potomack River . . . . I returned the Charters into the House of Delegates."[98]

In his extracts from the Virginia charters Mason paid particular attention to the issue of territorial limits and boun-
942 daries. In each of the charters he noted the clause granting the Company the islands within one hundred miles of the coast.[99] From the 1612 charter he included the following key phrase concerning the extent of Virginia's grant: "Together with all and singular the Soils, Lands, . . . Waters, Fishings, Mines and Minerals etc. . . both within the said Tract of Land upon the Main, and also within the said Islands and Seas adjoining . . . ."[100] Mason next examined the issue of whether these rights of the Company were transferred to the royal colony itself by the actions of 1624. Mason realized this was a critical issue. Early in his extracts he made the following reference to the clause last cited above: "See Sect. 4th of the 3d Charter of James 1st. by which harbors, fisheries, etc. etc. etc. are granted to the Company which being of a public nature must plainly inure to the people of the Colony, after the dissolution of the Company if this dissolution had been legal. Sed Quere."[101] The Latin legal phrase indicated that Mason was not totally sure of his point and wanted to investigate the issue further. A few pages later in his memorandum, Mason actually cited section four of the

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98 2 Mason Papers 754-755 (Oct. 19, 1782).

99 1 Mason Papers 164, 166, 169-170.

100 1 Mason Papers 170.

101 1 Mason Papers 163.

1612 charter and added this illuminating and less unsure
943 annotation: "This Clause, Sect. IV, of this Charter, respecting the ports, rivers, waters, and fishings, and a Clause of the same nature in Sect. VI. of the Second Charter (not particularly recited in these Extracts) being of a publick Nature in which the people and Inhabitants were interested as well as the company, it is presumed could not be destroyed or avoided by the Dissolution of the Virginia Company."[102]

Mason then articulated the following interpretation of the impact of the 1624 dissolution of the Virginia Company upon the boundaries of the Virginia colony: "The Bounds of the Colony. . . remained unaltered until King Charles the First in the year 1632, by Charter to Cecilius Calvert Lord Baron of Baltimore, established the Proprietary and Province of Maryland. That Country being then uninhabited, the Importance of it little known or attended to, and the scene of Confusion introduced by the Civil War in England prevented the people of Virginia making any opposition."[103] Mason's interpretation was accurate, but he was obviously unaware of the extent to which the colonists had protested the grant to Lord Baltimore in defense of their territorial integrity. Mason's further view
944 was that only royal grants to Baltimore, Penn, and the Carolina proprietors had altered the boundaries of Virginia as originally established by the charters. After describing these later charter grants, Mason concluded: "And by these Means have the ancient and original Boundaries been contracted; and the Colony and Dominion of Virginia reduced to its present Limits."[104] The only direction in

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102 1 Mason Papers 170 note.

103 1 Mason Papers 176.

104 1 Mason Papers 176.

which Virginia had not suffered some formal curtailment of her boundaries was to the eastward into the marginal sea.

Mason returned to this issue of the impact of the dissolution of the Virginia Company on the charters when discussing the 1676 charter of Virginia. Mason obviously believed that Virginia did acquire a new royal charter in that year and he copied the body of this charter into his memorandum.[105] Mason used the 1676 charter to make a further argument in favor of the limited impact of the 1624 decision: "This seems to acknowledge and confirm the Company's right to the Charter to be in the Colony after the dissolution of the former."[106] He was concerned to show that the early charters continued to establish the territorial limits of Virginia after 1624. Mason noted that
945 the 1676 charter omitted a discussion of boundaries: "The Country of Virginia is only mentioned at large and in general terms in this Charter, and not described or ascertained by any particular Limits or Boundaries." He then proceeded to interpret the significance of this omission: "For (not to mention the liberal and beneficial Manner of Construction which we have a right to) the plain, natural, and obvious meaning of the Charter is, to grant and confirm certain Rights, privileges and Immunities to all his Majesty's Subjects, who then did or ever should inhabit that Tract of Country in America, usually called Virginia, according to the Description and Boundaries of the original Charters, not before otherwise appropriated or disposed of by his Majesty's ancestors. In this situation hath it remained from

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105 1 Mason Papers 177-178, see also 166.

106 1 Mason Papers 163.

the time of this last Charter; and in this Manner hath Virginia been constantly laid down ever since, in all the English maps, as well those published by publick Authority as others, to wit, Bounded . . . on the East by the Atlantic Ocean. . ."[107]

Virginians entered the Revolutionary era firmly convinced that the early charters still established the basic territorial limits of the colony.

* * * * *

946 Q. What were the implications, in your opinion for Virginia's claim to territorial boundaries in the marginal sea and Virginia's assertion of ownership over the seabed and the resources thereof, of the Colony's emergence as a sovereign and independent state in 1776?

A. In the spring of 1776 the citizens and legislators of Virginia held a series of assemblies and conventions that resulted in the colony of Virginia becoming an independent and sovereign state. In early May the General Assembly dissolved its relationship with Great Britain. The preamble to an act concerning courts and judges summarized what had occurred: "Whereas it hath been found indispensably necessary to establish government in this colony, independent of the crown of Great Britain, or any authority derived therefrom . . ."[108] The convention of May, 1776 declared that "no government separate from or independent of, the government of Virginia, ought to be erected or established within the limits thereof."[109] On May 15, 1776 the Virginia Convention issued this momentous directive to its delegates to the Continental Congress:

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[107] 1 Mason Papers 179-180.

[108] 9 Hen. Stat. 126.

[109] 9 Hen. Stat. 111.

947 "Resolved unanimously, That the delegates appointed to represent this Colony in General Congress, be instructed to propose to that respectable body, to declare the United Colonies free and independent States, absolved from all allegiance to, or dependence upon the crown or parliament of Great Britain; and that they give the assent of this Colony to such declaration, and to whatever measures may be thought proper and necessary by the Congress for forming foreign alliances, and a confederation of the colonies, at such time, and in the manner, as to them shall seem best: Provided, that the power of forming government for, and the regulations of the internal concerns of each colony, be left to the respective colonial legislatures."[110]

These Virginia resolutions for independence were presented to the Continental Congress on June 7, 1776, and led directly to the formal Declaration of Independence. In July, 1776 the latter document declared the former colonies to be independent states and severed all connections between them and the mother country. The Declaration ended with the significant provision that the "Free and Independent States" had "full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which Independent States may of right do."[111]

948 In June, 1776 the convention of the State of Virginia drew up a constitution. The indictment of George III in the preamble to the new constitution included "plundering our seas, ravaging our coasts. . . ."[112] Article 21 of the Constitution turned to a matter that was now of considerable importance, the territorial limits of the new state:

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110 1 Hen. Stat. 8.

111 1 Hen. Stat. 35.

112 1 Hen. Stat. 50.

The territories contained within the charters erecting the colonies of Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released, and forever confirmed to the people of those colonies respectively, with all the rights of property, jurisdiction, and government, and all other rights whatsoever which might at any time heretofore have been claimed by Virginia, ... The western and northern extent of Virginia shall, in all other respects, stand as fixed by the charter of King James the first, in the year one thousand six hundred and nine, and by the public treaty of peace between the Courts of Great Britain and France, in the year one thousand seven hundred and sixty-three; unless, by act of Legislature, one or more territories shall hereafter be laid off, and governments established westward of the Alleghany mountains.[113]

949 Virginia thus acknowledged and accepted the changes actually made by the Crown in its territorial boundaries after 1624. But the constitutional convention only found it necessary to describe Virginia's territorial boundaries specifically in those directions, north, south, and west, where changes had occurred since the granting of the early charters. Otherwise the authority of Virginia to the eastward over the marginal sea and the seabed stood as established in the early charters. The 1609 charter had included jurisdiction over the sea, islands, and the seabed within one hundred miles of the coast, and the State of Virginia now asserted this claim on the basis of the 1609 charter.[114] The state also

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[113] 1 Hen. Stat. 56. Thomas Jefferson drafted this provision. See 1 Jeff. Papers 385 note 19.

[114] In 1773 George Mason, the authority on Virginia's charter, noted that "the principal Design' of the 1612 charter, 'seems to be to grant to the said Company the Islands of Bermudas...." He was

(continued)

asserted the primacy of the charters in another connection; the Convention resolved on June 24 "That no purchases of Lands within the chartered limits of Virginia shall be made, under any pretence whatever, from any
950 Indian Tribe or Nation, without the approbation of the Virginia Legislature."[115]

Virginia asserted its ownership of the marginal sea, the seabed, and the resources thereof, in 1776 on the basis of its independence and sovereignty as a state. As Justice Story later wrote, "none of the colonies before the Revolution were, in the most large and general sense, independent, or sovereign communities. They were all originally settled under, and subjected to the British Crown. Their powers and authorities were derived from, and limited by their respective charters . . . ."[116] Virginia became an independent and sovereign state in May, 1776, and acquired the technical legal authority of sovereignty, especially in such matters as the ownership of land and the extent of territorial boundaries.[117] Although Virginia asserted its an-
951 cient territorial limits in 1776 on the basis of the charters,

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114 (continued) aware that the Virginia Company subsequently sold the Bermudas to others. This awareness that the main purpose of the 1612 charter was later negated may explain why the state in 1776 claimed its ancient territorial limits on the basis of the 1609 charter, rather than the 1612 charter. The 1609 charter has remained the basis of Virginia's territorial claim until the present day. 1 Mason Papers 171-172note.

115 Journal of the Virginia Convention of 1776 in 6 P. Force, *American Archives*, Fourth Series, 1588 (1846).

116 1 Story, *Commentaries on the Constitution* 196.

117 See Claude H. Van Tyne, Sovereignty in the American Revolution, 12 *American Historical Review* 529-545 (1906-1907); and A.C. McLaughlin, *A Constitutional History of the United States* 131-136, also 99, 106, 127 (1935).

there were grounds for asserting its territorial limits on the simple basis of the sovereignty the state had taken over from the Crown. The Hubard Report to Congress in 1844 made this point, but also suggested the important relationship of the charters to Virginia's sovereignty:

"This sovereign neither claims nor ever has claimed, anything whatever *under* these charters. She refers to them, constantly, as she would do to any history, geographical treatise, or authentic map, as the best evidence the nature of the case permits, to prove what are the metes, bounds, and extent of the territory which she does claim. She refers to them, as she does to the grants made to others . . . as proofs of what were and are the limits of that region in America called Virginia. . . ." [118]

The Virginia Commissioners in the Maryland-Virginia boundary dispute of the early 1870's hypothesized that even if Virginia had not had a royal charter in force in 1776, "the colony became a sovereign State in June, 1776, and thereby became sovereign over her ancient limits, and the right of eminent domain is independent of all colonial charters or Royal patents, and is as supreme as royalty itself." [119]

952 The United States Supreme Court in 1823 accepted the following description of occurrence in Virginia in 1776 as one of the stated facts in a major case:

"17th. That on the 6th of May, 1776, the colony of Virginia threw off its dependence on the crown and government of Great Britain, and declared itself an independent state and government, with the limits prescribed and established by the letters patent of May 23d, 1609, as curtailed and restricted by the letters patent establishing the

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[118] *Hubard Report, 1844,* 25.

[119] *Report and Journal of Proceedings of the Joint Commissioners to Adjust the Boundary Line* 243 (Annapolis, 1874).

colonies of Pennsylvania, Maryland, and Carolina, and by the treaty of February 10th, 1763, between Great Britain and France; which limits, so curtailed and restricted, the state of Virginia, by its constitution and form of government, declared should be and remain the limits of the state, and should bound its western and north-western extent. . . ." [120]

The Supreme Court has continued to recognize the sovereignty of Virginia in 1776 and that the royal charters constituted the basis of the new state's claim to its territorial
953 limits.[121] The Supreme Court has also rejected an argument that has sometimes been used to dispute Virginia's title to its territorial claims. Chief Justice Jay wrote in 1793 that during the Revolutionary era, "it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed, not to the people of the colony or states, within whose limits they were situated, but to the *whole people.* On whatever principle this opinion rested, it did not give way to the other and *thirteen sovereignties* were considered as emerging from the principles of the revolution, combined by local convenience and considerations." [122] Chief Justice Taney concluded in 1842 that "when the Revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject

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120 Johnson and Graham's Lessee v. William M'Intosh, 21 US. (8 Wheat. 558) 558.

121 See Field, J., Virginia v. Tennessee, 148 U.S. 504, 508 (1892).

122 Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 470, quoted in 1 Story, *Commentaries on the Constitution* 205.

only to the rights surrendered by the Constitution to the general government."[123]

954 Q. Do you have an opinion whether the Treaty of Paris of 1783 affected Virginia's territorial boundaries to the eastward in the marginal sea and if so, would you state your reasons for your opinion?

A. After seven years as an independent state claiming territorial boundaries to the eastward as derived from the charters to the Virginia Company, Virginia may have suffered its first decrease in seward jurisdiction by virtue of the Treaty of Paris between Great Britain and the United States of America, dated September 3, 1783. In article one the English Crown recognized Virginia and its sister states as "free sovereign and Independent States." The Crown then entered into a general agreement with these states concerning territorial boundaries. On the east the territory of the states comprehended "all Islands within twenty Leagues of any Part of the Shores of the United States . . . ."[124] The American people retained fishing rights in the sea. Virginia received a copy of this definitive peace treaty on February 3, 1784.[125]

955 In reality this peace treaty with England did not affect the validity of Virginia's claim to ownership of the sea, seabed, and the resources thereof to the distance of one

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123 Martin et al v. The Lessee of Waddell, 41 U.S. 1013; see also Story, J. in Town of Pawlet v. Clark, 13 U.S. (9 Cranch 292, 335, 299).

124 The Treaty is printed in Richard B. Morris, *The Peacemakers. The Great Powers and American Independence* 462-463 (1965).

125 3 *Journals of the Council of the State of Virginia, 1776-1781* 326 (H.R. McIllwain and W.L. Hall eds. 1931-), (hereinafter cited as J. Council State).

hundred miles from its coast. The peace negotiations did not even touch explicitly on this particular issue, except to the extent that the eastern seaboard states had their jurisdiction over offshore islands to the distance of twenty leagues recognized. The eastern boundaries of the American states were never really a matter of controversy or contention during the peace negotiations as a whole, except for the peripheral issue of fishing rights on the high seas. When the issue arose, there were even indications that the peace commissioners from the United States argued territorial boundaries based on the charters to the individual colonies. When there was controversy over the north-east boundary's inclusion or exclusion of the St. John's River versus the St. Croix River, John Adams's colleagues "thought it would be too hazardous to contend for a river which was not named in the charter of Massachusetts, against a river that was named in it."[126] The Treaty of Paris did have the positive effect of formalizing the existence and powers of the states. Chief Justice Marshall focused on the meaning of the treaty in an 1823 opinion:

956 "By the treaty which concluded the war of our Revolution, Great Britain relinquished all claim, not only to the government, but to the 'propriety and territorial rights of the United States', whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these states. We had before taken possession of them, by declaring independence; but neither the Declaration of Independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled."[127]

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126 Adams is quoted in Morris, *Peacemakers* 363.

127 Johnson and Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat. 584) 584.

In accordance with this last comment by the Chief Justice, Virginia has continued to assert an eastern boundary that extended one hundred miles into the marginal sea.

Q. Do you have an opinion whether the Articles of Confederation infringed upon Virginia's ownership of the marginal sea and the seabed and if so, please state the reasons for your opinion?

A. The Articles of Confederation, as adopted by the Continental Congress in 1777, finally went into force in March, 1781, and formalized the confederation of the United States. Gordon Wood, the leading student of the
957 constitutional history of this period, has recently written that "the Confederation was intended to be, and remained, a Confederation of sovereign states."[128] Article II provided that "each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in Congress assembled."[129] The delegated powers were not insignificant with respect to the concems of this testimony with the exercise of jurisdiction. Article IX granted the Continental Congress the power to make peace and war, to enter into treaties and alliances, "of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas . . . ." The Congress became the last court of appeal

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128 G.S. Wood, *The Creation of the American Republic, 1776-1787* 357 (1969); see also McLaughlin, *Constit. Hist.* 119-120.

129 1 Hen. Stat. 37.

958 in all disputes between the states concerning boundaries and jurisdictions. The Congress acquired authority to operate a navy.[130]

Yet this grant of powers to Congress did not formally infringe upon Virginia's ownership of the marginal sea and the seabed. Wood has emphasized that "whatever the limitations the Confederation may have placed in fact on the individual sovereignty of the states, few believed that their union in any theoretical sense contravened that sovereignty." The individual states remained independent, with their territorial integrity intact. As Wood further noted, "commercial regulation and taxing power, indeed all final governmental, lawmaking power remained with the states."[131]

Q. Did the negotiations between Virginia and the Continental Congress over the cession of the North-West Territory have any implications for Virginia's boundary claims to the eastward and if so, would you please discuss those implications?

A. The sovereign state of Virginia strikingly exercised its independence in its relations with the Continental Congress in the course of negotiations over the cession of lands on the north-west side of the Ohio River to the United
959 States. This episode further demonstrated that Virginia took its territorial boundaries as stated in the early charters very seriously. Within the limits of prevailing knowledge, Virginia had always claimed extensive territory to the west of the settled regions of the colony. The General Assembly passed an act in 1752, for example, to encourage persons to settle on the waters of the Mississippi, which Virginia included within its boundaries.[132]

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130 1 Hen. Stat. 41-43.

131 Wood, *Creation Amer. Republic* 354-355.

132 6 Hen. Stat. 258; renewed in 1753, *Id.* 355-356.

Virginia's claim that it was entitled to the territory northwest of the Ohio River on the basis of the 1609 charter did not go unchallenged in the Continental Congress. The various land speculators and land companies that were vitally interested in this vast expanse of land turned to the Continental Congress to attempt to deny Virginia's claims.[133] Thus Virginia had to prove title to the territory on the
960 basis of its charters before the territory could be conveyed to Congress for the creation of a national domain. None of the theories advanced by the land speculators to justify their competing claims to the northwest territory met with much acceptance inside or outside of the Continental Congress, but they did cause the Virginians to endure several years of anxiety on the matter. The initial argument was that the Continental Congress was a sovereign body that had succeeded to the powers and prerogatives of the British Crown, and thus could exercise control over lands west of the Appalachians as the British had done since 1763. A corollary was that there were lands lying outside the bounds of any particular state and that Congress had succeeded to the sovereignty over them. A further refinement was that the common efforts of the associated states in defense of their liberties had earned them a common right to the Western lands.[134] A letter from Richard Henry Lee at the Continental Congress in August, 1777 alerted

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133 This entire issue is well-treated in the following works: Jensen, The Creation of a National Domain, 1781-1784, 26 *Mississippi Valley Historical Review* 323-342 (1939), (hereinafter cited as Jensen, *MVHR*); J.P. Boyd, The Virginia Cession of Territory Northwest of the Ohio, 6 Jeff. Papers 571-580; Boyd, Virginia's Claim to Western Territory, 6 Jeff. Papers 647-668.

134 These arguments are identified and dismissed by Jensen, 26 *MVHR* 324, 329, 338.

Thomas Jefferson and his fellow Virginians about the general trend of the arguments being used against Virginia's territorial claims; "The Confederation goes on but slowly, occasioned by the immensity of business created by the
961 war. But I find our right to our Charter bounds, as stated by our Act of Government will be strongly contested. The Charter of 1609 it is said has been vacated, and that no transfer of that Charter right can be shown from the Company to the people of Virginia. That therefore the ungranted lands were the property of the Crown, and being taken from it by common exertions, must become common Stock. Will you be so kind as to favor me with your reasons and authorities in support of our right?"[135] For the moment there was no response from Virginia on this particular issue, although in a dispute with Pennsylvania in 1779 over a boundary line between the two states, Virginia did refer to its boundaries "as described in its charter of May 23rd, 1609 . . ."[136]

The General Assembly of Virginia first aroused itself against the activities and claims of the land companies in the fall of 1779 and in the process of a remonstrance to the Continental Congress made another important statement of Virginia's territorial claims. The state had passed an act "to prevent present settlements on the north west side of the Ohio river. . . ." In light of this enactment;
962 "The General Assembly of Virginia cannot avoid expressing their surprise and concern, upon the information that Congress had received and countenanced petitions from certain persons stiling themselves the Vandalia and Indiana company's, asserting claims to lands in defiance of the civil

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135 2 Jeff. Papers 31.

136 10 Hen. Stat. 527. Madison was one of the two boundary commissioners from Virginia in this dispute.

authority, jurisdiction and laws of this commonwealth, and offering to erect a separate government within the territory thereof. Should congress assume a jurisdiction, and arrogate to themselves a right of adjudication, not only unwarranted by, but expressly contrary to the fundamental principles of the confederation; superseding or controuling the internal policy, civil regulations, and municipal laws of this or any other state, it would be a violation of public faith, introduce a most dangerous precedent which might hereafter be urged to deprive of territory or subvert the sovereignty and government of any one or more of the United States, and establish in congress a power which in process of time must degenerate into an intolerable despotism."

The General Assembly then stated its views of the territorial claims of the states versus the Congress:

"Congress have lately described and ascertained the boundaries of these United States, as an ultimatum in their terms of peace. The United States hold no territory but in right of some one individual state in the Union: the
963 territory of each state from time immemorial, hath been fixed and determined by their respective charters, there being no other rule or criterion to judge by; should these in any instance (when there is no disputed territory between particular states) be abridged without the consent of the states affected by it, general confusion must ensue; each state would be subjected in its turn to the encroachments of the others, and a field opened for future wars and bloodshed; nor can any arguments be fairly urged to prove that any particular tract of country, within the limits claimed by congress on behalf of the United States, is not part of the chartered territory of some one of them, but must militate with equal force against the right of the United States in general; and tend to prove such tract of

country (if north west of the Ohio river) part of the British province of Canada."

On behalf of the Commonwealth of Virginia, the General Assembly protested "against any jurisdiction or right of adjudication in congress, upon the petitions of the Vandalia or Indiana company's, or on any other matter or thing subversive of the internal policy, civil government, or sovereignty of this or any other of the United American states, or unwarranted by the articles of the confederation."[137] Commenting on the Virginia Remonstrance, a 964 leading authority on this whole issue concluded: "It is hard to see how any valid legal arguments could have been brought against the Virginia contention, but many feeble theories have been concocted for that purpose."[138]

On January 2, 1781 the Virginia General Assembly set forth several conditions to govern its future cession of the territory northwest of the Ohio River to the Continental Congress. One provision related generally to the remaining territory of the state of Virginia: "That all the remaining territory of Virginia included between the Atlantic ocean and . . . shall be guaranteed to the Commonwealth of Virginia by the said United States."[139] On such a controversial issue Virginia did not intend to miss any opportunities to have its territorial boundaries recognized and even guaranteed. On November 3, 1781 a committee of the Continental Congress presented a report on the Virginia cession that was hostile to Virginia's western land claims. The Congress did not act upon the report and postponed

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137 10 Hen. Stat. 557-559 (Dec. 14, 1779). George Mason was the author of this Remonstrance, 2 Mason Papers 595-598.

138 Abernethey, *Western Lands* 226.

139 10 Hen. Stat. 566.

965 consideration of it sine die in May, 1782.[140] But the appearance of this slanted report finally stimulated the Virginians to a spirited defense of their claims.

In January, 1782 James Madison wrote to Jefferson from Philadelphia to enlighten him concerning the machinations in Congress. Virginia needed documents to prove its title. George Mason and Edmund Pendleton had furnished assistance, but Madison now wanted the results of Jefferson's research. He solicited a thorough survey of the whole subject, "beginning with the original charter, pursuing it thro' the subsequent charters and other public acts of the crown . . . ."[141] Attorney General Edmund Randolph of Virginia seems to have been the focal point for the compilation of evidence supporting the Virginia title. In a letter to Randolph in August, 1782 Madison encouraged him to seek enlightenment from Jefferson. He particularly referred to a document that Jefferson had shown him concerning the agreement between Virginia and the Commissioners of Parliament in 1651, "which shews clearly the ideas entertained by Virga, with respect to her territorial limits subsequent to the resumption of the Char-
965 ter."[142] Mason wrote Randolph in October of the same year:

"I have not bye me Copys of the Virginia Charters in 1606 and 1609, or I should have made some Remark on them, endeavouring to shew that Payne's construction of them is capricious and absurd, as several of his other Strictures are; . . . that the Description and Boundaries are

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140 Jensen, 26 MVHR 330, 332.

141 Jan. 15, 1782. 6 Jeff. Papers 147-149.

142 5 W.T. Hutchinson and W.M.E. Rachal eds. The Papers of James Madison 50 (1962) (Hereinafter cited as Madison Papers).

intelligible, and admit a natural and easy Construction; the Charter of 1609 confirming and enlarging, not destroying that of 1606; that tho' the Virginia Company was dissolved, and the Government resumed by the Crown, the Charter, so far as the Setlers and their Posterity are interested or affected, remains valid; . . . ."[143] Abernethey has pointed out a dangerous pitfall that confronted the land companies and smaller states such as Maryland which challenged Virginia's claim to the western territory. If Virginia's "charter boundaries were denied, the other States would have a hard time showing how their boundaries were established."[144] The lawyer William Samuel Johnson, who argued the case for Connecticut before the Court of Commissioners on the Connecticut-Pennsylvania territorial dispute in December 1781, clearly pointed out the absolute centrality of the royal charters: "All titles in America take their Origin from the Crown in the way of Charters and other Grants . . . . Charters or Grants are the foundation of all American property and charters or Grants once fairly made should operate eternally."[145] Johnson argued that "at the approaching peace with G. Britain our charters will be the best foundation to stand upon in discussing the subject of the back territory . . . . Our charters or Grants from the King of England made the only *firm basis* of American claim to those back lands."[146]

Sometime in the fall of 1781 Arthur Lee wrote a memorandum entitled "A concise view of the title of Virginia to

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143 2 Mason Papers 754-755 (Oct. 19, 1782); see also an enclosure titled "Some Remarks on the Title of Virginia to the Lands on the Western-Waters" in a letter from Mason to S. Purviance, May 20, 1782, in 2 Mason Papers 727-728.

144 Abernethey, Western Lands 366.

145 6 Jeff. Papers 495-496 reprints Johnson's argument.

146 6 Jeff. Papers 497.

the Western Lands in refutation of the Pamphlet called
968 Public good."[147] Lee's arguments were particularly interesting because they were those of a Virginia lawyer trained in England. From 1770 to 1774 Lee had attended the Middle Temple in London and was called to the Bar in London in April, 1775. He remained in Europe in the service of the Revolutionary cause until 1780, when he returned to service in the Virginia Assembly and from 1782 to 1785 as a Virginia delegate to the Continental Congress. Lee initially referred to the 1606 charter as establishing Virginia's claim to the western territory: "This Charter was confirmed and enlarged in 1609 under which we now claim." Lee then proceeded to analyze the significance of Virginia's becoming a royal colony in 1624: "Those who wish to rob Virginia of her territory really for the benefit of certain Companies of Land-mongers, that *pretendedly* for *public good,* make great use of this change, as if it anulled the Charter, and thereby took from the original Settlers and from us their Descendants the rights derived from the Charter. But in this there is neither truth nor justice. The Charter was
969 under the great Seal. The Inhabitants had done nothing to forfeit it, and the transaction between the Proprietary Company and the Crown for a change of the exercise of Sovereignty from the Company to the King, would not effect their rights which were distinct from those of the Company."

Jefferson was inevitably involved in this entire controversy. In a memorandum "Notes Concerning Boundaries"

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147 The manuscript is in the Lee Family Papers at Alderman Library, University of Virginia. The attributed date of October 28, 1781 seems reasonably accurate. Thomas Paine in 1780 had published *Public Good, being an Examination into the Claim of Virginia to the vacant Western territory. . .*

prepared ca. 1782-1784 Jefferson wrote: "Charters from the crown, whether to *proprietors* or *people*, are fundamental rights, vesting in all, and not alterable but by consent of all parties."[148] Jefferson also prepared a more extensive "Outline and Preamble of Argument on Virginia's Claim" in 1782.[149] It was really an outline for a legal brief establishing the extent of Virginia's territorial boundaries as derived from the original charters. The outline began as follows:

"A brief history of the several charters.
Their extent.
. . . .
Resumption by the crown
Whether there was such resumption
it's effect only to change the form of government
not lessen extent of country . . . .
Encroachments of the crown by granting Maryld.
Pennsylva. Carolina
The opposition of Virginia
Stipulation with the Commissioners for limits.
Subsequent assurances of the crown not to encroach again.
. . . .
Ratification by Virga; at the forming new constitution
. . . .
Acknowledgement that our charter was in force by ministerial writers in beginning of late dispute."

The previous pages of my testimony make it possible to understand the logic and sequence of Jefferson's argument without much difficulty.

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148 6 Jeff. Papers 487.

149 See 6 Jeff. Papers 663-668.

The report of a committee of Congress that finally led to the cession of northwest lands by Virginia appeared in June, 1783. The Congress agreed to the terms on September 13, 1783. Although generally recognizing Virginia's territorial claims in their entirety, the committee did not believe that they could agree to the provision requiring a United States guarantee of Virginia's remaining territory, as a precondition for the cession. Congress was only seeking cessions of land; it had not had an opportunity to dis-
971 cuss the right of Virginia to the territory it was not ceding. Most importantly, "your committee conceive this condition of a guarantee, to be either unnecessary or unreasonable, inasmuch as, if the land above-mentioned, is really the property of the state of Virginia, it is sufficiently secured by the confederation, and if it is not the property of that state, there is no reason or consideration for such guarantee."[150] Congressional acceptance of this report put to rout the various theoretical challenges to Virginia's territorial boundaries. Jensen noted that "Congress was at last passing from the control of the landless states whose motives were a compound of jealousy and private interest."[151] The efforts of leading Virginians had succeeded in establishing their case. The implicit guarantee and recognition of these claims by the Continental Congress suited the legal minds of the Virginia General Assembly. In October, 1783 it passed an act to authorize the cession of the northwest territory to the United States. Virginia in formal fashion ceded the jurisdiction it had "to the territory or tract of country within the limits of the Virginia charter . . . ."[152]

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150 11 Hen. Stat. 569-570.

151 Jensen, 26 MVHR 338. Only Maryland and New Jersey opposed acceptance of the Virginia cession at this point.

152 11 Hen. Stat. 327.

Congress accepted this second Virginia cession in March, 1784.[153] By requiring such a formal cession of territory, the United States basically recognized the validity of Virginia's remaining territorial and jurisdictional claims under its 1609 charter.[154] Virginia's eastward boundary extending one hundred miles into the marginal sea remained untouched.

Q. In your opinion, what effect did the adoption of the Federal constitution have upon Virginia's claim to ownership of the marginal sea and the seabed within one hundred miles of the eastern coast and its inclusion within the territorial boundaries of the state?

A. In the period of state constitution-making and under the Articles of Confederation the separate and independent states did not think in terms of a national government or a single republic.[155] Yet the decision at the Constitutional Convention in 1787, as later ratified by the individual states, was to subordinate the sovereignty of the states to the larger national interests embodied in a central government. The federal Constitution included specific and well-known grants of jurisdiction by the states to the United States. Yet none of these directly affected Virginia's claims to ownership and jurisdiction over the marginal sea, the seabed, and the resources thereof.

Article 1, Section 8 of the Constitution granted the federal government authority over duties, imposts, defense, foreign commerce, piracies and felonies on the high seas, and a navy. But this did not limit Virginia's claims to ownership of the marginal sea and seabed under its charter grants.

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153 See the "Deed of Cession as Executed" in 6 Jeff. Papers 577-580.

154 See *The Hubard Report, 1844* 21 for such an argument.

155 See Wood, *Creation Amer. Repub.* 128-130, 356.

The limits on the powers of individual states as stated in Article 1, Section 10, included restrictions on the granting of letters of marque and reprisal, entering into treaties and alliances, imposition of duties, and the maintenance of troops or ships of war in peace time. But most of these limitations dated from the Articles of Confederation and did not really alter the authority of Virginia over the marginal sea and seabed in terms of ownership. Virginia's maritime jurisdiction was limited in some areas in comparison to the authority exercised by the independent state, such as the provision in Article 3, Section 2, granting the federal government judicial power over all cases of "admiralty and maritime jurisdiction." Article 4, Section 3, empowered the central government to regulate the territory or other property of the United States, but "nothing in this constitution shall be so construed, as to prejudice any claims of the United States, or of any particular state." Finally the 10th amendment to the Constitution further guaranteed the territorial and jurisdictional claims to the eastward that Virginia made on the basis of its original charters: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Federalist No. 45 confirmed this interpretation, reassuring the states that: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement and prosperity of the state."

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In a debate in the Virginia ratifying Convention of 1788, Madison tried to assuage the fears of those concerned about the grant to the federal government of exclusive power of legislation in any area that became the seat of the United States government: "Let me remark. . . that there must be a cession, by particular states, of the district to Congress, and that the states may settle the terms of the cession."[156] By the specific and limited grants to the federal government embodied in the Constitution and by the ratification of it, Virginia did nothing to lessen its claim to ownership of the marginal sea and the seabed within one hundred miles of the eastern coast and its inclusion within the territorial boundaries of the state.[157]

Q. Do you have an opinion whether the colony and the Commonwealth of Virginia exercised authority and jurisdiction over the marginal sea, the seabed, and the resources thereof in the seventeenth and eighteenth centuries and if so, would you state your reasons for your opinion?

A. A response to this query initially requires a survey of the general exercise of authority and jurisdiction in the colony and state. Between 1624 and 1776 Virginia was a royal colony owing ultimate allegiance to the Crown of England. Following a period of salutary neglect of the American colonies in the first half of the seventeenth century, the Crown evolved a system of imperial supervision

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156 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 433 (J. Elliot ed. 1901).

157 See Judge A.T. Embrey, *"Waters of the State," or Property in Virginia in the Banks, Shores and Beds of the Bay of Chesapeake, the Sea, the Rivers and Creeks of the State and Control of the Waters Thereof* 162 (1931); also W.U. Solberg, ed. *The Federal Convention and the Formation of the Union of the American States* 366-374 (1958).

to regulate its holdings. After 1675 the Lords of Trade and Plantations, a standing committee of the Privy Council, exercised direct supervision over the colony of Virginia. After 1696 the Board of Trade and Plantations, a body separate from the Privy Council, replaced the Lords of Trade. The Board of Trade reported to a committee of the Privy Council and ultimately to the king in council. Such other English royal officials as the lords of the Treasury, the lords of the Admiralty, and the attorney-general also shared in the administration of the colonies.

Royal supervision of Virginia featured a system of dispersed responsibility in England that made prompt and effective administration of the colony from England impossible. Delays and negligence on the part of the imperial authorities were common. The Board of Trade was particularly inefficient between 1714 and 1748.[158] In accordance with the principles of mercantilism England had only
977 a limited concern with the colony of Virginia in any event. So long as the colony made a substantial contribution to the economic welfare of the mother country, many details and certain aspects of colonial governance escaped the attention of the imperial authorities. The English were concerned to conserve the royal revenues in the colony, enforce the Navigation Acts, and encourage successful trade. The Crown was primarily responsive to the needs of the English merchants trading in Virginia. Only flagrant infringements of the royal prerogative attracted the attention of the imperial authorities.

As a royal province Virginia was directly responsible to the Crown and not to parliament. Especially in the seventeenth century, the Crown insisted that the colonies were

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158 In general see P.S. Flippin, *Royal Government in Virginia* 36-39, 42-43-49, 69, 71 (1919). (Hereinafter cited as Flippin, *Royal Govt.)*

its preserve. It guaranteed the rights of the colonists by royal charters. Parliamentary attempts to impinge on the royal prerogative in a variety of areas involving the colony were not successful.[159] Although some statutes enacted by Parliament were specifically extended to include the colonies, Virginia was primarily subordinate to the Crown during the colonial era.

978 The series of instructions given to newly appointed royal governors embodied essential royal policy for Virginia. The governor became the main agent of the royal prerogative in the colony. Yet his instructions rarely encompassed much more than the central econmic concerns of the mother country and their successful implementation. The sets of instructions issued to Virginia governors from 1682 to 1771 showed "that during this period the policy of the British government in regard to the colony was practically uniform."[160] Especially in the eighteenth century, some of the royal governors were not even particularly enthusiastic supporters of the crown. The official royal governor of Virginia never set foot in the colony from 1704-1737, and the royally appointed lieutenant-governors fell under the sway of the Assembly. Governor Gooch was not obsessed with upholding the royal prerogative from 1727 to 1749; he allowed the Burgesses to accumulate power. So long as the interests of the Crown, as represented by the British merchants, were protected, the imperial authorities were increasingly willing to leave the House of Burgesses to its own devices. Wilcomb Washburn, a leading historian of colonial Virginia, has described the resulting relationship between the Crown and Virginia

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159 See N. Varga, The English Parliament's Authority over Virginia before the Restoration, 62 *Va. Mag. Hist. Biog.* 281-288 (1954).

160 Flippin, *Royal Govt.* 69.

by the late seventeenth century: "The Virginians' relation-
979 ship to the crown was increasingly informal rather than emotional, and their true interests self-centered."[161]

The royal governor was the single most powerful and important individual in Virginia. He was the direct representative of the royal prerogative. He recommended names for the Council that served him in an advisory capacity. The governor summoned the Assembly and could prorogue it at will. He had initial power to review and disallow statutory enactments of the legislature and discretionary power in matters not provided for by his instructions. The instructions to the governors and their Councils in the first decades of royal rule empowered them "to direct and govern, correct and punish our Subjects now Inhabiting or being, or which shall hereafter inhabit or be in Virginia, or in the Isles, Havens, Creeks, Ports or Territories thereof. . . ."[162]

980 Thus on a day to day basis the governor was intimately concerned with the exercise of the jurisdiction that Virginia held under its charters. Distance from England and the mercantile orientation of English imperial policy permitted the governor considerable power over the ordinary conduct of affairs. The historian Flippin has made the important point that "so long as a governor could keep the colony quiet and prosperous, and trade with England was successful, thus increasing the royal revenues and furnishing the British merchants a lucrative return for their

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161 W.E. Washburn, Law and Authority in Colonial Virginia, *Law and Authority in Colonial America* 126 (G.A. Billias ed. 1965).

162 See the instructions to Sir Francis Wyatt in 1639, to Sir William Berkeley in 1650, and to Sir George Yeardley in 1626, 1 McDonald Transcr. 371, 392, 401. See generally L. Labaree ed. *Royal Instructions to British Colonial Governors, 1670-1776* 13, 50, 82-84, 134-135 (1935).

investment, nothing was said about the royal instructions, the royal prerogative, or the popular spirit of the colonists."[163]

The Governor's Council was closely associated with him in the day to day exercise of jurisdiction. The Council was the upper house of the legislature as well as the General or highest court in Virginia. The General Court enjoyed an exceedingly broad jurisdiction to deal with almost any legal matter that arose in the colony.[164] The councillors "were the most influential men in the colony, since they filled the most important offices and held, on account of their family relationship and wealth, the highest social position."[165] Their power steadily increased vis-a-vis the governor in the colonial era, and their support became essential to his success in office. They could and did unite with the House of Burgesses against a recalcitrant governor. An action of the Council in April 1754, illustrated their conception of their own importance by the mid-eighteenth century. The Crown had forwarded some instructions concerning legal appeals to England. The Council responded by appointing a committee to inform his majesty "how incompatible the Obedience to such an Instruction would prove with the laws and Constitution of this Colony."[166]

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163 Flippin, *Royal Govt*, 149.

164 See, for example, 3 Hen. Stat. 289 (1705). The destruction of the original records of the General Court of Virginia during the Civil War created a major gap in the historical and legal records of the colonial era. It is most likely that the General Court at one time or another touched on issues directly relevant to the concerns and argument of this memorandum; yet almost no record of the decisions of the General Court now exist.

165 Flippin, *Royal Govt.* 166-167.

166 5 Exec. J. Council 465.

The House of Burgesses enjoyed an even greater accession to the exercise of power than the Council in colonial Virginia. The first meeting of the Grand Assembly of Virginia in 1619 initiated a substantial degree of self-government by this legislative body. The Assembly continued to meet on a fairly regular basis for the remainder of the colonial era. The Crown approved its existence and gave it basic powers to formulate policy for the governance of Virginia. Although the Assembly did not meet every year,
982 it did keep a close watch on the Governor's activities. Prior to 1680 the governor, Council, and Burgesses met together under the rubric of the Grand Assembly.

As early as the mid-seventeenth century the Burgesses had a sense of their own importance and power in the governance of the colony. In a conflict with the governor and Council in 1658, the Burgesses declared themselves as representatives of the people to have the supreme power in Virginia, subject only to "the supreme power in England."[167] In November, 1682, the General Assembly passed an act imposing penalties on any persons "that shall publish or declare that the acts of assembly of Virginia are not of fforce."[168] In April, 1752 the General Assembly addressed a representation to the Crown against the disallowance of certain laws enacted during the 1748 revision of Virginia laws. They requested royal reconsideration of the disallowed statutes, and among other arguments made reference to "the antient constitution and usage of this colony. . . ."[169] The power of the purse exercised by the legislature was a major reason why its quest for power was so successful in the colonial era.

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167 1 Hen. Stat. 502, also 530.

168 2 Hen. Stat. 501-502.

169 5 Hen. Stat. 435.

983 The movement for independence only increased the powers of the Virginia legislature. The new state constitution greatly reduced the powers of the governor and intensified legislative domination of government. Wood has argued that "to the Americans in 1776 their legislatures represented more than the supreme lawmaking authority in their new states. They were as well the heirs to most of the prerogative powers taken away from the governors by the Revolution."[170]

One finds little hesitation among colonial governors, Councils, and Legislatures in Virginia to exercise jurisdiction over almost any problem or issue that came to their attention and required action. Such assertion of authority with respect to the marginal sea, its resources, and the seabed, will be assessed in the remainder of this testimony. These agencies of government will appear as very much problem and need oriented. They had little hesitation in acting upon almost any issue they encountered. The issues they treated with the greatest delicacy and circumspection involved the fundamental concerns of mercantile policy, but this had little to do with the interests of this testimony. The colonists enjoyed a substantial degree of self-government with respect to the exercise of authority and jurisdiction over the marginal seas, the seabed, and the natural resources of the colony.

The Virginia legislature acted with dispatch upon all issues which arose with respect to the Eastern Shore of Virginia and the seacoast in general. This illustrated the governmental response to particular problems and its general awareness of the special concerns of Virginia's coastal region. Land patents were readily issued for the numerous islands off the seacoast in the early years of settlement.[171]

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170 Wood, *Creation Amer. Repub.* 136-143, 154, 162-163.

171 See Ames, *Studies of the Virginia Eastern Shore* 32-35.

In 1780 the Assembly ordered that certain unappropriate lands on the eastern seashore that had been reserved for the public's common good, especially "the accustomed privilege of fishing," should remain as common land.[172] In 1785 the Assembly passed "an act to dispose of the waste and unappropriated lands in the commonwealth of Virginia, on the eastern waters."[173] When a person complained to the Assembly in 1679 that others were fishing on his property and hauling their nets on his shore, the legislators declared that every man's right to the land patented by him extended to low water mark, making the
985 foregoing activity subject to an action of trespass.[174] The legislature frequently declared that owners of high lands adjoining swamps, marshes or sunken grounds were to have one year's notice before another person could take up this land.[175]

The General Court of Virginia exercised direct jurisdiction over the seabed in a case around 1735 involving a lot reclaimed from the sea in the town of Hampton. The Court declared that land claimed or gained from the sea belonged to the owner of the adjoining property, if the water had previously ebbed and flowed over it.[176] In 1771 the Virginia Council rejected a petition for a grant of land on Cape Henry, because the seashore and lands were useful to the local inhabitants "for carrying on a Fishery" and for erecting a lighthouse. "The whole of

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172 10 Hen. Stat. 226-227; renewed in 1792, 1 S. Shephered, ed. The Statutes at Large of Virginia 65 (1835-1836).

173 12 Hen. Stat. 100-101.

174 2 Hen. Stat. 456.

175 2 Hen. Stat. 300 (1672); 3 Hen. Stat. 528 (1710); 5 Hen. Stat. 421-422 (1748).

176 Curle v. Sweeney, *Virginia Colonial Decisions. The Reports by Sir John Randolph and by Edward Barradall of the Decisions*

[continued]

the said Lands, as well the desert, as the Sea and Bay Shores, be reserved for his Majesty's use . . . ."[177] In 1704 the Council exercised direct jurisdiction over an episode occurring on Assoteague Island off the coast of Accomack county.[178]

But in many ways the marginal sea, its resources, and the seabed did not loom large on the Virginia horizon in terms of areas that required the exercise of jurisdiction. No one lived on the sea; governing bodies found themselves more often preoccupied with problems in the inhabited parts of Virginia. The marginal sea was generally not within the boundaries of any individual county, so it was removed from the regular attention of powerful local authorities. Chesapeake Bay and Virginia's great rivers generated many more problems that required attention than did the marginal sea. And despite the maritime flavor of colonial life, even in Virginia, the Eastern Shore and the marginal sea were far removed from the habitations of the vast majority of Virginians. As late as 1700 a resident of the Eastern Shore who had agreed to serve on the Council reminded his colleagues of his geographical isolation: "Liveing at so great a Distance on the Eastern Shore, beyund the Great Bay of Cheasapeak where the Passage is very often Troublesome and hazardous the same may sometimes Casually hinder my attendance . . . ."[179] On the sea coast the threat of bad

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176 (Continued) *of the General Court of Virginia, 1728-1741* B119 (1909).

177 6 Exec. J. Council 406-407.

178 2 Exec. J. Council 400, 434.

179 2 Exec. J. Council 91.

987 winds, storms, and tides encouraged ships to hurry within the Virginia Capes as fast as possible and not linger in the marginal sea. Yet despite all of these qualifications, the governing bodies in colonial Virginia still exercised a substantial jurisdiction over the marginal sea, the seabed, and the resources thereof.

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988 Q. What forms of maritime jurisdiction did the colony and State of Virginia exercise over the marginal sea? A. Twentieth century Americans need to be reminded of the maritime flavor of life in pre-industrial times, even in a colony and state like Virginia, which had such an intense commercial preoccupation with tobacco and the land required to grow it. Colonial Virginians did choose to exploit Virginia's landed resources much more than those derived from the sea and its seabed. Yet the author of the standard study of the Chesapeake world in the colonial era has pointed out that "colonial dependence upon shipping for marketing staple commodities abroad, for importation of necessary goods from overseas, for securing the latest news and fashions from the mother country, for travel, and for protection from the enemy, lent a maritime flavor to life in Virginia and Maryland and made the inhabitants more acutely aware than their descendants today of the importance of the sea and of navigation."[180] The most common contact of the Virginia colonists with water was not the seacoast or the ocean, but the major rivers and creeks and the vast expanse of Chesapeake Bay. Jurisdic-
989 tion over these bodies does not pertain directly to the concerns of my testimony.

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180 Middleton, *Tobacco Coast* 25.

One entered Chesapeake Bay from the Atlantic ocean through the Virginia Capes, Cape Charles on the north, and Cape Henry to the south, with a distance of about twelve miles between them. From Cape Henry to Old Point Comfort at the mouth of the James River, the distance was 17.5 miles, while from Cape Henry to the first settlement at Jamestown the distance was 57 miles.[181] The Virginia seacoast, which was open all year long, featured navigable rivers, harbors and anchorages.

Despite some continuing debates with common law courts over the extent of their jurisdiction in the seventeenth century, English Admiralty courts enjoyed a flourishing supervision over the seas, public rivers and streams, and the shores of the sea. They controlled wrecks, whales, flotsam, privateers, pirates, and some issues pertaining to fisheries.[182] But for most of the seventeenth century separate Admiralty courts were not established in the American colonies. The colonies were left to cope with the traditional issues pertaining to admiralty jurisdiction through the existing common law courts. In Virginia the county courts and the General Court tried admiralty cases, including some matters occurring on the high seas, and prizes and wrecks.[183] Even during the period of Company rule, the colony of Virginia enjoyed a direct grant of admiralty jurisdiction. Sir Samuel Argall was both governor and admiral of Virginia. His duties as admiral included protection of the colony from attack by sea, the seizure

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181 Figures cited are from Middleton, *Tobacco Coast* 31 and 1 Jamestown Voy. 465.

182 See Crump, *Colonial Admiralty Jurisdiction* Chapter 1.

183 General information on admiralty jurisdiction as exercised in colonial Virginia can be found in Crump, *Id.* chapter two; Bruce 1 *Institutional History* 697-705; Flippin, *Royal Govt.* 324-333.

of interloping trading vessels, and supervision of ships coming into the harbors of Virginia.[184] The 1609 charter of the Virginia Company granted the following papers to the governors and officers appointed for Virginia by the Company: "They shall and may, from time to time forever hereafter, within the said precincts, of Virginia, or *in the way by sea thither and from thence,* have full and absolute power and authority, to correct, punish, pardon, govern and rule, all such the subjects of us, our heirs and successors, as shall, from time to time, adventure themselves in any voyage thither, or that shall, at any
991 time hereafter, inhabit in the precincts and territories of the said colony, as aforesaid, according to such orders, ordinance, constitutions, directions, and instructions, as by our said council, as aforesaid, shall be established; and in defect thereof, in case of necessity, according to the good discretions of the said governor and officers, respectively, as well in cases capital and criminal as civil, both marine and other; . . . ."[185]

The governor and Council that ran Virginia on a day to day basis in the seventeenth century possessed a considerable maritime jurisdiction, whether in their capacities as an executive, legislative, or judicial body. The royal instructions to Lord Culpeper as governor of Virginia, in December, 1679 and again in January, 1682, directed him "to exercise all the powers belonging to the place and Office of Vice-admiral of and in all the seas and Coasts about your Government. . . ."[186] The Grand Assembly of Virginia placed specific jurisdiction over maritime causes

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184 Crump, *Colonial Admiralty Jurisdiction* 59-60.

185 1 Hen. Stat. 96 (emphasis added).

186 5 McDonald Transcr. 291 and 6 *Id.* 19. Governor Effingham received the same instruction in Sept. 1683, 6 *Id.* 233.

in the hands of the General Court and the county courts. An act of the Assembly in March, 1658, empowering county courts to hear maritime causes, illustrated the extent to which matters normally handled by the Admiralty courts in England became the concerns of local common law jurisdictions in seventeenth century Virginia. "The countie courts shall heare maritime causes, and the sherriffes shall have power to arrest on board shipps by warrant from the Governour or any one of the councill, or under the hand of any two commissioners, whereof one to be of the quorum, untile it be otherwise settled."[187] In June, 1680 the Assembly confirmed this power of sheriffs in response to a query. Their authority was "equall and alike with their authority and power on land in their counties in like cases, and this to continue in force untill there be courts of admiralty settled."[188]

In March, 1660 the Grand Assembly took the surprising step of passing "an act for establishing a Court of Admiralty."[189] Its enactment demonstrated the willingness of governing bodies in colonial Virginia to act upon almost any problem that seemed to require attention:

"Whereas by daily experience wee find the inconveniences that happen to the inhabitants of and traders into this country for want of a court of admiralty. Bee it enacted and ordained by this present Assembly, that the Governour and Council shall have full power and authority of a court of admiralty to cognoss, determine and administer justice in all things pertaining to seafairing, that shall appertaine, happen or fall out (within the jurisdiction of this collonie) either between mariner and merchant, or mariner and

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187 1 Hen. Stat. 466-467.

188 2 Hen. Stat. 489.

189 1 Hen. Stat. 537-538.

master . . . and all other business whatsoever among sea-affairs done on the water, any where within the limits and the jurisdictions of Virginia or the lawes and cognizance thereof, with the cognition of writts, the causes and actions of reprisalls, of letters of marque to take stipulations, cognitions and insinuations, And to do all other things without which the jurisdictions of the admiralty cannot stand or bear out, ... "

The admiralty court was further instructed to proceed against pirates and illegal traders. Whatever the good intentions of the Assembly, this act remained a dead letter. Perhaps the best reason for the inaction appeared in an answer by Governor Berkeley to a query from the Lords Commissioners of Foreign Plantations in 1670: "What courts of judicature are within your government relating to the admiralty? Answer. In twenty eight yeares there has never been one prize brought into the country; so that
994 there is no need for a particular court for that concern."[190]

Although the General Court and the county courts continued to carry the burden of exercising admiralty jurisdiction, more and more problems seemed to surface in the last years of the seventeenth century. This led to a movement for the creation of separate Admiralty courts in all of the American colonies. In May, 1691, in response to a royal instruction for the appointment of a court of Exchequer, the Council responded that a court of Admiralty was also an absolute necessity in Virginia. The Council further requested "that Rules and Methods for the proceedings in the said Courts may be given, there never having been either of these Courts in this Country, . . . "[191] The whole issue of admiralty jurisdiction was becoming

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190 2 Hen. Stat. 512.

191 1 Exec. J. Council 177, also 526.

more prominent. The newly arrived governor, Sir Edmund Andres, read his royal commission to the Council in September, 1692, "Constituteing and Appointing him Vice Admirall of the Rivers within this Government *and the Seas Adjacent*. . . ."[192] In October, 1696 the Council sought the opinion of the Attorney-General of Virginia as to which court should handle the issue of the legitimacy of claims to two prize ships. It was his opinion that the governor may "appoint such persons as you shall think fitt for tryal and determination of Such maritime affairs. . . ." But the Council followed his alternative recommendation of placing the cases before existing courts of record in the colony.[193] In June, 1696 the Council followed the opposite course in the case of a French prize captured by a royal ship during a voyage to Virginia. "It is the opinion and advice of the Councill that there being no Court of Admiralty erected in this Government his Excellency may and ought to give Commissions under the Seal of the Colony appointing a Judge register Marshall and other officers necessary for tryal of the said prize." The governor appointed one member of the Council as an Admiralty judge to conduct a special court of Admiralty.[194] It was perhaps most significant in terms of the exercise of maritime jurisdiction that the colony handled the entire matter on its own.

In 1697 the Crown through a directive sent to Virginia from the High Court of Admiralty established a separate Admiralty court for Virginia. This action followed the restatement of the acts of trade in 1696 and made clear

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192 1 Exec. J. Council 270 (emphasis added).

193 1 Exec. J. Council 355, 358.

194 1 Exec. J. Council 367-369.

that the new admiralty courts had a primary responsibility to enforce royal trading policy. The colonial courts also
996 exercised jurisdiction during the remainder of the colonial era over such matters as privateering, piracy, prizes, wrecks, and whales. The Admiralty court set up by the Virginia Council early in 1698 for Virginia and North Carolina was a part of Virginia's judicial system. Appeals were possible to the High Court of Admiralty in England.[195] The latter appointed the governor of Virginia as a Vice-Admiral, who in turn appointed the judges for the local Admiralty court.[196]

The new Admiralty courts were more closely linked to the imperial authorities than the courts that had handled maritime matters in the seventeenth century. In theory the new courts were also self-supporting on the basis of the fees they earned from cases heard. A letter received by the Council from the king in August, 1704, directed them to "be obedient to such orders and Instructions as they shal from time to time receive from the Lord high Admiral and to require all Persons in this Plantation whom it may concern to be aiding and assisting in the recovery
997 of her Majesty's dues and the dues of the Lord high Admiral in cases of Prizes. . . ."[197] The Council sent a copy of these instructions to the Collectors of Customs and the Naval officers of the several districts into which Virginia was divided. The suppression of illegal trade remained

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195 See generally Crump, *Colonial Admiralty Jurisdiction*, chapter 9; 1 Exec. J. Council 379; 2 *Id.* 25-26.

196 See 2 Exec. J. Council 251, 259, 264; 1 *Id.* 399; 2 *Id.* 64, 126, 309, 430; 3 *Id.* 248; 2 Spotswood 351-354; Labaree ed. *Royal Instructions* 442.

197 2 Exec. J. Council 376.

one of the primary expectations of the imperial authorities with respect to the Admiralty court in colonial Virginia.[198]

This Admiralty court exercised a broader and more expansive authority than the Admiralty court in England.[199] In 1730, 1743 and 1750 Governor Gooch described this jurisdiction as follows in response to the queries of the Board of Trade on the present State of Virginia:

"For breaches of the Acts of Trade, and for determining Controversys concerning Salvage, mariner's wages, and other Maritime Affairs, there is a Court of Admiralty held before a judge constituted by Commission under the Seal of the High Court of Admiralty of Great Brittain; and to this Court belong an Advocate, a Register and Marshal appointed by the Governour who, by a Commission is also
998 Vice Admiral of all the *Seas, Coasts,* Rivers and Creeks *within his Government.* This Court is not held at any certain time, but is called as Occasion or Business require. . . . "[200]

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198 See Labaree ed. *Royal Instructions* 383.

199 The issue is discussed by L.K. Wroth, The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction, 6 *AJLH* 250-251, 366 (1962).

200 July 23, 1730 in Colonial Office 5/1322, ff. 68-74, Public Record Office, London; Aug. 22, 1743 in C.O. 5/1326, ff. 12-19; 1750 in C.O. 5/1327, ff. 78-83. I am indebted to Dr. Edward M. Riley, Director of Research at Colonial Williamsburg, for furnishing transcripts of these documents. Governor Dinwiddie's description in 1755 was similar to those made by Governor Gooch. 1 Dinwiddie 384.

The Virginia Admiralty court supervised an expansive territory. Hartwell, Chilton, and Blair in their report on Virginia written in 1697 ascribed the admiralty functions of the governor of Virginia to his position "as Vice-Admiral of the Virginia Seas."[201] Such a description at the very least included the marginal sea off the coast of Virginia. In April, 1699 the General Assembly stipulated as part of
999 an act against pirates and privateers "that all treasons, fellonyes, piracyes, robberies, murders or other capitall offences that shall be commited upon the high seas or in any river, . . . where the admirall hath jurisdiction, shall be enquired, tryed, heard, determined, judged and execution awarded and done within this his majestyes collony and dominion in such forme as if such offence had been comited in and upon the land of this his majestyes collony and dominion."[202] The indictment of a pirate in Virginia in 1719 was for an act "on the high seas, near Cape Charles in this Colony, within the Jurisdiction of the Admiralty and of this Court . . . ."[203] In 1719 the Vice-Admiralty court of Virginia also condemned and sold the goods captured from a pirates' ship in North Carolina. Virginia proceeded to do this despite North Carolina's objection that the ship should have been condemned in that colony as a wreck. Virginia forwarded the value of the condemnation to England to await the royal decision.[204]

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201 H. Hartwell, J. Blair, and E. Chilton, *The Present State of Virginia, and the College* 22 (H. D. Farish ed. 1940). The three authors were prominent royal officials in Virginia.

202 3 Hen. Stat. 178.

203 1 *Calendar of Virginia State Papers and Other Manuscripts, 1652-1781* 196 (W. P. Palmer et al. eds. 1875-1893).

204 2 Spotswood 316-319.

The colonists lived in an age of imprecision and lack of geographic knowledge with respect to martime matters.
1000 This encouraged Virginia to exercise an expansive maritime jurisdiction with impunity. An episode in 1715, for example, suggested that the Admiralty in England was not capable of careful or sharp distinctions with respect to the maritime jurisdiction of Virginia. Governor Spotswood discovered that the Admiralty had ordered a royal ship to Maryland and then to Boston. He sent the following information to the Secretary of the Admiralty: "I apprehend you are under some mistake as to the Scituation of that province; for tho' it appears by the Map that part of Maryland is bounded on ye Sea, yet the Seat of the Government, and the greatest part of the Province lyes far up the Bay of Chesapeake, whereas the Land on the Sea Coast is little inhabited, and no port or harbor on that side . . ."[205] He generously suggested that in future they send their missives to Maryland via the Virginia government.

On the eve of the American Revolution the Admiralty court in Virginia functioned much as it had during the eighteenth century. It was not popular by this time because of its role in the enforcement of the acts of trade. The Crown recognized its problems with illegal trade by an order-in-council dated July 6, 1768 establishing four Vice-Admiralty courts in the colonies to hear appeals from
1001 provincial admiralty courts or to have original jurisdiction in the enforcement of the acts of trade.[206] Virginia was placed in the Philadelphia Vice-Admiralty district.

At the Virginia Convention in December, 1775, the colonists decided to enforce the continental association

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205 2 Spotswood 107.

206 Jensen, *Amer. Col. Doc.* 707-708.

against importation. The Convention appointed three men as Admiralty judges to hear breaches of this non-importation agreement. In May, 1776 the Convention gave the Admiralty judges jurisdiction over all captures of enemy vessels. The new Virginia constitution of June, 1776 provided for regular judges of Admiralty matters.[207]

The Virginia General Assembly passed a statute creating a state court of Admiralty in October, 1776:

"The said court shall have cognizance of all causes heretofore of admiralty jurisdiction in this country, and shall be governed in their proceedings and decisions by the regu-
1002 lations of the continental congress, acts of general assembly, English statutes prior to the fourth year of the reign of King James the first, and the laws of Oleron, the Rhodian and Imperial laws, so far as the same have been heretofore observed in the English courts of admiralty, save only in the instances hereafter provided for. If in any case the regulations of the American congress shall differ from those established by act of the general assembly of this commonwealth, if such case relates to a capture from any publick enemy with whom the United States of America are or may be at war, the said regulations of the congress shall be observed. In all other cases, the supremacy of the laws of this commonwealth within the same shall prevail."[208]

The Assembly passed a further statute concerning the Admiralty court in May, 1779. The above passage was rewritten as follows:

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207 The details are from 9 Hen. Stat. 103-105; 1 *Official Letters of the Governors of the State of Virginia* 21 note (H. R. McIlwaine, ed. 1926-1929); 9 Hen. Stat. 117. The Virginia Council of State received resignations from three Admiralty judges and appointed others in their places in August, 1776. 1 J. Council State 103.

208 9 Hen. Stat. 203.

"The court of admiralty . . . shall have jurisdiction in all maritime causes, . . . and shall be governed in their proceedings and decisions by the regulations of the congress of the United States of America, by the acts of the general assembly, by the laws of Oleron, and the Rhodian and Imperial laws, so far as they have been heretofore observed in the English courts of admiralty, and by the laws
1003 of nature and nations. If the regulations of congress happen to differ from those of general assembly, the latter are declared to be supreme in cases wherein citizens only are litigants, and the former in all other cases: . . .[209]

The Virginia Court of Appeals exercised admiralty jurisdiction on an appellate basis after 1776.

The Virginia Admiralty Court functioned in an independent fashion during the Revolutionary years. In May, 1781 the Assembly authorized Congress to levy a duty of five per cent on all prizes and prize goods condemned by the Virginia Admiralty court, but then suspended the act in November until other states passed similar laws.[210] In March, 1782 the Virginia Council of State responded to a letter from the governor of North Carolina by issuing a directive to the Virginia Admiralty Court, so that nothing can "interrupt that harmony which ought to subsist between the United States of America."[211] In October, 1788 the Virginia Assembly established district courts: "Those cases in which the court of admiralty hath jurisdiction by law, and which are not taken away by the constitution of the United
1004 States, are hereby transferred to the district courts, to be

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209 10 Hen. Stat. 98.

210 10 Hen. Stat. 409, 451

211 3 J. Council State 56. This directive concerned the handling of a specific case.

proceeded on as the law requires in the said court of admiralty."[212] In December, 1788 the Assembly recognized that the new federal Constitution granted admiralty and maritime jurisdiction to the United States and discontinued the Virginia court of Admiralty as of March, 1789.[213]

Pirates represented a serious threat to the safety of Virginians from about 1660 to 1730. In the course of defending against these predators, colonial authorities engaged in a particularly important form of maritime jurisdiction and regulation. As early as 1621 the Virginia Company instructed the governor of Virginia "to punish piracies."[214] In the seventeenth century piracy was primarily within the jurisdiction of the General Court. Bruce noted that in some of the earlier cases the pirates were sent to the court of Admiralty in England:

"There is, however, reason to think that this took place only when the acts they were accused of had been committed, not off the coast of Virginia, but in remoter waters. . . . When the act of piracy had been committed in the waters of Virginia, the trial of the persons guilty took place
1005 in the Colony."[215] In the eighteenth century pirates were tried either in Admiralty court or in specially appointed courts of Oyer and Terminer for the trial of pirates.[216]

Both the Virginia Council and Assembly found themselves much preoccupied with the issue of pirates in the late seventeenth and early eighteenth century. The governor and Council issued a large number of proclamations warning the

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212 12 Hen. Stat. 736; renewed in Oct. 1792, 13 *Id.* 432.

213 12 Hen. Stat. 769-770

214 1 Hen. Stat. 114

215 1 Bruce, *Institutional History*, 676-677.

216 G. Webb, *The Office and Authority of a Justice of the Peace* 107 (Williamsburg, 1736); Labaree ed. *Royal Instructions* 450-451.

populace of the presence of pirates in general or particular, ordering their seizure, preparing the seacoast against their raids, and warning the inhabitants not to have dealings with them.[217] "Whereas of late there have been severall Ships taken and plundered and some other sunke, burnt or otherwise destroyed by Pyrates lying off and hovering over the Coasts of this Dominion . . . .," read a proclamation issued in 1700. An act of the Assembly in 1699 warned against pirates and privateers and the harm they committed "on the high seas." An act cited earlier directed that crimes committed at sea were to be tried in Virginia as if they had occurred on land.[218] It is worth noting that the Assembly of the state of Virginia passed an act in 1785 "to prevent losses by pirates, enemies, and others, on the high seas."[219]

A brief note of a few cases involving pirates will furnish some sense of the scope of the jurisdiction exercised by Virginia over the marginal sea, and occasionally beyond. In May, 1700 the Virginia Council took immediate cognizance of the case of a Liverpool merchant ship taken by pirates "about thirty Leagues from the Capes." When the ship master managed to sail his pillaged vessel to the Eastern Shore, the colony granted him assistance in refitting his ship and permitted him to engage in trade despite the loss of his customs records.[220] In the spring of 1700 the colony also made prodigious efforts with the assistance of a royal guardship to capture the pirate ship *La Paix* that

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217 See for example 1 Exec. J. Council 62-63 (1684), 89-90 (1688); 2 *Id.* 66 (1700); 3 *Id.* 89-90 (1706).

218 3 Hen. Stat. 176-177.

219 12 Hen. Stat. 167-168.

220 Jensen, *Amer. Col. Doc.* 262-264; 2 Exec. J. Council 68.

was operating off its seacoast. The ship with its one hundred pirates was finally captured within the Capes.[221] In 1716 Governor Spotswood learned that pirates were preparing to raid Virginia shipping from the Bahamas and sent a
1007 ship to reconnoiter the situation. Spotswood informed the Crown that he took this action because he was the nearest royal governor and also held a commission from the late King William for the appointment of the admiralty officers in those islands.[222] In 1718 Virginia initiated a controversy with North Carolina by seizing a pirate ship in the latter's territory and having it condemned in the Virginia admiralty court.[223] Most of the acts of piracy that concerned Virginia in 1724 occurred within about ten leagues of the Virginia coast.[224]

Virginia engaged in a significant exercise of jurisdiction over the marginal sea when it issued directives to its guardships to convey merchant ships a certain distance off the coast for protection from pirates. In times of war royal instructions insisted that the tobacco ships travel in convoys; protective vessels convoyed them right across the Atlantic in most cases.[225] The Virginia Council normally set a date in the spring for the convoy to sail. Protecting the
1008 tobacco fleet from pirates and privateers usually involved

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221 See the documentary account of the colony's efforts in Jameson, ed. *Privateering and Piracy in the Colonial Period: Illustrative Documents* 259-275 (1923).

222 2 Spotswood 169-171

223 2 Spotswood 273-275.

224 See 4 E. Donnan ed. *Documents Illustrative of the History of the Slave Trade to America* 117-120 (1930-1935).

225 Labaree ed. *Royal Instructions*, 460-461; 1 Exec. J. Council 103 (1689).

the Atlantic ocean within a limited distance of the Virginia coast. The authorities obviously considered the marginal sea within about fifty leagues of the coast to be the prime area requiring protection from pirates. The situation in the spring of 1700 when Virginia captured the one hundred pirates from the *La Paix* and wanted to send them to England was nicely illustrative.[226] The governor put the pirates in groups on separate merchant ships that sailed in a convoy under the temporary protection of a royal ship for a certain distance offshore. The governor himself decided to board the Shoreham and sail "forty or fifty leagues off the Coast" to insure that the merchant ships were safe from pirates. But after the governor's return from this sea journey, the Council reconsidered their former order that the royal warship "every twenty days to go out to Convoy all Ships and Vessells off the Coasts about fifty or sixty Leagues without the Capes where the greatest danger is . . . ." "His Excellency Informing the Councill that when he went out in the Shoreham with the Late fleet they found the strength and force of the Current to be such that sailing outwards forty or fifty leagues they made it above one hundred thirty six Leagues Inwards bound and if they had not had fair Winds might have been two or three weeks before they had recovered the Capes which great Inconveniency with Divers others being Considered. It is ordered that the said Captain William Passenger Command of his Majesties Ship Shoreham every twenty daies or shorter time if he see convenient Cruseing upon the Coasts or Convoying any Ships outwards bound shall go no farther than the Soundings."

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226 This episode can be followed in 2 Exec. J. Council 84-85, 91-92. Sending the pirates to England was a condition of their surrender. This was unusual; normally such pirates were tried in Virginia.

The Council may not have been aware that vessels approaching Virginia obtained their first soundings of bottom in eighty or ninety fathoms at a distance of forty or fifty leagues off shore. But the first hydorgraphic map of the seacoast was not available until 1735. Its table of soundings in various latitudes off the Virginia Capes were taken between 18½ and 26½ leagues from the coast which was perhaps a better estimate of the distance the Council may have intended by the reference to the soundings.[227] This interpretation is supported by the directive of the Council in June, 1701 that the warship "Convoy this Fleet 20
1010 Leagues without the Capes of Virginia . . . ."[228] The Commercial importance of this activity was suggested by the fact that this particular convoy included 49 ships. In 1709, however, the Council directed a guardship to convey a tobacco fleet "fifty Leagues out to Sea . . . ."[229] Another illustration of a Council directive to guardships occurred in 1761, when the authorities had two royal ships at their disposal to help in the defense of Virginia's seacoast. The Council ordered one to "cruize within four or five leagues North and South, and not above eight or ten leagues to the Eastward of the Capes, so as to make the Entrance into the Bay once every twenty four hours." They ordered the second ship to "cruize from fifteen to thirty Leagues to the Eastward and between the Lattitudes of Cape Hatteras, and Cape Henlopen."[230] Virginia obviously exercised an extensive supervision over the marginal sea in the process of protecting the interests of its citizens and traders.

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227 Middleton, *Tobacco Coast* 27, 74.

228 2 Exec. J. Council 159.

229 3 Exec. J. Council 223.

230 6 Exec. J. Council 194.

The issue of privateering primarily arose during the interminable years of warfare involving England and its European enemies. The Virginia governors had instructions to commission privateers from the colony during wartime and to condemn prizes taken by these privateers in the Vir-
1011 ginia Admiralty court.[231] During the period of the Revolutionary war Virginia continued to issue letters of marque or reprisal to privateers from the state, with the proviso that such state privateers pay attention to the regulations of the Continental Congress on such matters. The latter primarily concerned the need for careful identification by the state of those to whom such powers were granted.[232]

Virginia made efforts to protect its own ships and shipping from foreign privateers during wartime, much as it responded to the threat of pirates. In the early 1670's Governor Berkeley informed the imperial authorities that no privateers had frequented the "coasts and neighbouring seas" of Virginia, "since the late Dutch war."[233] In 1632 Virginia captured, tried, and convicted some privateers.[234] Privateers became a real problem in the early 1700's and
1012 Virginia occasionally was successful in capturing one.[235] In 1758 Virginia remained dependent upon royal guardships to "protect the Coast of Virginia from the Depredations of Privateers."[236] The latter simply represented another issue

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231 See Labaree ed. *Royal Instructions* 446; 3 Exec. J. Council 506 (1719); 6 *Id.* 12 (1756), 214 (1762); 2 Dinwiddie 497 (1756).

232 3 J. Council State 109.

233 2 Hen. Stat. 513

234 1 Exec. J. Council 38-39.

235 See 3 Exec. J. Council 8 (1705), 149 (1707); 1 Spotswood 104 (1711).

236 6 Exec. J. Council 77.

that required Virginia to continue to pay attention to its marginal sea.

The enforcement of the Crown's rights to the goods in a wreck or lost goods of various kinds was an interesting aspect of Virginia's extensive maritime jurisdiction. James II wrote to Lord Howard of Effingham, the governor of Virginia, in October, 1687, concerning some treasure that had recently been brought to the American colonies from a wreck near the coast of Hispaniola. "And one full moyety of all Treasure and Riches taken upon, out of, or from the bottom of the Sea being by the ancient ordinances of the Admiralty due unto us as Lord High Admiral according to the Reports or Certificat of our Judge of our high court of Admiralty and Judge Advocate."[237] James ordered his governor to search out the one half share due the Crown in this instance, "or from any other wreck whatsoever which hath lately been brought or shall bee
1013 brought into the Plantation under your Government . . . ." In February, 1688 the Virginia Council received similar instructions to take care of the Crown's share of any plate, silver, gold, riches, or treasure taken from a wreck.[238] In August, 1692 the Council proclaimed that all anchors, cables, and boats found in the rivers and bays of the colony belonged to the Crown and not to the persons finding them.[239] A proclamation by the governor in May, 1700 asserted the jurisdiction of Virginia on behalf of the Crown over all sorts of things found on the water or the coast: "Whereas Especially at this time severall goods and merchandizes may be found floating upon the water in the

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237 Oct 22, 1687, 7 McDonald Transcr. 277-278.

238 1 Exec. J. Council 89.

239 1 Exec. J. Council 267.

Bay of Chisapeake or upon some other haven River or Creek in this his Majesties Colony and Dominion or may be drove on Shore and there privately taken up and carryed away . . . .

. . . . require all his Majesties Coroners and Sheriffs in their respective Counties and Stations to use their utmost Endeavour to take and secure all Wrecks, Buoys, Cables, Anchors, Boates or other goods and merchandizes which they shall find in or floating upon the water or Drove upon the Shore and all such goods and things as may be accounted for Floatsam Jetsam or Lagan . . . and Give me an account thereof from time to time . . . ."[240] Persons discovering and reporting such material received an allowance for salvaging it. The directive specifically applied to Chesapeake Bay and the rivers, not because the Crown did not claim similar rights in the marginal sea and seacoast, but because the whole question was more pertinent to an island and sheltered body of water. The authorities responded to the wreck of a ship that hindered navigation anywhere in Virginia waters, as they did by erecting a beacon over a wreck in the York river in February, 1708.[241] In 1710 Governor Spotswood sent a boat to Currituck Inlet in North Carolina to salvage cables from the wreck of a royal ship. He then sold the material and paid charges for salvage from the total amount.[242] The Assembly of the state of Virginia passed "an act concerning wrecks" in May, 1782:

"Whereas many vessels have been and may hereafter be stranded on the sea coast, bay or river shores within this commonwealth, and the goods or other property belonging

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240 2 Exec. J. Council, 84, 86.

241 3 Exec. J. Council 166.

242 1 Spotswood 3, 67-68

1015 to such vessels may be embezzled and stolen, to the great injury of the owners."[243] This act was primarily to protect the property of ship owners when their ships encountered difficulties. It provided for commissioners of wrecks "in each of the counties bordering on the sea or bay shores in this state," who were responsible for assisting endangered, stranded, or wrecked vessels.

Q.. Do you have an opinion on whether the trade and commercial jurisdiction of Virginia involved the exercise of authority over the marginal sea and if so, would you state your reasons for it? A. The establishment and enforcement of trade regulations by the colony and state of Virginia was another aspect of jurisdiction that involved the marginal sea. Prior to the development of significant imperial supervision of colonial trade in the last third of the seventeenth century, Virginia acted almost like an independent state in this respect. In 1643 and 1658 the Grand Assembly encouraged and regulated trade with the Dutch.[244] In 1645 the Assembly specifically encouraged its inhabitants
1016 to engage in as much free trade as possible with the residents of England to the benefit of the colony.[245] The Articles of Agreement between Virginia and the Commissioners of the Commonwealth of England in 1652 agreed "that the people of Virginia have free trade as the people of England do enjoy to all places and with all nations. . . ."[246]

With the emergence of an imperial trade policy, the enforcement of royal trade regulations was a major preoccu-

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243 11 Hen. Stat. 51-54; the Council of State appointed the commissioners of wrecks for the four seacoast counties in July. 2 J. Council State 118-119, 430 (1785).

244 1 Hen. Stat. 258, 469, also 540 (1660).

245 1 Hen. Stat. 296.

246 1 Hen. Stat. 364.

pation of the colonial authorities. This affected all aspects of maritime jurisdiction from admiralty courts, to pirates, to the regulation of shipping and coastal defense. The suppression of illegal trade remained a major colonial preoccupation. In 1715 Governor Spotswood, for example, would not allow a French ship that limped into Virginia to sell its cargo and condemned two other ships for trading with the French islands.[247]

The state of Virginia continued to exercise an independent trade jurisdiction after 1776. The state assembly passed an act to protect and encourage the commerce of nations acknowledging the independence of the United States of America.[248] Several acts restricted foreign vessels to
017 certain ports within the commonwealth.[249] In 1785 Virginia agreed not to charge tolls on ships coming through the Virginia Capes and to maintain the waters of Chesapeake Bay as a common highway for Virginia and Maryland residents.[250] In October, 1783 Virginia passed "an act to authorize the congress of the United States to adopt certain regulations respecting the British trade."[251] This nicely illustrated Virginia's independence in such matters during the period of the formation of the Union.

Virginia imposed a series of duties and importation taxes on incoming vessels in the colonial era. For a good part of the seventeenth century any ship entering Virginia from

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247 2 Spotswood 103-105-108.

248 10 Hen. Stat. 202-203.

249 11 Hen. Stat. 402-404 (1784); 12 Hen. Stat. 320-323 (1786), 434-436 (1787).

250 12 Hen. Stat. 50-55.

251 11 Hen. Stat. 313-314.

the ocean had to pay castle duties and port charges.[252] From about 1680 on, the colony raised revenues by set-
1018 ting import duties on liquors and slaves.[253] By royal instruction the colonial authorities appointed naval collectors, who played a significant role in exercising the maritime jurisdiction of the colony and in enforcing import duties. They enforced embargoes, organized convoys, cleared vessels for the sea, collected fees in their districts on the entering and clearing of vessels, and enforced the acts of trade.[254] The state of Virginia created and continued in existence a number of naval officers for each district after 1776. They had an extensive jurisdiction over importation, exportation, embargoes, and general maritime supervision.[255]

Q. Did Virginia enact regulations concerning shipping and related maritime matters that, in your opinion, per-
1019 tained to the exercise of authority and jurisdiction over the marginal sea? A. Many of the trade regulations previously cited illustrated the supervision exercised by the colony of Virginia over matters relating to ships engaged in oceanic pursuits. A few additional illustrations of this matter will suffice. In 1656 the Grand Assembly ordered all

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252 1 Hen. Stat. 176 (1632), 192 (1632), 218 (1633), 229 (1640), 247 (1643) 301 (1645) 533-534 (1660); 2 Hen. Stat. 134 (1662).

253 2 Hen. Stat. 466-469 (1680); 3 Hen. Stat. 23 (1684) 38 (1686), 88-92 (1691), 229-235 (1705), 344-349 (1705); 4 Hen. Stat. 143-150 (1726), 276 (1730), 310 (1732) 393 (1734); 5 Hen. Stat. 26-31 (1738), passim.

254 Labaree, ed. *Royal Instructions* 657; Beverley, *Hist. and Present State of Va.* 241, 247 (1705); Flippin, *Royal Govt.* 253-256.

255 9 Hen. Stat. 184-191 (1776); 10 Hen. Stat. 304-306 (1780); 11 Hen. Stat. 258-264 (1783); 12 Hen. Stat. 304-319 (1786), 438-452 (1787).

ships arriving in Virginia to report to the governor.[256] In 1658 the Assembly ordered all ships coming from England to provide four months provisions for passengers on the ocean voyage to Virginia.[257] In 1700 the Council determined that all masters of vessels driven ashore "by stress of Weather or for supply of Provisions wood or water, were to give Bond to perform the Laws of this Country."[258]

The Virginia Assembly also encouraged the building of ships by Virginians to engage in foreign commerce. In 1662 the Assembly passed a statute offering a cash reward for such construction in Virginia and exempted boats owned by Virginians from certain duties.[259] Some shipbuilding occurred on the Eastern Shore of Virginia, but this activity never really flourished in colonial Virginia.[260] In 1671 Govenor Berkeley made clear that Virginians owned few ocean going vessels.[261] In 1743, however, a royal official reported that Virginians owned about fifty ships engaged in trade with the mother country.[262] Governor Fauquier reported to the Lords of Trade that in 1762 Virginians owned one hundred and two ships engaged in the ocean trade.[263]

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256 1 Hen. Stat. 392.

257 1 Hen. Stat. 435; renewed 2 Hen. Stat. 129 (1662).

258 2 Exec. J. Council 103.

259 2 Hen. Stat. 122, 178; in 1663 the Assembly rewarded the builder of a large vessel. 2 *Id.* 199, also 204.

260 See C. W. Evans, *Some Notes on Shipping and Shipbuilding in Colonial Virginia* 23-24 (1957); Middleton, *Tobacco Coast* 230-243.

261 2 Hen. Stat. 515, 516.

262 Flippin, *Royal Govt.* 51.

263 Colonial Office 5/1330, ff. 261-284, Public Record Office London.

The attempt to build a lighthouse on Cape Henry for oceanic vessels engaged in trade with Virginia was not a success story until the 1790's. The project was originally conceived by the energetic Governor Spotswood in 1720. The Assembly passed an act for this purpose in 1728, which the Crown vetoed primarily because of the opposi-
1021 tion of English merchants.[264] A further act of the assembly in 1752 was similarly unfruitful.[265] Another act in 1772 finally initiated construction of a lighthouse in 1773, which was interrupted by the outbreak of war.[266] In 1777 the state of Virginia erected a makeshift lighthouse at Cape Henry.[267] In 1789 Virginia formally ceded title and jurisdiction over up to two acres of land on Cape Henry to the United States for the erection of a lighthouse, with the proviso that Virginia citizens retained the privileges
1022 "they now enjoy of hauling their seines and fishing on the shores of the said land . . ."[268] This transaction illustrated the care and formality with which states have occasionally transferred the ownership of an area within their territorial

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264 The entire story is well told by A. P. Middleton, The Struggle for the Cape Henry Lighthouse, 1721-1791, 8 *The American Neptune* 26-36 (1948); see also Middleton, *Tobacco Coast* 28. The 1728 statute is printed in W. Winfree, comp. *The Laws of Virginia. Being a Supplement to Hening's The Statutes at Large 1700-1750* (Richmond, 1971), 291-295. The English merchants expressed their opposition to the Lords of Trade in 1722, 9 Sainsbury Abstracts 47, 50. The latter reported their veto of the 1728 Virginia statute in a letter to Governor Gooch in May, 1729. 9 Sainsbury Abstracts 448.

265 6 Hen. Stat. 227-229; 6 Exec. J. Council 146 (1759)

266 8 Hen. Stat. 539-541, 652-653 (1773).

267 1 J. Council State 350.

268 13 Hen. Stat. 3-4; renewed in 1798, 2 Shepherd Statutes 88-89.

boundaries to the federal government. The United States began work on the first federal lighthouse in 1791 and completed the effort in 1792.

The Virginia Assembly engaged in a series of efforts in the seventeenth century to restrict the incoming oceanic trade of the colony to at first one port and then several designated ports.[269] The Crown disallowed the major efforts of the Assembly in 1691 and 1705 actually to create a number of ports.[270] The English authorities and merchants were much more alarmed at the threat of economic diversification in Virginia than they were at the problems of collecting customs and duties and enforcing general trade regulations under the existing system. Such prospects dimmed their theoretical commitment to the idea of established ports.

1023 Thus Virginia did not develop any significant ocean ports in the colonial era, with the exception of Norfolk, which had become the principal seaport of the colony by the mid-eighteenth century. Almost any river in Virginia became a resting place for ships from the sea. There were also some harbors on the seacoast of the Eastern Shore of Virginia. Especially in wartime the Council became concerned that ships search out the most adequate protection available when in these seacoast rivers. In April, 1692 the Council then discovered "by Considering of the Mapps that the Severall like Rivers on the Seabordside of the Eastern Shore by being Navigable are very dangerous both for Enemyes and false Traders . . . ."[271] They asked the Burgesses from the Eastern Shore whether it would be an injury to their

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269 See 1 Hen. Stat. 163, 166, 190, 214, 245, 412-414; 2 Hen. Stat. 135.

270 3 Hen. Stat. 53-69, 108-109, 404-419.

271 1 Exec. J. Council 153-154, 228

fellow residents "if noe Ships or Vessels whatsoever should be permitted to goe into the Little Rivers and harbours on the Seaboardside of the Eastern Shore, they affirmed it would not . . . ." The Council then instituted such a prohibition, "except onely Smiths Island River which is known to be fitt place to Secure Marchants Ships in Legally trading to this Colony at their first arrivall."

Virginia also exercised jurisdiction over the regulation and establishment of ferries. The matter was a common
1024 preoccupation of the legislature.[272] But most of the ferries were on rivers or Chesapeake Bay and had little to do with the seacoast. There is some evidence that regulated ferries existed on the seacoast side of the Eastern Shore in the eighteenth century between the islands and the mainland and over the seacoast rivers.[273]

Professional ship pilots made their appearance in Virginia waters in the early years of settlement. Virginia began to regulate and license this maritime occupation in 1651, in response to "a generall complaint made by master of shipps that wee had neither pilotte nor beacons to direct them in their bringing their shipps upwards . . . ."[274] Most of the work of the pilots initially consisted of picking up ships from the sea in the vicinity of the Virginia Capes and guiding them over Chesapeake Bay to their respective landing places. In 1691 the Council agreed to appoint a pilot for Smiths Island River, which is on the seacoast side of the
1025 Eastern Shore.[275] A major enactment in 1755 establishing

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272 See for example 3 Hen. Stat. 469-476 (1705); Middleton *Tobacco Coast* 62-64; Evans, *Notes on Shipping and Shipbuilding* 37-46.

273 See 2 Exec. J. Council 279 (1702) concerning a ferry to Hog Island; and 6 Hen. Stat. 19 (1748).

274 2 Hen. Stat. 35.

275 1 Exec. J. Council 182.

pilots and regulating their fees stated specifically that pilots were to pick up vessels "coming from sea."[276] Pilots were not necessary on the marginal sea, or at least until the ships began to approach the Capes and sought passage through its dangerous shoals.

The state of Virginia passed similar acts for the regulation of pilots.[277] Enactments by the Assembly concerning pilots in 1801 and 1802 made clear that the rates for pilotage began from or at the sea and provided for the return of the ship to sea by the pilot.[278] This recognition of the activities of pilots in the marginal sea was much more explicit than in previous enactments. The whole issue simply represented another aspect of Virginia's extensive exercise of jurisdiction over the marginal sea.

A number of residents of Virginia went to sea as sailors.
26 The colony asserted authority over them as well as other mariners that entered its territory. Most of the statutes regulating seamen date from the eighteenth century. The Assembly passed a mjaor act in 1722 "for punishing mutinous and disobedient Seamen; and for the more speedy determination of controversies arising between masters of Ships, and their crews."[279] The act applied to ships employed in "trading within this colony," but the prohibited

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276 6 Hen. Stat. 490-494; this act was frequently renewed: 7 Hen. Stat. 580-585 (1762); 8 Hen. Stat. 197 (1766), 358 (1769), 542 (1772).

277 11 Hen. Stat. 185-189 (1783); 12 Hen. Stat. 299-303 (1786); 13 Hen. Stat. 267-268 (1791); 1 Shepherd Statutes 169-173 (1792), 302 (1794).

278 2 Shepherd Statutes 286 (1801), 309-313 (1802).

279 4 Hen. Stat. 107-110.

acts do not seem to have had to occur within the confines of Virginia. The statute authorized two Justices of the Peace to board a ship and settle an issue. The broad jurisdiction exercised by Virginia in this statute was emphasized by the final proviso in the basic act. It directed that nothing in the statute should be taken "to limit or restrain the power, authority and jurisdiction of the lord high admiral of Great-Britain, the vice admiral of this dominion, or judge of the vice admiralty, for the time being, in any matter or thing, properly belonging to the cognizance of the admiralty court." The Assembly passed a generally similar statute in 1748, with the emphasis less on the punishment of mutinies and more on the general problems involved in regulating the behavior of seamen on ships trading "within this colony."[280] The implication was that
1027 Virginia would exercise a jurisdiction over behavior that had occurred anywhere, once the mariner was within Virginia's territory again or for the first time. The repeated proviso that Virginia did not intend to infringe on admiralty jurisdiction suggested that this issue was a sensitive one that the legislators could not confront too directly.

The state of Virginia passed "an act concerning Seamen" in 1785.[281] The act required the registration of all seamen living in Virgnia with the expectation that some would take advantage of opportunities to join the Navy of Virginia. Young indigent persons were to be bound out to sea as apprentices. Their complaints of ill treatment were to be heard by the county court nearest to the port from which an apprentice served. Justices of the Peace

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280 6 Hen. Stat. 24-28 (1748); amended in 8 Hen. Stat. 523-524 (1772).

281 12 Hen. Stat. 131-137.

had jurisdiction over charges against mutinous and refractory seamen. The state of Virginia intended to exercise jurisdiction over conduct that occurred on Virginia ships located anywhere.

Another aspect of Virginia's maritime jurisdiction involved the imposition of a period of quarantine on ships and passengers arriving in Virginia from foreign ports afflicted with the plague. The Assembly passed such an act in 1722.[282] In the late 1760's the Crown disallowed a
1028 supplementary statute designed to impose quarantine on English ships importing convicts or servants infected with various other diseases.[283] The Assembly renewed the act in 1772.[284] The act of the state of Virginia in 1783 to require "vessels coming from foreign parts to perform quarantine" left the decision to the discretion of the governor and Council, who could judge the necessity of such a quarantine in specific cases.[285]

Ships engaged in the tobacco trade frequently brought a load of stones and bricks to Virginia as ballast, which they then sought to discharge before taking on their primary cargo. The Virginia Assembly passed its first "act to prevent the casting of ballast into Rivers and Creekes" in 1691.[286] The prohibition extended to ports, havens, and harbors, which included a few places on the eastern seacoast of Virginia. Ballast was to be deposited on shore, not in a spot that could hinder navigation. The renewal of this ballast provision in 1705 added an additional prohibition that was in a direct sense an early act for environmental

282 4 Hen. Stat. 99-103.

283 8 Hen. Stat. 260-261 (1766); 6 Exec. J. Council 304 (1768).

284 8 Hen. Stat. 537-538.

285 11 Hen. Stat. 329-331.

286 3 Hen. Stat. 46-47.

protection. The problem was simple: "The commanders or masters of the ships or vessels which have imported negros into this colony and dominion, have caused such negros as died on board, to be cast into the rivers and creeks where such ships or vessels did then ride, to the great annoiance of the inhabitants adjacent."[287] In future any Negro, "or other person whatsoever," that died under such circumstances was to be buried on shore. The colony and state of Virginia continued to pass statutes, including these basic provisions concerning ballast and dead bodies, at least into the 1790's.[288]

In 1679 Virginia initiated another lengthy series of statutes to clear rivers, creeks, and navigable bodies of water in general of such obstacles to navigation as logs and trees.[289] County courts handled primary jurisdiction over this problem. In addition to the general acts for this purpose, the Assembly of the colony and state passed a significant number of statutes after 1745 for the clearing of specific rivers.[290]

The general significance of this particular material concerning ballast and the clearing of rivers and the like was its illustration of the willingness of the Virginia authorities, particularly the Assembly, to take the necessary steps to

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287 3 Hen. Stat. 353-354.

288 Webb, *Justice of the Peace* 278 (1736); 6 Hen. Stat. 94-101 (1748); 7 Hen. Stat. 392-394 (1761); 12 Hen. Stat. 180-181 (1785); I Shepherd Statutes 145-147 (1792).

289 See 2 Hen. Stat. 455 (1679), 484-485 (1680); 3 Hen. Stat. 394-395 (1705); 4 Hen. Stat. 110-112 (1722); Webb, *Justice of the Peace* 278 (1736); 6 Hen. Stat. 69-71 (1748).

290 See for example 5 Hen. Stat. 375-377 (1745); 6 Hen. Stat. 291-293, 394-395; 8 Hen. Stat. 148-150, 564-581; 11 Hen. Stat. 450-462 (1784), 510-525 (1784).

cope with such problems. These had only a peripheral relevance to the issue of the exercise of jurisdiction over the marginal sea or the seabed. Yet in the unlikely event that the marginal sea and seabed had begun to be plagued by similar problems, it is apparent that the Virginia legislature would have taken the steps necessary to cope with the situation.

Another minor aspect of the Assembly's willingness to supervise and regulate maritime matters concerned the problem of mills and dams on navigable rivers and streams. These became a significant obstacle not only to river traffic, but more especially to fish. Beginning in 1759 the Assembly enacted a series of specific statutes requiring the owners of mills and mill-dams on particular rivers to make openings or slopes in their dams for the passage of fish.[291]
1031 The state of Virginia continued to pass such statutes, now on the general level.[292] An interesting statute passed by the state assembly in 1808 sought to prevent the obstruction of the passage of fish up and down the James River during the summer and fall seasons.[293]

Q. In your opinion, did provisions for the maritime defense of the colony and state of Virginia require the exercise of authority and jurisdiction over the marginal sea?

A. Provisions for the maritime defense of the colony and state of Virginia required the exercise of authority and jurisdiction over the marginal sea. This primarily involved

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291 7 Hen. Stat. 321-322 (1759), 409-410 (1761); 8 Hen. Stat. 581-583 (1772).

292 12 Hen. Stat. 187-190 (1785); 1 Shepherd Statutes 138-139 (1792).

293 3 Shepherd Statutes 409.

arranging for royal or local ships to cruise the marginal sea and for lookouts to be posted on the seacoast to watch for the enemy. Virginia had no land based defenses, such as forts, that could be really effective against ships on the seacoast. The forts that were periodically built for the protection of the rivers did not prove to be very useful.[294] Virginia's main reliance, especially in time of war,
1032 was upon guardships. In general Virginia depended on the royal ships provided by the imperial authorities for purposes of defense of the Virginia seacoast. This also included protection of its shipping in wartime or during periods of attack from pirates and privateers. The governor of Virginia controlled the royal ships of war sent over for Virginia's use in his capacity as the vice-admiral.[295] Convincing the royal authorities of the necessity of such a guardship became a preoccupation of the governor and his Council in the late seventeenth and early eighteenth centuries. In 1680 the Council considered "now absolute necessary it is for the peace and safty of this his Majesties Country so full of great Rivers Bayes and waters that the Dominion of the Sea Should be preserved. . . ."[296] They requested an armed vessel of substantial size to be constantly on station in Virginia. Such requests had to be renewed periodically as defense problems loomed larger.[297]

On the numerous occasions when Virginia had a large warship available, the colony employed it for a variety of duties on the marginal sea. In 1690-91 the ship did remain

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294 See in general 2 Bruce, *Institutional History*, Chapter 13.

295 Flippin, *Royal Govt.* 97-98.

296 1 Exec. J. Council 7.

297 See 1 Exec. J. Council 41 (1683), 143-144 (1691); 2 Spotswood 350 (1721).

within the Bay to cruise back and forth examining vessels and preventing any from leaving before the convoys officially sailed.[298] Sometimes the Council directed the ship to sail about or between the Capes.[299] Governor Spotswood used royal guardships to convoy trading vessels off the coast and on occasion to a place as far away as Barbados.[300] Sometimes the guardships became involved in the suppression of illegal trade in and out of Virginia.[301]

Virginia was largely dependent on royal guardships to fight pirates and to convoy its ships off the coast, primarily because large sized ships were necessary for coastal duty; small ones were of no value except in shoal waters and around the islands just off the coast. Virginia simply did not have an armed vessel of its own that could begin to match some of the large ships of the pirates and privateers. Throughout the colonial period, however, Virginia did hire at its own expense small ships to work as effectively as possible in coastal defense, to chase enemies into
34 shallower water off the coast, or to assist the larger guardships with specific problems. The colony hired its own boats in the 1660's and 1670's before it really began to secure royal guardships.[302] The royal instruction to Lord Howard of Effingham as governor of Virginia in the early 1680's granted him full power "for the resisting and withstanding of all Enemys, Pyrats and Rebells both at Land and Sea. . . ," including authorization in dealing with the enemy, "If the occasion shall require to pursue and prosecute

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298 1 Exec. J. Council 127, 166, 197.

299 1 Exec. J. Council 41 (1683); 1 Spotswood 3 (1710).

300 1 Spotswood 67-68; 2 Spotswood 249-250.

301 1 Exec. J. Council 321, 330, 354; 1 Spotswood 9-12, 14-15.

302 See 2 Bruce, Institutional History, 178-189.

in or out of the limits of Our said Colonie and Plantations of any of them."[303] In 1683 the Crown after long deliberations among its various agencies agreed to station a ketch on the coast of Virginia as the governor had long requested for the control of trade and defense.[304] The records of the Council that begin in 1680 noted numerous occasions on which Virginia continued to hire a sloop of its own for use in the marginal sea.[305]

1035 Costs and lack of success frequently meant that such a ship remained in the colony's employ for a short period of time. In 1741 the inhabitants of Norfolk and Hampton petitioned for relief "against the Spanish Privateers, now Committing Depredations near the Capes." The Council then hired two sloops for a three month period "for the Purpose of Cruising in a Warlike manner on the Coast."[306] On a number of occasions the Council agreed to hire its own boat while the royal ship was being repaired or careened.[307] Such matters became a heavy charge to the colonial treasury; occasionally the Assembly refused to allocate funds for such defense purposes or refused to pay for expenses incurred.[308] An abstract of a letter from the Lords of Trade to Governor Spotswood in 1713 made clear

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303 Instructions of Jan. 1682 and Sept. 1683 in 6 McDonald Transcr. 18, 232.

304 See the extensive correspondence on this subject in 6 McDonald Transcr. 273-280.

305 1 Exec. J. Council 497 (1683); 3 *Id.* 170 (1708), 211, 219 (1709).

306 5 Exec. J. Council 54, 57-59.

307 5 Exec. J. Council 49 (1744); 6 *Id.* 230 (1762).

308 See for example 1 Spotswood 120, 151; 2 *Id.* 9-10

their lack of sympathy with the Assembly's position: "Think the Assembly very much in the wrong in rejecting the claims for the fitting out of a Spy Boat and he should represent to them the reasonableness of their discharging such debts as are contracted solely for their service and security."[309]

Another common measure employed for maritime defense involved the posting of lookouts in each of the sea-
1036 coast counties of Virginia. The Council began to order the assignment of such lookouts in 1691 and continued the practice as needed for a number of years.[310] From 1699 to 1704 there was a lookout on Smith's Island or Mock Island off the coast of Northampton County. After 1705 lookouts became a regular part of the defenses of the country during times of danger.[311]

The independent state of Virginia took on a major burden of maritime defense in 1776. The Assembly played the major role in the creation of a Navy for Virginia. In May, 1776, the Assembly passed "an Ordinance for establishing a board of Commissioners, to superintend and direct the naval affairs of this colony."[312] This Board was to supervise the building of naval vessels, furnish them, and direct all matters relating to the Navy. In October, 1776 the Assembly ordered the naval commissioners to
1037 build two frigates and four larged armed gallies "fit for

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309 8 Sainsbury Abstracts 410 also 420.

310 1 Exec. J. Council 143-144, 228 (1692); 2 *Id.* 5-6, 69, 110, 130, 174-175, 320-321, 353, 425.

311 3 Hen Stat. 364 (1705); 4 Hen. Stat. 197-204 (1727), 395 (1734); Webb, *Justice of the Peace* 225 (1736); 6 Hen. Stat. 115-116 (1748).

312 9 Hen. Stat. 149-151. See the 10 mss. volumes of "Naval Records of Virginia, 1776-1783" in the Virginia State Library.

river or sea service.[313] In May, 1777 the Assembly reestablished the system of lookouts to sea stationed in the eastern seaboard counties.[314] In May, 1779 the Assembly discontinued the Navy board and replaced it by a new board of war and trade.[315] "An act to regulate the Navy of this Commonwealth" followed in October, 1779.[316] One naval vessel was to serve at sea as a prison ship, while another was to be established as a lookout boat. In 1780 the presence of the British in and around Virginia territory resulted in acts for the defense of the eastern frontier of Virginia: "Whereas it is indispensably necessary that there should be a marine force for the protection of the sea coast of this state. . . ."[317]

The Council of State and the Committee of Safety primarily implemented the directives of the Assembly in the matter of defense of the marginal sea and seacoast of Virginia. By the fall of 1783 the Council noted that Congress permitted Virginia to retain two armed vessels for
1038 the protection of its trade. The state still had two such public boats in the summer of 1787.[318]

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Q. Have you formed an opinion as to the attitude of the Virginia colonists and authorities toward the exploitation of the colony and state's natural resources, including

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313 9 Hen. Stat. 196.

314 9 Hen. Stat. 294.

315 10 Hen. Stat. 123.

316 10 Hen. Stat. 217.

317 10 Hen. Stat. 296-299, also 379-386 and 458 (1781).

318 3 J. Council State 300; 4 *Id.* 135.

the sea, the seabed, and the resources thereof and if so, would you state your opinion and the reasons for it?

A. The goal of the first settlers of colonial Virginia was the total exploitation of the natural resources of the New World. Initially the newcomers were concerned about natural resources, including fish, minerals, and precious metals, wherever they could be found within the limits of their charter. All the first published comments on the new found land expounded on its great marine resources, especially fish, oysters, sea crabs, and seafish. The first voyages of discovery after the settlement of Jamestown noted the natural abundance surrounding the explorers. The Spanish model spurred on the first adventurers in Virginia to search for mines, especially for such precious metals as gold.[319] The English people needed to be sup-
1039 plied with such basic resources as coal, copper, iron, salt, and naval stores. A visitor to the fledgling colony reported to the Spanish government in January, 1610, that the English were seeking to exploit the many iron, copper, and other mines in Virginia.[320]

The Virginia Company strongly encouraged the development of natural resources that could be sent back to the mother country in a profitable commercial arrangement. In May, 1609 the Company advised their local representatives to search for royal mines, to make pitch, tar, ashes, and iron, and to fish for cod, sturgeon and the like.[321] In July, 1621 the Company encouraged the governor of Virginia to explore the seacoast of the colony, to search after

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319 See generally 1 Bruce, *Institutional History* 9-21.

320 1 Jamestown Voy. 152-153.

321 *The Three Charters of the Virginia Company of London With Seven Related Documents* 66-67 (S. Bemiss, ed. 1957).

minerals, to make salt, iron, pitch, and tar, and to find good fishing between James River and Cape Cod "or any wher within our limmittes. . . ."[322] As early as 1630 the Virginia Assembly passed an act "for the better furtherance and advancement of staple commodities," including potash, saltpetre, iron, salt, and vines.[323]

1040 The first adventurers to Jamestown did not need much encouragement to make the exploitation of natural resources a major preoccupation. The potential much impressed them. One wrote in the spring of 1607 that "in the large soundes neere the sea are multitudes of fish, bankes of oysters, and many great crabbs. . . . And within sight of land into the sea we expect at tyme of yeare to have a good fishing for codd. . . ."[324] Captain John Smith wrote in 1612 concerning "the commodities in Virginia or that may be had by industrie."[325] According to Smith, "the Bays and rivers have much marchandable fish and places fit for salt coats, building of ships, making of iron, etc." Although gold was by no means the only mineral resource the settlers were seeking, the search for gold in the first years did assume major proportions on occasion. In 1608 the struggling settlers devoted much time to loading a ship with a golden dirt that turned out to be iron pyrites. In 1612 Smith described the problem he had then faced: "But the worst mischefe was, our gilded refiners with their golden promises, made all men their slaves in

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322 *Id.* 124.

323 1 Hen. Stat. 151.

324 1 Jamestown Voy. 99.

325 2 Jamestown Voy. 353.

hope of recompence, there was no talke, no hope, no worke,
1041 but dig gold, wash gold, refine gold, load gold. . . ."[326]

The initial enthusiasm of the Company period for the exploitation of Virginia's natural resources continued in some measure into the early era of royal rule. During the first half century after 1624 the Crown continued to encourage such activity. Royal commissions and instructions to governors recognized that "by the discovery of industrious and well experienced men, the limits and bounds of the said Plantation may be augmented and the Trade and Commerce . . . much advanced. . . ." Governors were empowered to grant commissions "unto any of our subjects there addressing themselves for the discovery of the same Country and ports, Bounds and Limits and Extents thereof."[327] Governor Harvey was himself an enthusiastic participant in this effort. Soon after his arrival in Virginia in 1630, he could write that he had already been to look at the site of an iron works and that it looked promising; "I have also hope to discover a Salt Peter mine in the Bay." In the fall he planned to travel inland for eight to
1042 ten days to see for himself "whether there be anie such silver mine as is, and hath bin commonlie reported or not. . . ."[328] In 1632 Governor Harvey reported to the Privy Council that Virginia gave promise of producing potash and saltpetre, but that "skilfull" persons from England would be needed to start an ironworks.[329] In

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326 2 Jamestown Voy. 393-394; see also Beverley, *Hist. and Present State of Va.* 30-31.

327 Commission to Sir Francis Wyatt, Jan. 11, 1639, 1 McDonald Transcr. 371-372; see also instructions to Gov. Yeardley in 1626 and Gov. Berkeley in 1650, 1 *Id. 402, 392.*

328 2 McDonald Transcr. 40.

329 2 McDonald Transcr. 111.

1662 the Crown announced through its instruction to Governor Berkeley that it intended to erect an iron works in Virginia that would be larger than anyone could privately undertake. The king sought the advice of the governor and Council in Virginia, but nothing seems to have come of the venture.[330]

Although the seventeenth century did witness continuing efforts to discover and exploit the natural resources of Virginia, the successful beginnings of the tobacco trade discouraged considerable involvement in such activity. Virginians had found the road to wealth in a crop that they had not anticipated. Tobacco remained the great Virginia mania for the remainder of the colonial era. All other activity was subordinated to the tobacco trade, leading to recurrent appeals from those in authority for broadening
1043 the basis of the economy. Deploring the excessive focus on the growth of tobacco became a commonplace theme.[331] Yet at the same time imperial policy by the late seventeenth century tended to discourage Virginia from extensive efforts to exploit her natural resources and diversify the economy.[332] The Board of Trade saw the colony more as a market for English exports than as a source of varied and useful imports.

Q. What efforts were made, if any, to develop the mining and mineral resources of the colony and the state of Virginia?

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330 1 McDonald Transcr. 418.

331 Captain J. Smith, *The True Travels, Adventures and Observations* 43 (1630); 1 Spotswood 73-74 (1711).

332 These points are well-developed in Sister J. de Lourdes Leonard, Operation Checkmate: the Birth and Death of a Virginia Blueprint for Progress 1660-1676, 24 *William and Mary Quarterly*, 3rd Ser., 44-74 (1967).

A. The colonial authorities in Virginia encouraged and controlled to at least some extent the development of the mineral resources of the colony. There were recurrent reminders of how much more could be done in this area. Hartwell, Chilton, and Blair asserted in 1697 that "the Manufacturer of Iron and Other Minerals, with which that Country, to all Advantages, is well stored," was one of
44 the potential improvements to be made in Virginia.[333] A major restatement of the land law in statutory form by the Assembly in 1749, included a specific provision encouraging patentees of land to work in digging any stone quarry, coal, or other mine, upon his tract. . . ."[334] On occasion the Council exercised some supervision over the exploitation of natural resources. In 1690 they summoned one Colonel Hill to appear before them and answer for his contempt, because he had raised fifty men "to go in search for Gold mines without License. . . ."[335] In 1702 a French refugee blacksmith living above the falls on the James River petitioned the Council "that he may have leave to use the coal mines lately discovered there for his forge. . . ." The Council permitted him "to take what Coales he shall want out of the said Coalmine. . . ."[336]

The English Crown exercised an important influence and control over the exploitation of Virginia's natural resources, especially those derived from mining. Unless otherwise provided for, the Crown exercised absolute ownership of the product of mining in Virginia. The colonists were fortun-
5 ate that the first charters granted extensive mining rights in Virginia to the Company, that were later taken over by

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333 Hartwell, Chilton and Blair, *Present State of Va.* 5.

334 5 Hen. Stat. 425.

335 1 Exec. J. Council 522.

336 2 Exec. J. Council 244.

the colonists themselves. The 1606 charter authorized mining for gold, silver and copper, with the Crown retaining a claim to only one-fifth of the gold and silver and one-fifteenth of the copper.[337] The 1609 charter extended to the colonists the right to search for iron, lead, tin, and all other minerals, as well as gold, silver and copper, retaining now to the Crown only one-fifth of the gold and silver.[338] The 1612 charter simply repeated or confirmed these 1609 provisions concerning mining.[339] This issue arose again in the royal instructions to Governor Culpeper in 1679, which authorized him "to make leases under Our Great Seal . . . for any Number of Years, not exceeding one and twenty years of any Mine or Mines as well Royal Mines, as others to us belonging, reserving to Us our Heirs and Successors one tenth part of all such Ores as shall arise and be gotten of such Mines during such term as such Mine shall be devised."[340] Imperial authorities anxious
1046 to increase royal revenues obviously thought there were some possibilities in the New World.

Since there was little mining activity in the seventeenth century, the issue of the percentage due the Crown from mining remained something of an academic issue, until the governorship of Spotswood in the 1710's. He and his Council became much exercised in the process of trying to secure clarification from England on this issue.[341] The

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337 1 Hen. Stat. 61-62.

338 1 Hen. Stat. 88-89, 93. Gold and silver were isolated as "royal mines."

339 1 Hen. Stat. 100-101, 109-110.

340 5 McDonald Transcr. 292.

341 See 3 Exec. J. Council 267; 1 Spotswood 160-162, 168; 2 *Id.* 70-71.

initial response received by Spotswood illustrated the extent to which the mother country could discourage manufacturing and exploitation of natural resources in Virginia. In 1711 the Lords of Trade refused to sanction iron mines in Virginia: "are still of the same mind and cannot think it for her Maj. service or the advantage of this Kingdom that such a Manufacture should be promoted in the Plantations."[342] In 1713 the Lords of Trade reported to one of the Queen's principal advisors that Governor Spotswood had hopes of discovering silver and gold in the Virginia mountains, but that persons were unwilling to search for mines, "until her Majesty pleasure be declared what share her Majesty shall think fit to reserve in case such mines
1047 be found."[343] Either the colonists did not have knowledge of the specific charter provisions on such matters, or they were unwilling to rely on such ancient provisions for so mutable a matter. Spotswood enlisted powerful support in November, 1713, when the titular governor of Virginia, the Earl of Orkney, wrote to the Queen on his behalf and seeking clarification of this important issue.[344] The Queen referred the matter to the Lord Treasurer. Then in May, 1714 the Lords of Trade agreed to the substance of the Earl of Orkney's memorial concerning mines and minerals in Virginia, "with the reservation of one fifth part thereof, as is reserved in the Charter granted to the inhabitants of Mass. Bay."[345] This applied to all mining

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342 Lords of Trade to Gov. Spotswood, Nov. 22, 1711, 8 Sainsbury Abstracts 330.

343 Lords of Trade to Dartmouth, Feb. 27, 1713, 8 Sainsbury Abstracts 404.

344 Nov. 30, 1713, 8 Sainsbury Abstracts 433.

345 Lords of Trade to Lord High Treasurer, May 12, 1714, 8 Sainsbury Abstracts 459.

that took place in Virginia. Such clarification permitted the Virginia colonists greater freedom in future efforts to exploit the natural resources of the colony.

By 1781 Jefferson could enumerate gold, lead, copper, iron, pit coal, marble, and limestone as minerals that could be found in Virginia and that had attracted some
1048 mining operations.[346] One could readily add pitch, tar, potash, and saltpetre as products of basic natural resources in Virginia. In the case of each of these minerals or by-products there is evidence from the colonial and early national period that some efforts of varying success had been made to develop the resource.[347]

1049 A variety of reasons help to explain the inadequate development of the colonial mining industry in Virginia. Rev. William Stith, the mid-eighteenth century historian of Virginia, stated the matter simply when he said: "Virginia is not a Country of Mines." The emphasis in Virginia was upon producing the basic staples of life.[348] Nor

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346 T. Jefferson, *Notes on the State of Virginia, 1781* 26-29 (W. Peden ed. 1955).

347 See the following: (copper) I.N. Hume, *Here Lies Virginia* 128 (1963); (coal) Beverley, *Hist. and Present State of Va.* 125; K. Bruce, *Virginia Iron Manufacture in the Slave Era* 87-88 (1931); (lead) 1 J. Council State 65 (1776); 3 *Id.* 83, 179 (1782); A. Hecht, Lead Production in Virginia during the 17th and 18th centuries, 25 *West Virginia History* 173-183 (1964); (potash) Beverley, *Hist. and Present State of Va.* 72; J.P. Hudson, *A Pictorial Booklet on Early Jamestown Commodities and Industries* 11 (1957); (saltpetre) 2 Hen. Stat. 514 (1671); 5 Hen. Stat. 362-363 (1745); (pitch and tar) S. Snow, Naval Stores in Colonial Virginia, 72 *Va. Mag. Hist. and Biog.* 75-93 (1964); 4 Hen. Stat. 96 (1722); 2 Exec. J. Council 412 (1704); 3 *Id.* 193-194 (1708).

348 W. Stith, *The Hist. of the First Discovery and Settlement of Virginia* 81 (1747).

was this totally a matter of choice or preference on the part of the Virginians. Full-scale exploitation of natural resources was neither economically nor technologically feasible in early America. Governor Berkeley tried to explain the intense focus on tobacco cultivation by 1663 as follows: "There was never yet any publick incouragement to assist the Planters in those more chargeable undertakings, as Iron-Mines and Shipping." He also referred to "the want of a public Stock to enable us to procure able men for the finding all sorts of Mines, making Iron of those Mines that are found, ..."[349]

The lack of technological and scientific knowledge concerning mining methods should not be forgotten. As early as 1612 Captain John Smith wrote about Virginia: "Concerning the entrailes of the earth little can be saide for
050 certainty. There wanted good Refiners. . . ."[350] The Virginia iron industry only began to flourish after 1710, when Governor Spotswood supported the immigration of some German miners.[351] A naturalist reported in the 1730's that in Virginia "they have found definite mines of antinomy, iron, lead, and copper, which however up to date have not yet been worked, much less correctly investigated from lack of people who understand such things."[352] Governor

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349 Sir W. Berkeley, *A Discourse and View of Virginia* 6-7, also 5 (London, 1663; reprinted 1914).

350 2 Jamestown Voy. 350.

351 2 Spotswood 66, 95.

352 W. Byrd II (?), *Natural History of Virginia, or the Newly Discovered Eden* 18 (R.C. Beatty and W.J. Mulloy eds. 1940). The author of this work is now thought to have been John Lawson rather than William Byrd. See P.G. Adams, The Real Author of Wm. Byrd's Natural History of Virginia, 28 *Amer. Literature* 211-220 (1966).

Dinwiddie lamented the absence of persons with appropriate technical training and money in 1755.[353]

A variety of other problems stifled the colonial mining industry. Little demand existed for such a resource as coal, when wood was readily available for heating and cooking purposes. It was economically unfeasible to transport some available ores to places where they could be
1051 readily used.[354] The Reverend Hugh Jones wrote in 1724 that "there is coal enough in the country, but good firewood being so plentiful that it encumbers the land, they have no necessity for the trouble and expense of digging up the bowels of the earth, and conveying them afterwards to their several habitations.[355] Mining entrepreneurs even had to contend with the danger of Indians. The massacre of 1623 ended the first effort to operate an ironworks in the colony.[356]

The colonial iron industry merits attention as the most successful colonial effort to utilize the mineral resources of Virginia. Despite fledgling efforts at the beginning of an ironworks that ended with the Indian massacre of 1623, the Virginia colonial iron industry had its real beginnings with the energetic Governor Spotswood after 1710. Thereafter iron mining became an important part of the Virginia

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353 1 Dinwiddie 387.

354 See Beverley, *Hist. and Present State of Va.* 290; also 1 Hen. Stat. 135-136 (1628).

355 G. Jones, *The Present State of Virginia, 1724* 92 (R.L. Morton ed. 1956).

356 See Beverley, *Hist. and Present State of Va.* 126; also 1 Hen. Stat. 135-136 (1628).

1052 economy.[357] Primarily because of the costs involved, the Virginia Assembly did not respond to Spotswood's initiative in these first years, leading him to complain to England that "the Country hath so little inclination to make use of the advantages which nature has put into their hands. . . ."[358] The colony and state of Virginia finally began to pass acts for encouraging adventurers in ironworks in 1727 and thereafter.[359] The legislators became eager to encourage the exploitation of natural resources, once the technical feasibility and commercial viability of the project had been demonstrated to at least some extent. Tobacco and landowning were such certain ways to commercial success in comparison to most alternative enterprises, that it required a substantial effort to divert capital and initiative from this tried and true path.

1053 Given the technical and financial problems facing the colonial mining industry, it is perhaps surprising to discover how much activity occurred in this area. Governor Gooch prepared the following survey of mining in Virginia for the Lords of Trade in 1730:

"Mines of Iron Oar are found in many Places of the Country, and five Furnaces for melting of it are already sett up. Three Copper Mines are already discovered; two in the Northern Neck, and one in the County of Spotsilvania; the Oar is very encouraging; on one they are at Work, and will very soon begin with the other two. There

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357 See in general Bruce, *Virginia Iron Manufacture* 3-79; Lester J. Cappen, *Iron Works at Tuball* (1945); B. Hindle *Technology in Early America* 44, 46 (1966); Hume *Here Lies Va.* 206-207.

358 1 Spotswood 41, also 20-21.

359 4 Hen. Stat. 228 (1727), 296 (1730); 6 *Id.* 137 (1748); 9 *Id.* 303 (1777); Webb, *Justice of the Peace* 228 (1736).

are also many Signs of Lead, Tin and Antimony in the place near the great Mountains, but for want of Men skilled in these Searches, and money'd persons to try Experiments, it is probable these and other richer Metals may for many Years remain undiscovered."[360]

Gooch's response in 1743 was more pessimistic: "Mines of Iron Oar are found in many Places of this Colony and five Furnaces for Melting thereof have been set up, but meeting with little Encouragements, they decline and a very considerable one is this year broke up. Attempts have been made to work upon some Copper Mines but not being attended with Sucess have been dropt." [361] By
1054 1750 there were only two furnaces for smelting iron ore in existence. Gooch could also mention a recently discovered copper mine by 1750.[362] Progress in the colonial mining industry was obviously not inevitable, despite major investments of time and money. In 1755 Governor Dinwiddie reported to the Lords of Trade that there were "large quantities of Iron Oar in many Places, and some Furnaces for manufacturing it, fit to send to Great Britain. . . ."[363] Governor Fauquier's report in 1763 perhaps in its mixture of positive and negative aspects represents a fitting conclusion to this brief survey of the vagaries of colonial mining in Virginia:

"There are Coals found in various parts of the Colony especialy near the Falls of James River which Pits have been lately open'd and work'd and Coal exported to the

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360 C.O. 5/1322, ff. 68-74, query 9, Public Record Office, London.

361 C.O. 5/1326, ff. 12-19, query 9, PRO.

362 C.O. 5/1327, ff. 78-83, query 9, PRO.

363 1 Dinwiddie 386.

northern Colonies. The Country is also full of Iron, Stone, of which Iron is made in many parts of it. There have been Mines both of Copper and Lead discover'd but neither of them work'd, excepting one Mine very rich in Lead lying on a branch of new River in the road to the upper Cherokee Nation. The proprietors of this are now beginning to work it, of which number I was one my
1055 self but quitted it on a Doubt whether Lead would bear the Expence of so long a Land Carriage as is necessary to bring it to Market. The Mine is certainly rich in Lead and was thought to contain a considerable Quantity of Silver, but by the Experiments yet made it does not contain a sufficient Quantity to answer the Expence of extracting it."[364]

It was at least apparent in Fauquier's description that the Crown had ceased to hinder and discourage the exploitation of Virginia's natural resources and was permitting the entrepreneurial instincts of colonial Virginians to emerge.

Q. In your opinion, what efforts were made by the colony and state of Virginia to exploit natural resources drawn from the marginal sea and the seabed?

A. The supply of salt for the colony and state of Virginia was a perennial concern of the authorities. The domestic production of salt was an important illustration of the exploitation of a natural resource drawn from the sea. Along the seacoast of Virginia two methods were used in the production of salt. Solar salt was made by the evaporation of sea water by the heat of the sun in salterns along the shores of oceans and seas, while the alternative was to boil salt water in regions where fuel

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364 C.O. 5/1330, ff. 261-284, query 8.

1056 was cheap.[365] In either case the salt water was run directly from the sea into salterns by means of canals.

The Virginia Company began the manufacture of salt on Smith's Island off the seacoast. In 1610 Captain Samuel Argall reported on his explorations of the islands off the seacoast: "Salt might easily be made there, if there were any ponds digged, for that I found salt kernel where the water had overflowed in certain places."[366] Saltmaking began on Smith's Island in the 1610's. Initially the workers boiled seawater, but by the 1620's they were experimenting with evaporation by the sun. There is some evidence that by 1633 the Eastern Shore had exported some salt to Massachusetts.[367] The settlement at Dale's Gift in the 1610's also dedicated itself to saltmaking and catching fish on the Eastern Shore.[368] The Virginia Company directly encouraged both of these efforts.[369] In 1628 the Council in Virginia ordered a person to the Eastern Shore to "seeke out fit places for to experiment the making of
1057 salte by the sonn. . . ."[370]

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365 H. B. and G. M. Weiss, *The Revolutionary Saltworks of the New Jersey Coast: With Notes on the Early Methods of Making Salt in New England, New York, Delaware and Virginia* passim (1959).

366 Quoted in J. Wharton, *The Bounty of the Chesapeake: Fishing in Colonial Virginia* 12 (1957).

367 Ames, *Studies of the Va. Eastern Shore* 111-114.

368 J. Rolfe, *A True Relation of the State of Virginia lefte by Sir Thomas Dale Knight in May last 1616* 39 (1951 edition).

369 Wharton, *Bounty of the Chesapeake* 20.

370 *Minutes of the Council and General Court of Colonial Virginia* 174 (H.R. McIllwaine ed. 1924).

Virginia authorities again became actively involved in the encouragement of a saltworks in the 1650's and 1660's particularly in support of the efforts by a leading resident of the Eastern Shore, Colonel Edmund Scarbrugh. The Assembly helped defray his expenses, rewarded him for the first significant quantity of salt he produced, granted him a monopoly for the Eastern Shore, and forbade the importation of salt into that region.[371] But Scarbrugh could not produce enough salt for everyone, and his monoply had to be ended.[372] He had encountered the perpetual problem of producing enough salt for everyone and of adequate quality.

Only the outbreak of the Revolutionary War moved the Virginia legislature to try again to stimulate the production of salt domestically. In the meantime, Virginia, like most other American colonies, dependended on a supply of
1058 salt from Salt Tortuga, one of the Leeward Islands. The lack of a domestic salt supply seriously hindered the salting of fish in Virginia. The General Assembly of the state of Virginia made a determined effort in the spring and summer of 1776 to encourage the making of salt. This effort continued for the remainder of the Revolutionary period with some success.[373]

Almost every commentator on colonial Virginia noted the plentifulness of fish in the surrounding waters and seas. The first adventurers to Jamestown were astonished

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371 2 Hen. Stat. 12 (1660), 38 (1661), 122 (1662); also Beverley, *Hist. and Present State of Va.* 67; Wharton, *Bounty of the Chesapeake* 21-22.

372 2 Hen. Stat. 186 (1663), 236-237 (1666); also Wharton, *Bounty of the Chesapeake* 22.

373 See 9 Hen. Stat. 122-126; 9 Hen. Stat. 310-312; 1 J. Council 18, 125, 154, 269-270.

by the numbers of fish they saw. The Virginia Company tried to stimulate the fishing industry from the beginning, encouraging mariners to discover the best places for fishing in the nearby ocean. In 1610 Captain Samuel Argall fished off the Virginia coast for the benefit of the colony. The early charters granted the colonists substantial fishing rights in the Atlantic ocean.[374] Eighteen century commentators also boasted of Virginia's great natural resource of
1059 fish and shellfish.[375]

Although a large number of Virginians caught fish on a daily basis, commercial fisheries did not really develop in Virginia until at least the mid-eighteenth century. The fishing industry faced a number of serious problems: fishing in Chesapeake Bay was erratic; the colony lacked ice and had little salt; sun-drying was difficult in the region; transportation, packing and handling facilities were inadequate; there were few towns to provide a ready market.[376] Until at least 1700 Virginia imported some salted fish from New England.[377] Again fishing took a back seat to the tobacco trade. The colonial legislature hardly involved itself with the issue of fishing. In June, 1680 the Assembly did pass "an act restraining strikeing and killing fish at unseasonable times."[378] But in general the colonial government

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374 See generally Wharton, *Bounty of the Chesapeake* 3, 10-12, 14.

375 Hartwell, Chilton and Blair, *Present State of Va.* 7; Beverley, *Hist. and Present State of Va.* 146; Byrd (?), *Natural History of Va.* 73-79.

376 See Wharton, *Bounty of the Chesapeake* 3. 40-41.

377 See Capt. J. Smith, *The True Travels* 44 (1630); 3 Exec. J. Council 193-194 (1708); Wharton, *Bounty of the Chesapeake* 14.

378 2 Hen. Stat. 487-488; repealed in 1686, 3 *Id.* 30.

1060 did nothing to foster commercial fisheries.[379] In fact, it was not until enactments of 1795 and 1805 by the legislature that there was much evidence of the existence of commercial fisheries in the state.[380]

Colonial commentators also admired the vast quantities of oysters and other shellfish available in Virginia.[381] Oysters were gathered in the lower parts of the Bay and at the Virginia Capes where the water was saltiest. Oystering was a regular occupation by the mid-eighteenth century, and there were some suggestions that an oyster trade existed, although the problems of preserving oysters by pickling them were severe.[382] In addition to eating this seabed resource, the colonists used oyster shells extensively for iron smelting, for making roads and garden paths, and in making mortar for bricks. Burned oyster shells produced
1061 the lime employed in making mortar and hence in building.[383] The colonial legislature did not have much concern with oysters and shellfish. It was not until the early nineteenth century that the state legislature passed acts "to prevent the destruction of oysters within this commonwealth"

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379 J.C. Pearson, The Fish and Fisheries of Colonial Virginia, 23 *William and Mary Quarterly*, 2nd Ser., 7 (1943).

380 1 Shepherd Statutes 371-373; 3 *Id.* 173.

381 See Wharton, *Bounty of the Chesapeake* 8, 37; G. Percy, *Observations Gathered out of "A Discourse of the Plantation of the Southern Colony in Virginia by the English*, 1606," 9-10 (D.B. Quinn ed. 1967); Byrd (?), *Natural Hist. of Va.* 82-86.

382 See Middleton, *Tobacco Coast* 56-58.

383 See W. Dailey, Lime Preparation at Jamestown in the Seventeenth Century, 18 *William and Mary Quarterly*, 2nd Ser. 1-12 (1938); Hume, *Here Lies Va.* 66; Wharton, *Bounty of the Chesapeake* 59-60.

and the like. The practice of burning oysters for the lime without eating the oysters first was particularly condemned.[384]

Whaling was a colonial industry that especially involved the exploitation of the resources of the marginal sea. Whales were occasionally found and seen off the coast of Virginia.[385] In 1693 the Council gave several persons a commission to catch whales and removed the duty from them: "It is the Coucills Opinion that the Ketching of Whales in the Bay, and on this Coast, is for their Majesties Service
1062 and Advantage of this Countrey. . . ."[386] In 1699 the governor responded to the address of the Burgesses and Council by issuing a proclamation forbidding the striking or killing of whales in Chesapeake Bay, because this resulted in the killing of fish and the pollution of the rivers by smells.[387] In 1710 the Governor and Council approved the petition of two Virginia partners that they be allowed to engage in whaling "upon the coast of this her Majestys Colony and in the bay of Chesapeak. . . ."[388] In 1751 and 1752 several gentlemen of Virginia fitted out the sloop Experiment for the purpose of engaging in the whale fishery on the seacoast of Virginia. The vessel caught a number of whales in the next year or two, much to the satisfaction of the Virginia Gazette, which reported each

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384 See 3 Shepherd Statutes 47-48; Whealton, *Md. and Va. Boundary Controversy* 45 (1904).

385 Byrd (?), *Natural Hist. of Va.* 73; Middleton, *Tobacco Coast* 206-207.

386 1 Exec. J. Council 275.

387 1 Exec. J. Council 449; 2 *Id.* 21, 28.

388 3 Exec. J. Council 244.

success, and tried to encourage this undertaking off the coast of Virginia.[389] Some whaling took place on a regular basis by 1791 because 1263 gallons of whale oil appeared in a list of goods exported for that year.[390] A comment by the Reverend Hugh Jones in 1724 perhaps best summed
1063 up the ambivalent position that Virginia found itself in with respect to the exploitation of the resources of the marginal sea: "As for carrying on the fishing trade in Virginia, though there be plenty of fish there, yet I believe other countries where fisheries are established, and that have little else to mind and depend upon, would outdo it in this respect; only more whales might be taken upon the Eastern Shore, and bring good gain to such people as would make it their business." Jones was a perceptive and prophetic individual.[391]

Q. Do you have a concluding opinion concerning the question of ownership of and jurisdiction over the marginal sea, the seabed and the resources thereof, for a distance extending outward into the continental shelf for one hundred miles from low-water mark on the Virginia coast and if so, would you please state the reasons for it?

A. In my opinion, Virginia's claim to ownership of, and jurisdiction over, the marginal sea, the seabed, the subsoil, and the resources thereof, for a distance extending outward into the continental shelf for one hundred miles from low-water mark on the Virginia coast can be clearly established and demonstrated. The royal charter of 1609 to the Virginia Company established the territorial
064 limits of the colony of Virginia to the eastward upon which

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389 Virginia Gazette, May 9, 1751; June 13, 1751; April 24, 1752.

390 Wharton, *Bounty of the Chesapeake* 43.

391 H. Jones, *Present State of Va.* 142.

this claim to ownership of the marginal sea and its resources was initially based. This 1609 charter further conveyed to Virginia power over, and rights within, the region of "the Virginian Sea", including the specific grant of mineral and fishing rights. The conveyance to Virginia of the marginal sea was in recognition of the resources available for potential exploitation. Despite royal grants in the colonial era that affected the territorial extent of Virginia to the north and south, the English Crown made no further alterations in the eastward boundary of Virginia after it became a royal colony. In the colonial era Virginia thus enjoyed both *dominium*, that is ownership and proprietary rights, as well as *imperium*, that is powers of regulation and control, over the marginal sea and its resources. This sea was central to basic economic and defense considerations of the colony of Virginia in the colonial era, and Virginia specifically exercised extensive jurisdiction over this maritime region in the seventeenth and eighteenth centuries.

At the time of the formation of the Union (1776-1789) ownership of the continental shelf in the marginal sea passed from the colony of Virginia to the successor state. The state of Viginia also inherited from the English Crown any
1065 degree of ownership over this region that it had shared with the mother country, while the colony was a separate part of the British colonial empire. At the time of the Revolution Virginia's chain of title to boundaries extending one hundred miles into the marginal sea dated back to the original Virginia charter grants from the Crown. By reference to the charter of 1609 in its Constitution of 1776, the now sovereign state of Virginia asserted its historic claims to its historic boundaries, except as these had been adjusted by later royal grants.

The various boundary controversies among Virginia, North Carolina, Maryland, and Pennsylvania well illustrated the concern that the colonists had with territorial issues.

Virginia was very careful to defend its historical boundaries to the fullest extent possible in every direction. The effort made by prominent Virginians to establish the validity of the 1609 charter and its boundary stipulations in the course of the controversy over Virginia's cessation of the territory northwest of the Ohio river at the time of the formation of the Union made clear the basic importance attached to the issues of formal boundary lines and legitimate land titles.

From the time of the formation of the Union and the
1066 assertion of its territorial limits to the eastward as derived from the 1609 charter, Virginia has never granted away or transferred in any formal manner its ownership over the marginal sea and the seabed to any other state, individual, or the federal government. In particular the Commonwealth of Virginia has never passed on to the United States Government the ownership of the continental shelf that it acquired from the colony of Virginia and from England at the time of the formation of the Union.

Thus the seaward boundary of Virginia has continued to extend one hundred miles into the marginal sea during the period of existence of the colony and state of Virginia, and certainly prior to and at the time that the Commonwealth became a member of the Union. During and before this latter era Virginia had traditionally exercised sovereignty and dominion over the marginal sea, the seabed, the subsoil, and the resources thereof. Virginia similarly held title to the seabed and subsoil in the marginal sea. The submerged lands that the continental shelf encompassed within one hundred miles of the Virginia coast were within the state's historic boundaries. Virginia at the time of the formation of the Union enjoyed the right to explore and exploit the natural resources of the continental shelf that lay within her historic boundaries.

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CROSS-EXAMINATION OF PHILIP C. JESSUP

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BY MR. RASHKOW:

1147 Q. It is your opinion then that in the 18th century the mere assertion of a right to a broad area of sea without any further action was sufficient to gain sovereignty over those areas?

A. No, I would say assertion plus acquiescence.

Q. Assertion plus acquiescence. No further action was required?

A. No.

Q. During your discussion about ports and harbors on 477 through 479, whatever that was, 497 to 499, you added that it is reasonable to assume that these waters included more than territorial waters *stricto sensu*. What do you mean by the expression territorial waters *stricto sensu*?

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1148 A. I mean by that the area of waters which were, as I have explained, considered to be part of the territory of the states. And more than the three mile limit in terms of what I am talking about here as evidence by the treaties which I then begin to quote following page 500.

Q. On page 506 you speak of the curtailment of previous claims to sovereignty over the sea, in the context that the doctrine of the territorial sea crystalized in the 18th and 19th centuries. Could you tell me more specifically when that doctrine crystallized?

A. In terms of precisely, I think this could never be done. I always rely there on that very remarkable dictum that Justice Cardozo wrote in New Jersey against Delaware, in which he says, "International law . . . has at times like the common law a twilight existence till it receives the
149 imprimatur of a court which attests to its jural quality." I think one always has to bear in mind – he was talking, of course, about the development of the law of the thalweg that there is a boundary line in rivers. But this applies equally to the maritime boundaries out to sea in trying to fix the specific time.

Q. You say the development represented a curtailment of state jurisdiction. Is there any evidence that this curtailment applied only to rights in the sea and not to rights in the seabed also?

A. Would you say that again?

Q. You state that the development of the territorial sea doctrine represented a curtailment of state jurisdiction. Is there any evidence in state practice during this period which you are discussing that this curtailment applied only to the sea and did not apply equally well to the seabed?

A. I think this appears from my subsequent discussion of the practice in regard to the development of pearl fisheries, coral fisheries, sponge fisheries, and other fisheries of the seabed which continued to be operated in the limits which I have described and which are not marked by curtailment during this period. In other words, there was no interference with the traditional claims to the exploitation of the seabed as there was a curtailment
50 of the previous claims to exercise rights over the surface waters.

Q. Then the evidence upon which you base the conclusion that claims in the seabed were not curtailed at

the same time that claims to the sea were curtailed is this evidence relating to the sedentary fisheries?

A. Right.

Q. Did any of the nations who curtailed these claims distinguish between the sea and the seabed in the curtailment, in their relations with other nations?

A. They didn't use this expression, England didn't write to France and say, "I curtail your right in the waters." But in terms of the practice the states which were exercising control over seabed fisheries continued to exercise that control without significant opposition at the same time that they were asserting a denial of the right to extend your control over the surface waters.

Q. On page 506 of your testimony you testified that the curtailment of claims to sovereignty over the seas occurred because of insistence by powerful maritime states, including Great Britain and the United States. When did Great Britain begin to advocate a three mile territorial sea?

1151 A. It varies to some extent, and as I said before, it depends very frequently on the nature of the claim which is being asserted. Of course, you do have in the Territorial Waters Jurisdiction Act of 1878 the assertion that the rights of the Crown to the three mile limit extend and have always extended. They didn't attempt to say what year they had in mind as the most distant year in which this applied. But in terms of a good deal of the international practice this certainly was developing in English practice in the 18th century, and probably the early part of the 18th century.

Q. When did the United States as a nation begin to advocate the three mile territorial sea?

A. This is after independence?

Q. Yes.

A. You go back I suppose again to the Jeffersonian letters to Genet and Hammond. The letter to Hammond of course, is more complete than the letter to Genet, and some think it was because Jefferson was very much irritated by Genet who was always pestering him with the assertion of French claims and a desire to establish closer relations between France and the United States. And in his letter to Hammond, Jefferson says in the meantime he wishes to fix provisionally on some distance. He goes on to talk about the human sight estimated at 20 miles or, as I men-
1152 tioned before, the cannon ball usually stated at one sea league. Some supported three sea leagues, and so on. And he says for the present we are going to take the three mile limit for purposes of neutrality. But you do have some other discussions which are not definitely based upon the three mile limit. For instance, in my book on *The Law of Territorial Waters* you have a report of a Congressional Committee in 1782 about fishing rights off the Newfoundland banks, which was a rather special case. And there they talk about a three league limit. In the case which I also cite, the opinion of Attorney General Randolph in 1793, you have a consideration of a fight between the British ship and the French frigate, and he says that the United States is justified in attaching to our coast an extension of the sea beyond the reach of a cannon shot. But, as I point out, he was there talking about Delaware Bay as a territorial bay. So that you go on into the Jeffersonian statements in 1793. And then you get variations as you go into the later statements in 1806, 1807, in the instruction to the commissioners to negotiate treaties with the British.

Q. Is it fair to say then that in your opinion the three mile rule had been established as American policy in the early part of the 19th century?

1153 A. Yes. I think this is particularly indicated by the instructions of 1806, 1807, Madison to Monroe and Pinckney where, after stating as sort of a consideration it would be nice if we could go out so far, he said, "If you can't get that," he said, "don't take anything less than one sea league." In other words, this I think was the minimum which the United States was prepared to accept. But there were still tentative feelers to see whether they could get away with a broader limit. But if I may just put in this point, as a result of Washington's neutrality policy, which was a novelty in international law, in my opinion, on insisting on neutral duties as well as neutral rights, the tendency there was to restrict the extent of territorial waters because the United States was firmly taking the position that they had duties in the territorial waters as a neutral to prevent the capture of ships by belligerents. Therefore, for that purpose there was a desire to limit the area of responsibility, whereas when you come to a question of fisheries, particularly up off Newfoundland, the tendency was to say how far out can we move this so that we have a right to fish freely.

Q. Since the United States established its territorial sea at three miles early in the 19th century, has the United States changed its position as to the breadth of
1154 the territorial sea?

A. Yes, within the last few months the United States has indicated it would be ready to accept the 12 mile limit as a part of a deal to establish a series of zones which would include the zone of territorial waters and what is called, or I think it was a few months ago, a trusteeship zone, and then the international zone. You also have a beginning of a yielding on that in the final compromise of the United States-Canada proposals at the Geneva Conference in 1960 when they were trying to get

a reconciliation. But apparently, at least the negotiating position of the United States now, is that they would accept the 12 mile zone. But as to the existing law they were very firm at the Geneva Conference of '58 that the three mile limit was established in international law. And, as I recall, this was firmly stated in a number of the anti-smuggling treaties concluded early in the prohibition era. In the British treaty, we said it is the firm intention of the contracting parties to maintain the principle of three miles as the limit of territorial waters.

Q. Is it then your position that the United States has maintained since the early 18th century, in its relations with other countries, that its territorial sea was, and today
1155 is, officially three miles?

A. Yes.

MR. CLAGETT: You said the early 18th century?

MR. RASHKOW: Excuse me, early 19th century.

THE WITNESS: Yes.

BY MR. RASHKOW:

Q. In many places in your testimony you refer to the exploitation of sedentary fisheries beyond territorial waters. Is the right to exploit these resources, which you have testified to, the same right as described by you in quoting from Mr. Carter in the Bering Sea arbitration at page 624 and 625?

A. Yes. Carter refers back at 625 to the most famous case, the Ceylon fisheries, and he indicates the British had conceded that international law recognizes the right of the state to acquire certain portions of the waters of the sea and the soil under the sea, and to include them within the territory of the state. This includes the question of the territorial sea as well as the seabed. Then he goes on to develop the question of the seabed and knocking out the argument about occupation by insisting on the right to, as he says on page 627, "The claim applies strictly to

the soil under the sea. Such claim may be legitimately made to oyster beds, pearl fisheries, and coral reefs; and,
1156 in the same way, mines."

Q. How far out was this right as described by you and described by Mr. Carter applicable, to what distance into the sea?

MR. CLAGETT: When?

BY MR. RASHKOW:

Q. During the 18th and 19th centuries.

A. I have pointed out in various of my discussions of these exploitations of the seabed that it is not always possible from the available evidence to say exactly how far out the seabed fisheries were exploited. But in my discussion of the claims of Ceylon, I have noted the distances in many respects where the claims went out quite far beyond the three mile limit, and I have noted various statements that they did not limit their claims to the area of territorial waters. For instance, on page 576, I quote Mr. Ormsby-Gore in the parliamentary debate as saying the farthest point was 25 miles from the coast of Ceylon. Now, it is true that in regard to the fisheries at Palk's Bay the claim was justified on the ground that this could be considered an historic territorial bay. This, I think, is not true in regard to the Gulf of Manaar. And this conclusion, I think, is borne out by the
1157 various discussions. At times there were claims that the Gulf of Manaar was also a territorial bay, but at page 16 of my *Law of Territorial Waters*, I quote Russell, J., as saying the Gulf of Manaar is a part of the high seas from its size, configuration, and geographical position. He did not believe the Crown had or was under any circumstances asserting any special right with respect to the Gulf. So that you have in the area of the Gulf, as distinguished from Palk's Bay, claims which go out maybe

20, 25, 30 miles. And some of the descriptions of the area are in terms of square miles which makes it a little difficult to determine just how far out to sea they went. But I have said in my testimony that it seems to me from the general descriptions one can assume reasonably from the description of the type of fishery, the type of ship, the depth of the water, etc., that many of these went out beyond the three mile limit. And on page 583, for instance, I quote statements that the pearl beds go out 18 miles from land. I think it is impossible to set a particular mileage limit around the world, and I think the conclusion which I have stated in my testimony, and which I have maintained, is that it doesn't matter whether you went out 10 miles beyond the three mile limit, or 20 miles, or 30 miles, if you were exploiting one of the
1158 sedentary fisheries, and other states did not object.

Q. On page 623 of your testimony you quote from Mr. Carter, and you say that the ILC would agree with Mr. Carter with respect to the justification for the right of sedentary fisheries. That quote is: "It is where there is a natural advantage, within a certain proximity to the coast of a particular nation, and in respect to which it enjoys peculiar advantages growing out of its proximity, and where, if it is permitted to establish and carry out a system of national regulation, it may furnish a regular constant supply of a certain product of the seas, for the uses of mankind . . . " Is this a fair statement of what is, in your opinion, the principle of international law which governs seabed resources?

A. That is Carter's explanation of the basis of the claim –

Q. Quite right.

A. – from 623, 624? I think it is a resonable analysis of why the rights were carried on. But I think one has to read that particular statement of Carter's in the general context of his argument in the whole Bering Sea case because he was trying to lead up from the established notion that you had a right to exploit the seabed near your coast to his idea of the conservation of the seal herd and the right of the United States to exclusive rights
1159 there. So, I think his argument moves on into a bit of pleading for the main element of the case. But I think, as I say here, that the ILC would probably agree with Carter that this is a justification for the development of the rule.

Q. On page 643 of the transcript you testified that what has always obtained in your view is the exclusive right of the adjacent coastal state to make an occupation in a certain limited sense, and to use and enjoy the resources when the occasion arises. What do you mean by an occupation in a certain limited sense?

A. I put it in quotation marks because I have explained rather fully in previous parts of my testimony I do not accept the doctrine which has been advocated by various writers that the seabed can be occupied and that occupation of the seabed is essential to the establishment of a claim. And, in particular, I quoted rather at length from Lauterpacht's articles in which he disposes, I think quite effectively, of the claim about occupation. I also pointed to the views of the International Law Commission and to the views of the International Court of Justice, all of which I think indicate that occupation is not necessary. And I have said in that passage on 643, "Of course no one would go to the trouble of making a physical 'occu-
1160 pation' (to the very limited extent such an occupation is possible, even today) of the seabed before a resource was

discovered." What I have in mind is – perhaps I could give you two illustrations. I have pointed to the discussion at the Geneva Conference of the Indian Government's insistence on including articles which dealt with the peculiar kind of fishery off the Indian Coast where they put permanent stakes into the bed of the sea and maintained these for the purpose of netting, and so on, year after year after year. And the conference was agreeable to recognizing that that was a good basis for a claim. That is a kind of physical occupation. I think you can say also that if you have mounted a drilling apparatus and have your platform and all and are operating there, that you can talk about a physical occupation, although as I have explained I do not think that this is at all a prerequisite to the assertion of a claim. But, as I say as I go on, I think at the end of that page, "the exclusive right of the adjacent coastal state to make an 'occupation' (in the limited sense to which I have referred) and to use and enjoy the resources when the occasion should arise." That is the general sense in which I am using it there.

[161] Q. To whom do the resources belong if the coastal state never makes the limited occupation, never takes any action?

A. I think it is very clear from the decision of the International Court in the North Sea case that this is an inherent right and you may begin to exploit whenever you have the desire or the facilities.

Q. So, as an inherent right it is not necessary to take any action or to make any claim with respect to those resources?

A. The court is very clear on that, I think. I quoted specifically – if I can find it here – the court says, this is at page 526 of my testimony, "In short, there is here an inherent right. In order to exercise it, no special legal

process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised."

Q. The court is speaking in the context of the continental shelf convention, although it may apply to previous law.

A. Yes.

1162 Q. In your opinion, could this inherent exclusive right of a coastal state to the resources of the seabed exist customarily in international law during the 17th century?

A. Yes.

Q. The 18th century?

A. Yes.

Q. And the 19th century?

A. Yes.

Q. Did this right, inherent exclusive right, exist for the entire bed of the sea?

A. Well, I suppose you mean there does it go out into the middle of the ocean, into the deep seabed. Here I think you would have to say no. You cannot say how far out it did go, as I have explained a few minutes ago in answer to your question. But it was based on the idea that these were resources proximate to the coastal state. And it was the proximity of those resources, somewhat in line with Carter's argument which we just discussed, which entitled the state to exploit these, and you had your inherent right. But it is also clear from the opinion of the court in the North Sea case that they recognized that there was a terminal point to the continental shelf and this did not go out into the middle of the ocean,

1163 the deep sea.

Q. Is it your opinion then that the inherent exclusive rights of the coastal state to the resources of the seabed and subsoil beyond the territorial waters were found by the International Law Commission to be justified on this principle of proximity?

A. In part, yes.

Q. When you say in part, yes, what would the other considerations be upon which they justified it?

A. I think in terms of the general usage, which they analyzed, and the evidence which was presented to them in all of the studies which were made for the ILC of the tradition or practice of the exploitation of the seabed. I think the International Law Commission, in dealing with sea laws particularly, but in the other cases, other subjects as well, was very much influenced by practice and not necessarily so much by the rationale, if I may call it that, for example, of Carter's argument.

Q. Under international law could a nation renounce those seabed rights?

A. It can renounce them in the sense of making a treaty with another state by which we say we hereby give you the rights to exploit this area, or it can make a cession of an area as it can of land territory.

1164 Q. Is there any other way in which it could renounce those rights, such as by acquiescence of activities in relation to those?

A. Yes, I have suggested in my testimony – I can't give you the page at the moment – that if there were a long acquiescence in the exercise of those rights by an offshore state, by another state, that this might establish in the offshore state, or the foreign state, a sort of prescriptive right which you could say would constitute a renunciation by the permissive state.

Q. What about a declaration, could it renounce its

rights by declaration in the nature of the Truman Proclamation?

A. You mean saying we repudiate the Truman Proclamation, we say we have no such rights?

Q. Quite right.

A. Well, then, other states would be entitled to rely on that to come in and exploit. And if the state didn't change its mind and chase them out you would have one of these cases of acquiescence.

Q. If a nation did renounce those rights by whatever means it takes to renounce rights, to whom would those
1165 rights, the resources of the seabed, belong?

A. These are renunciations not in favor of any particular state but a complete renunciation?

Q. Yes.

A. I think you would get back to the argument which I discussed a little bit as to the distinction between a *res nullius* and a *res communis*. I don't think one could say that the case of – your hypothetical case of renunciation, that these resources would revert to the state of *res communis* because this was not the condition anyhow. And you might well say that this became a *res nullius* and might be subject to acquisition by any state.

Q. Assuming that the colonies had rights in the seabed out to 50 or 100 miles in 1776 under international law, assuming also that the United States renounced these rights at the end of the 18th century, and did not assert rights to the seabed again until the Truman Proclamation in 1945, assuming those two facts, is it your opinion that the rights to the seabed acquired by the United States under international law as a result of that assertion belong to the Federal Government or to the states under international law?

A. Excuse me, did you characterize those as facts?

Q. Yes.

1166 A. You started by saying assumptions, and then you said assuming those facts.

Q. Assuming those were found to be the facts.

A. Well, I got misled there because I thought you were saying that these were facts. Would you please repeat that?

Q. Assuming that the colonies had rights in the seabed out to 50 or 100 miles in 1776, and assuming also that the United States renounced those rights at the end of the 18th century, and did not assert rights over those resources until the Truman Proclamation in 1945, assuming those two facts, or assuming they are found to be facts, given those assumptions, is it your opinion that those rights to the seabed would belong to the United States or to the states?

A. I think you are asking me a question somewhat out of the range of my expertise for which I am qualified to testify. And you stated a hypothetical situation which I don't accept, of course, because there was no such renunciation. If you are thinking, as I suppose you are, of the doctrine expressed in the Canadian case that rights which were acquired after the confederation, they must be rights acquired by that entity which is recognized in international law as a sovereign state entitled to rights under international law which was part of their
1167 thesis, I think, in the British Columbia case, then you are putting a situation in which you lead to a conclusion that the entity in international law is the one which acquires the rights. But, as I say, this is a kind of hypothesis which I have never considered because it seems to me to be entirely contrary to facts in terms of any renunciation which might have been made as is specified in your assumptions. On the other hand, in regard to the

Federal system in the United States, I think that I would not be justified in going into the ranges of constitutional law for which I have not been qualified. I would ask counsel whether I am correct that he did not qualify me as an expert in constitutional law.

MR. CLAGETT: That is correct, sir. I am sure I could have if I had wanted to.

THE SPECIAL MASTER: I would like to ask a point on that question, if I might. The first assumption; namely, that the states as colonies had acquired certain rights in the seabed which is being claimed here by the states –

THE WITNESS: Yes.

THE SPECIAL MASTER: – assuming, but you say you don't think it was the fact, but assuming that it was so, that the Federal Government by a suitable instrument renounced rights in the seabed beyond the three mile limit,
1168 would that renunciation be recognized in international law by other states as binding on the states which were the holders of those rights?

THE WITNESS: I would think, Judge Maris, that there you would get into the question as to whether the Federal Government could renounce something which did not appertain to the Federal Government which was the property of somebody else.

THE SPECIAL MASTER: From the international law standpoint the Federal Government is the entity with which other nations deal, representing whatever complex of powers there exist here in this country.

THE WITNESS: Yes, I think that is correct. Foreign governments faced with a declaration by the United States Government that, if I may alter the case a little bit to make it a little clearer in my own mind, suppose the United States Government in the 20th century said we no longer claim three miles as the limit of territorial

waters, we claim only two miles. Other states, in spite of cases like Manchester against Massachusetts, which recogized the three mile limit for the states, other states would deal with the Federal Government and say we stand on your position. And as indicated in many situations the
1169 Federal Government has asserted that the individual states do not have a right of contact with foreign governments in terms of international negotiations unless under the provisions of the Constitution they conclude a compact with the consent of the Congress.

THE SPECIAL MASTER: I suppose that the ultimate case would be a formal treaty or convention, to which the United States as a sovereign adhered, expressly giving up any right beyond a certain point, which the states were at that time claiming to have.

THE WITNESS: Your Honor, there has been published in the last few years two studies, and I am sorry, I can't identify them, and I merely refer to the fact that they do exist, in which a young scholar has pointed to situations in which state governments have dealt with foreign governments. I read them rather hastily and did not find them very conclusive. But there is perhaps some evidence that state governments have dealt with foreign governments without the opposition of the Federal Government. But I am quite sure that in the face of a stand by the Federal Government on its rights to conduct foreign relations of the United States, at the present time the foreign governments would insist that they had no need to pay any
1170 attention to what the state government asserted.

THE SPECIAL MASTER: Of course, there would be the question as to whether the state would then have some claim against the Federal Government.

THE WITNESS: Yes, sir.

BY MR. RASHKOW:

Q. On page 518 of the transcript you testified that, "No distinction in the legal principle applicable can be made between exploitation of pearl fisheries and drilling for oil." I take it that it is your opinion that both of these resources are subject to an inherent exclusive right of the coastal state as a result of the natural advantage which the coastal state has for their use and enjoyment?

A. And as a result of the reasoning of the International Court in the North Sea cases concerning the prolongation of the coast and the inherent right to its exploitation.

Q. Does this principle apply to fishing the waters in the coastal state?

A. No, a distinction has always been made, and I think I have pointed this out, between the right to deal with so called swimming fish and the right to deal with the seabed. This was brought out very clearly, I think, in the Geneva Conference.

1171 THE SPECIAL MASTER: Suppose we take a break for a few minutes now.

(Short recess.)

BY MR. RASHKOW:

Q. Prior to breaking for the recess, I asked you a question concerning rights to the fishery resources in the adjacent seas, and you said that these inherent exclusive rights did not extend to the fishery resources. Is it not true that some nations recently, within the last 20 years, have asserted an inherent exclusive right to the fishery resources of the seabed on the same basis as what you allege the rights of the sedentary resources is justified?

A. To a certain extent this is the basis of the justifications of Peruvian claims and the claims of some of the other states on the west coast of South America which have been generally rejected not only by the United States but by most other states. And the Peruvian case is

the clearest one because they claim that there was a relationship between the swimming fish off the coast of Peru and the entire livelihood of the Peruvian nation because one of their principal economic resources is the guano. Guano depends on the presence of the birds. The presence of the birds depends on the presence of the fish. And, therefore, if people are allowed to come in and catch
1172 all their fish, this is destructive of the very life of the country. This goes further, really, than the claim to the seabed where such a vital connection was not generally alleged. But it is perhaps an example where there is a claim to swimming fish, as I called them, on the basis of the peculiar rights of the adjacent shore states. But these also have to be noted or are an attempt, in my opinion, by the states on the west coast of South America to find, rather desperately reaching out for some justification to a claim of rights off shore because they don't have a continental shelf and since their coast drops off sharply into the sea. And it is only when the Argentine came in to join the west coast states that the Argentine was able to tie this in with a very extensive continental shelf. Now you've got Peking backing up the claim of the South American states. Whether that's on the basis of some particular interpretation of international law I am not informed.

Q. On page 569 of the transcript you testified that Hurst's language in his article "Whose Is the Bed of the Sea?" may be read to imply that he regarded the seabed as terra nullius except for isolated instances where actual occupation had been established. You added that you disagree with such implication. Does the language used by
1173 Hurst in the article imply, in your opinion, that Hurst himself viewed the seabed as terra nullius?

A. I don't know that I can be more explicit than I have here.

Q. I was confused as to whether the implication you were talking about was what concerned Hurst's beliefs, or whether it concerned the implication of the theory of seabed resources.

A. I was suggesting this is a situation in which actual language used can be interpreted in one of two ways. One possible interpretation is the terra nullius interpretation. But that is not the inevitable interpretation of what he said.

Q. Well, what did Hurst himself believe in your opinion?

A. Well, I don't know, I can only judge him by his language in that article. There I think it's ambivalent, it could be interpreted either way. And I am merely noting this is a possible interpretation. But if this was his position, then I would have to disagree.

Q. Is your position that the exploitation of sedentary fisheries and coal mines under the sea prior to the development of the continental shelf doctrine was permitted
1174 under international law as an incident of the inherent, exclusive rights of these states, rather than occupation or usage, consistent with the opinion of other publicists who have written in the field?

A. Yes.

MR. CLAGETT: I didn't understand that question. I don't know if the witness did. I wonder if it could be repeated.

MR. RASHKOW: Did you understand the question?

THE WITNESS: Well, I think I know what you were driving at, yes.

MR. RASHKOW: Would you still have an objection?

MR. CLAGETT: I would if only for my benefit. I found it difficult.

BY MR. RASHKOW:

Q. Is it your position that the exploitation of seden-

tary fisheries and coal mines under the sea prior to the development of the continental shelf doctrine was permitted under international law as an incident of the inherent, exclusive rights of these states, rather than occupation or usage. Is that position consistent with the opinion of other publicists who have written in this field?

A. I had better, to avoid any ambiguity, not try to say
1175 yes or no, but to give you an answer in a little more detail. My position is consistent with the first part of your question, that this developed as part of the inherent right. And very definitely, as I have tried to point out on a number of occasions, it did not depend on occupation. I have also pointed out in various places in my testimony that this is not the unanimous judgment of all international lawyers. Some of them have taken the position that it does depend on occupation. And I said earlier this morning that I relied very heavily on the reasoning in the Lauterpacht article, on the conclusions of the International Law Commission, and on the statements in the judgment of the International Court in the North Sea case. But, to summarize, definitely I reject the occupation of the sea.

Q. You referred to the Lauterpacht article, the International Law Commission –

A. I should add the Bering Sea arguments of the United States.

Q. – and Mr. Carter and the Bering Sea arbitration.

A. Or we can say the United States position.

Q. Are you familiar with any other publicists in the field whose opinion with respect to this right to the resources of the seabed is consistent with yours?

1176 A. In addition to those I have mentioned?

Q. Correct.

A. I am sorry, I can't recall the names of all of the members of the International Law Commission who joined

in asserting their view that it didn't depend on occupation. I could give you the names of the judges of the International Court that joined in the majority opinion. These represent pretty much top flight international lawyers, present company excepted, in passing on this issue.

Q. Now I, of course, am not referring to the doctrine itself.

A. As far as treatises are concerned, I think on this point as on most points, if you scan the literature of both periodical and published volumes you can total up a number of writers on each side. And it is not, in my opinion, significant to computerize them and say there are 40 one way and 60 the other, or 30, whatever it might be.

Q. Prior to the development of the continental shelf doctrine, as the doctrine under that name, was there any decision by the Permanent Court of International Justice or the International Court of Justice, or any other international arbitral tribunal which recognized as a principle of international law the principle that the coastal state had inherent exclusive right to the resources of the seabed and
1177 subsoil of the seas adjacent to its coast beyond the territorial seas?

A. You want international tribunals?

Q. Yes.

A. No, I don't remember that issue being posed in such a way. I have explained that I don't agree with the dicta in the Abu Dhabi case, which was an international arbitration and which held to the contrary. I explained I don't agree with that and I have given comments of others who have pointed out this was a dictum not necessary to the holding.

Q. Did the United States in the Truman Proclamation base the claim it made under that proclamation on such a principle of customary international law?

A. Yes, I think so. That is on the principle of inherent right, yes. I think that actually the Truman Proclamation was not designed to say here, we have a great innovation, we are going to create new international law. I think it was based on what they considered to be their basic rights. And this was one reason why they were so careful to exclude the possibility of its seeming to imply sovereignty over the waters over the continental shelf. They were very clear that it did not include this. And this in itself is an indication that they were thinking
1178 of the international law which preserved the freedom of the high seas outside the territorial waters, but asserting at the same time that the rights of sovereignty appertained to the United States for the seabed.

Q. To your knowledge, did the Truman Proclamation make any reference to any customary rule of international law which would justify the assertion made therein?

A. I haven't the exact language in mind. I know the person who, I think, was principally responsible for drafting it, Professor William Bishop in Michigan. But I don't recall the specific language in the proclamation.

Q. Prior to the Truman Proclamation in 1945, did the United States ever assert rights to the resources of the seabed and subsoil beyond the territorial sea?

A. There were, of course, and I think I mentioned some of these, some instances of exploitation of sponge off the Gulf coast, the Gulf states, they weren't specific assertions, perhaps, of the United States Government. I referred to the position of the United States in regard to some other claims. And I think there was one statement, I can't put my finger on it at this moment, in regards to the Mexican claims recognizing their right to regulate the fisheries. The situation in regard to the Federal Govern-
1179 ment before 1945, I think amounts to this, that in terms

of exploitability, which throughout I stressed is the prime consideration, there was not occasion to assert claims to the exploitation of the oil and other resources outside of the territorial waters. And when this became a reality the right was asserted and it was maintained in the Truman doctrine.

Q. So, in your opinion, if the occasion had arisen they would have claimed such rights prior to 1945?

A. Right. And I suppose one might say that the very argument we have been talking about, the argument of the United States in the Bering Sea arbitration, was an assertion of the right to exploit the resources of the seabed although we didn't happen to be engaged in sponge and coral fishing to a great extent on the national scale.

Q. To your knowledge, was there any attempt by the United States with respect to these sponge and coral fisheries to exclude foreign fishermen from participating in the fisheries beyond the territorial seas?

A. I am not aware of it.

Q. Aside from what you have testified to in connection with Carter's argument in the Bering Sea arbitration prior to the Truman proclamation, did the United States in the conduct of its foreign relations ever recognize this prin-
1180 ciple of inherent exclusive rights of the coastal states to the resources of the seabed beyond the territorial sea?

A. I think yes, but I would point out that in the places where these claims were most firmly established in the pearl fisheries, in the Mediterranean fisheries, in the Australian fisheries, the United States was not concerned. The principal case which I can cite you, where the United States took a definite stand supporting this, the case which I mentioned in my testimony in regard to the Philippines when the United States was in occupation, in which they adopted legislation or by decree insisted on

reserving the right to the exploitation of the subsoil pearl fisheries outside territorial waters off the Philippine Islands. This was the first decade of this century, or in the 1890's, after the Spanish-American War.

Q. What was the breadth of the territorial sea claimed by Spain prior to the Spanish-American War?

A. Generally six miles.

Q. On page 135 of your prepared testimony, 625 of the transcript, I believe, you say that the United States in the Bering Sea arbitration "successfully attempted to reason" from the doctrine of inherent exclusive right of the coastal states to seabed resources "to a sovereign
1181 right over surface fisheries."

MR. CLAGETT: You mean unsuccessfully, don't you?

MR. RASHKOW: Does he say unsuccessfully?

MR. CLAGETT: Yes.

THE WITNESS: What page is this?

MR. CLAGETT: 625.

THE WITNESS: "The United States rested on the established doctrine that seabed resources could be the subject of ownership by the adjacent state – which was not disputed – and unsuccessfully attempted to reason from that fact to a sovereign right over surface fisheries."

BY MR. RASHKOW:

Q. Did the Arbitral Tribunal accept the underlying argument of Mr. Carter that the coastal states had a right to the sedentary fisheries off its coast on the basis of inherent exclusive right?

A. No, the Tribunal didn't have to rule on that. And if it had pronounced on it I would say it was dictum because the main issue was the right to the protection of the seal herd, and as I pointed out the United States argument based on the old ferae naturae doctrine was rejected by the Tribunal, and the United States lost its

case on that basis. And also on the basis that the Tribunal
1182 did not accept the arguments of the United States about the prior claims of Russia in the Bering Sea.

Q. To your knowledge, were any seabed resources, other than sedentary fisheries, discovered off the coasts of any of the colonies in North America during the colonial period?

A. I would have to check to see whether any of the mining operations off the Canadian coast began at that period. Some of the mining operations in England, of course, were earlier, and I mention the mining off both the east and west coasts, but I don't recall the date on which they began. I am sure I must have it in the testimony somewhere.

Q. Did the Crown or the colonies during the colonial period ever assert against other nations a claim to any resources of the seabed and subsoil of the seas adjacent to its colonies in North America?

A. Yes, I think that in Professor Smith's testimony, or Professor Horwitz' testimony, and I mentioned some of this, there are references to the oyster fisheries, the salt beds, and I suggested that these are also claims to the right to exploit the subsoil or seabed resources. I think perhaps that all inclusive language in some of the charters also includes the seabed resources along with all the other
1183 things they mentioned.

Q. You were, then, referring to Professor Smith's testimony relating to excercises over sedentary fisheries or seabed resources of the colonies of the United States?

A. Yes.

Q. Is it your opinion that assertion of rights to salt pans constitutes assertion of rights to the seabed resources?

A. It is of the same general nature, yes.

Q. At page 643 of the transcript you testified that

you do not think the legal situation whcih existed in your opinion in the 17th and 18th centuries was significantly different to any more recent times, including the 19th and 20th centuries. Was the legal situation you were referring to that other nations would have acquiesced and respected assertions by a coastal state to exclusive rights to exploit newly discovered seabed resources?

A. I am sorry, I got confused on that. Would you repeat that?

Q. At page 643 of the transcript you testified that you do not think the legal situation which existed in the 17th and 18th centuries was significantly different at more
84 recent times, including the 19th and 20th centuries. Was the legal situation you are referring to the situation which would permit other nations to exploit seabed resources as a result of inherent exclusive rights?

A. Excuse me, at one point I think there is no reference to the 17th century. On page 642 I am talking entirely of the 18th century. And the reference on page 643, I think it is to the 18th century, rather than to the 17th century. I don't see any reference at that point to the 17th century. But I think, if I understand the drift of your question, I do assert that the situation existing in the 19th and 20th centuries is the same situation which would have existed in the 18th century if the cases arising at the present time would have arisen in those times.

Q. Are you familiar with the French-Brazilian lobster war in the early 1960's?

A. Generally.

Q. And was that a case in which France objected to assertion of ownership in the lobsters by Brazil?

A. Of course, it's not a seabed sedentary fishery in terms of the discussion if it is near the surface because lobsters are swimming fish. They are not attached to the bottom like an oyster. The French did object to the

1185 exclusion of French fishing vessels from the Brazilian lobster fishery. Actually, the word war was a journalistic description. The matter was finally adjusted by negotiation and agreement. But it was an objection to a Brazilian claim to regulate a swimming fish, fisheries of the sea.

Q. What was the Brazilian contention?

A. That I don't recall specifically, except that they have now also extended their claims to regulate shrimp fisheries, and the United States has recently made an agreement with them whereby we have agreed to limit the number of shrimp boats which will engage in the fishery. This is a compromise adjustment that has been made.

Q. Are you familiar with the agreement the United States entered into with Japan and the Soviet Union relating to the king crab fisheries off the coast of Alasska?

A. Yes.

Q. Was there a dispute between those states as to the rights of those resources?

A. Yes. They tied up partly with the other fisheries off the Alaskan coast, particularly the salmon fisheries. But the United States did agree to allow the Japanese, and I am not quite sure about the extent of the conceession to the Russians, to participate in the king crab fishery there, and the Japanese have carried it on. This is against
1186 the background of long disputes between the Japanese and the United States on the nature of their participation in fisheries off the Alaskan coast and off the northwest coast.

Q. Was the United States position during those negotiations that the king crab represented a sedentary fishery within the definition of the continental shelf resources of the continental shelf convention?

A. My impression is that it did not.

Q. Did these earlier disputes to which you refer bee-

tween Japan and the United States relate to crab fisheries or did they relate to swimming fisheries?

A. Largely to the swimming fisheries. I discussed that difficulty in an editorial comment in the *American Journal of International Law* in 1939 in connection with various bills which were then introduced in the Congress, most of which tended to assert a wide claim of the whole area, over the waters as well as the submerged land adjacent to the coast of Alaska. This, incidentally, was an indication of a concern with submerged lands or seabeds, and actually in the Copeland bill they use the term, the continental shelf, which is some seven years before the Truman doctrine, using the term continental shelf. But because that legislation, or those bills, rather – it didn't become legislation – those bills were couched in terms of the kind of broad claim to the Bering Sea which we had so firmly rejected when the Russians had asserted it. They were not supported by the Executive and did not become law. But they arose out of the difficulties of the Alaskan and northwest coast fishermen with the Japanese and, as I pointed out this almost did come to actual hostilities when some of the masters of the American fishermen asked their owners to send them rifles to drive off the Japanese.

Q. In your testimony you testified that you were a member of the International Court of Justice between 1967 and 1972.

A. Oh, no. I am sorry, '61 to '71.

Q. Excuse me, '61 to '71. How does a case come before the International Court of Justice?

A. It comes in various ways. It may be by a compromise agreed upon by the parties at the time; it may be by the individual initiative of the states invoking some prior treaty which contains a clause providing for the compulsory jurisdiction of the court, or it may be through

the request of an authorized organ of the United Nations or one of its agencies requesting an advisory opinion.

1188 Q. Once a case is before the International Court of Justice is the court free to deal with any and all issues related to the case?

A. Yes.

Q. You mentioned that you were a member of the International Court of Justice at the time of the North Sea continental shelf case and joined in a judgment in that case. Did you write the majority opinion for the court?

A. I am sorry, this is a matter of the privilege of the court and one is never allowed to disclose who writes the opinions of the court. I must ask Your Honor to be excused.

THE SPECIAL MASTER: We will certainly respect that.

BY MR. RASHKOW:

Q. Did you write a separate opinion in that case?

A. Yes.

Q. Did your separate opinion in that case deal with the inherent exclusive right of the coastal states?

A. No, I was interested in bringing out some factual considerations which seemed to me had not been sufficiently explored in the majority opinion. It was strictly a supplemental opinion. But I express no disagreement with

1189 the conclusions of the court majority.

Q. On page 534 of the transcript you say that you cannot read the judgment of the International Court of Justice in the North Sea continental shelf case as intimating that over a long historical period the continental shelf or adjacent seabed and subsoil was res nullius. You add that, "All the evidence refutes such a concept." What evidence are you referring to?

A. I am referring there to all of the material which I think mostly I recalled this morning, in which I reject the occupation theory, including the conclusions of the International Law Commission. And the argument of the United States in the Bering Sea case, and the other bits of evidence which I have already mentioned in connection with the doctrine of occupation. You will notice that I am speaking here in the passage you read about this being res nullius open to occupation by any state, and what I have maintained in all of my arguments about the sedentary fisheries of the seabed is in support of the general conclusion of the International Court that there is an inherent right which appertains to the coastal state and it is not open to every other state in the world to come in and exploit those fisheries.

90 Q. Am I correct in saying that it is your opinion that the doctrine of the continental shelf as a doctrine under that name is today received customary in international law?

A. Yes.

Q. Am I correct in saying in your opinion the doctrine of the continental shelf as a doctrine under that name was received customary in international law in 1958?

A. Yes.

Q. Would this be true in 1945?

A. No, the terminology would not have been fully developed. Although as I have just indicated the term was used earlier as, for instance, in that bill of 1938.

Q. Is it your opinion that the International Law Commission, during its discussion on the matter in the 1950's, felt the doctrine of the continental shelf was received customary international law?

A. Yes. They had some difficulty with it, but I think as a result of their investigations and of the testimony they took of the witness, rather, the views that were expressed by the various experts, they concluded that it was.

Q. Are you familiar with the definition of continental shelf given in the continental shelf convention of 1958?

A. I couldn't recite it word for word, but I am fam-
1191 iliar with it in general.

Q. Are you familiar with that part of it which refers to the exploitability of the continental shelf?

A. Yes, it is an indication that it is for exploration or exploitation. I think those are the two terms used. There was a tendency in Geneva to protect the right of scientific exploration even in the continental shelf, but reserving the right of exploitability to the coastal states.

Q. Do nations have a right in the seabed and subsoil, under the continental shelf convention, beyond the area of the seas that are exploitable?

A. Well, it's either the 200 meter depth or the exploitability levels, and you may have one or the other. And at the time they thought they were adopting a measure in terms of meters which would exceed the limits of exploitability. And that, of course, has been radically passed. But I think there is at the present time an outer limit beyond the limits of exploitability which are under the convention available to the coastal states. That is the reason I think that you've got the present discussion in the Seabed Committee on the exploitability of resources in the deep seabed, outside the continental shelf and outside the continental slope.

Q. The definition says to 200 meters or beyond where
1192 exploitable, is that correct?

A. Yes.

Q. Has the President proposed limiting the continental shelf doctrine to a 200 meter limit in his negotiations with the Deep Sea Committee?

A. Pardon?

Q. Has the United States proposed limiting the continental shelf doctrine to the 200 meter limit and establishing a trusteeship zone beyond that area?

A. In general, I examined the proposals of the United States at the Geneva Conference just about a year ago, but in about the last month or two months the Seabed Committee has been meeting at the United Nations in New York, and I have not seen the documentation on those meetings. And whether the United States has varied its proposals during those last few months, I am not aware. But, as I stated earlier this morning, in general the proposal of the United States was to agree on a 12 mile limit for the territorial waters and then to agree on the intermediate trustee zone and the deep sea area which would be under international supervision.

Q. If the United States, in negotiations in the conduct of its foreign relations, were to renounce any rights beyond the 200 meters, in your opinion would they be giving up rights they had in areas beyond 200 meters where ex-
1193 ploitable?

A. Yes. In other words, I think they now have rights to the area which is within the exploitability limit or the 200 meter zone.

Q. Under the Continental Shelf Convention there is a limit to the area which these rights applied, either the 200 meter or the area which is exploitable. Beyond those points to whom do the resources of the seabed belong?

A. Under the convention, I think the intention is that outside of that you are in the realm of the high seas where no one state has any particular privileges or rights.

Q. Could a nation, could any nation claim those seabed rights if they were able to exploit them?

A. If they are within the limits of exploitability. But the point which has come in connection with this, and it was somewhat argued but not in great detail in the North Sea cases, was whether the whole idea of proximity, which the court felt was tied up with the notion of the continental shelf, meant that there was some limit to the continental shelf. In other words, that this notion of the exploitability of the seabed could not be interpreted to mean that you could go way out into the middle of the ocean to any depth just because you could, perhaps through developing technology, and be able to recapture the man-
1194 ganese nodules from the seabed.

Q. Is it your opinion that the continental shelf doctrine limited the rights which the coastal states already had under customary international law to the resources of the seabed and subsoil?

A. Are you talking about the convention or the doctrine?

Q. I am talking about the convention.

A. Convention?

Q. Yes.

A. No, I don't think it did because it was inherent in the nature of the case all the way through from the earliest claims to the exploitability of the pearl fisheries that exploitability was inherent in the nature of it. If they had limited it to a definite meter limit, then it would have been a limitation.

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1209 REDIRECT EXAMINATION OF PHILIP C. JESSUP

BY MR. CLAGETT:

Q. Judge Jessup, at one point rather early in the cross examination Mr. Rashkow asked you a question about how far out the territorial limits of England extended in the 17th and 18th centuries. And you replied three miles. Did you understand that Mr. Rashkow was asking that question about both the 17th and 18th centuries when you replied three miles?

A. Well, as I indicated in response to another question, I think, while I said I couldn't give an exact birthdate to the three mile limit, I indicated it was consolidated and settled in the 18th century rather than in the 17th century.

1210 Q. So, in the answer to the question I mentioned –

A. I had more in mind the 18th century.

Q. There was some reference in your cross examination to the opinion in the Canadian case offshore mineral rights of British Columbia. I am referring, of course, only as to cross examination into the international law aspect of that decision. There is a sentence in that opinion which reads, "It is Canada which is recognized by international law as having rights in the territorial sea adjacent to the Province of British Columbia." If that sentence is intended to mean that international law holds as between the Federal Government and the Provinces of Canada it is the Federal Government that holds title to the subsea resources, would you agree with that statement?

A. That would, of course, be quite impossible. This would not be a question in which international law could possibly intrude.

Q. To your knowledge, has any state ever renounced its continental shelf resources?

A. I have no knowledge of such a renunciation.

Q. I take it you don't believe the United States has ever done so?

A. I think not.

1211 Q. There was some talk during cross examination as to whether the Truman Proclamation was made in accordance with an existing right under customary international law or not. If, in 1945 there had not been an existing right under customary law in favor of the adjacent state to claim the exclusive right to exploit continental shelf resources, would the Truman Proclamation have been an internationally wrongful act?

A. It certainly would not have established an international right. I will put it this way: that the general acquiescence in the Truman Proclamation immediately after it was issued, the fact that it was immediately so widely imitated, the fact that it was preceded by the British-Venezuelan arrangement, and the whole rationale of the Truman Proclamation and the accompanying statements along about the same period of the United States Government indicated that it was based upon an understanding of what the international law rights were. And if no such rights had existed, then I think it would have been comparable to some of the outmoded claims to the high seas, and might have been put in the same category as I would put the 200 mile claim of the South American states which asserts a sovereignty over the seas as well as over the seabeds. And in that sense it would have been an

1212 internationally wrongful act. And I think the more extensive claims would have been internationally wrongful or we can say an internationally invalid act.

Q. There was also some reference in the cross examination to the doctrine of inherent rights as stated in the majority opinion in the North Sea case. Is there anything in any of the opinions in the Australian case, which is one

of the Government's exhibits in this case, which bears on the interpretation of the majority opinion in that respect?

A. Yes. There is difficulty in remembering the names of all of the Australian judges, but the one that begins with a B, and who rather led off at great length – Barwick. He has a considerable passage on page 279 in which he quotes from the opinion of the International Court and says this may prove a sounder basis for the claim to the bed of the sea than the attempts made, in the cases to which I later refer, which relate to the ownership of the beds, the consideration which would support a claim for jurisdiction over the territorial waters.

Q. And as to the question whether Judge Barwick interpreted the majority opinion as you do, as saying that the inherent right had always vested, is there any language that bears on that?

1213 A. Well, that is the part that he quotes, and which I understood him to accept as being a sound diagnosis of the law in question. He quotes that part from the judgment of the International Court. Of course, there is here an inherent right, in order to exercise it no special legal process has to be gone through, nor have any special legal acts to be performed, and so forth, as we have quoted before. And then he goes on in the sentence I have quoted before, "This may prove a sounder basis for the claim." Then he goes on later, "Thus accepting for present purposes the decision of the International Court, internationally the continental shelf naturally appertains to a nation as an international person." Of course, this is dicta, but it is an indication that in his opinion, plus the interpretation which I have also given to the International Court judgment, is a sound one.

MR. CLAGETT: That is all I have, Your Honor.

MR. RASHKOW: I have two questions, Your Honor.

THE SPECIAL MASTER: Just a minute. Do any of the other states have any questions of this witness?

MR. LATIMER: We have no questions.

THE SPECIAL MASTER: All right. Go ahead, Mr. Rashkow.

1214 RECROSS EXAMINATION

BY MR. RASHKOW:

Q. In your discussion on redirect you discussed whether if the United States proclamation, the Truman Proclamation, was unlawful, you said it would have no validity in international law. Is it not true that an act when made is unlawful in attaining validity in international law through acquiescence?

A. Yes, I think the actual words I used were you could say it was an unlawful act or you could say that it was invalid. Now, it is true that in international practice an originally unlawful act or invalid act may acquire validity through acquiescence of other states.

Q. This discussion relating to Barwick's opinion in the Australian case concerning continental shelf rights, is it your opinion that Barwick believed that inherent exclusive rights to the seabed had always existed and existed prior to the continental shelf doctrine?

A. It seems so from that passage.

Q. Would you rest your opinion completely on that passage, or are you familiar with the total opinion?

A. Oh, I have examined the total opinion with some difficulty, and I think it contains various inconsistencies,
1215 and I disagree entirely with his interpretation of Regina against Keyn, as I have explained in my own testimony. And, of course, this was entirely unnecessary to the decision of the case which was before him.

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CLARIFYING EXAMINATION OF RICHARD B. MORRIS

BY MR. CLAGETT:

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1855 Q. Absent the Treaty of Utrecht it would be your testimony that the Crown would have no rights whatever below the low water mark?

A. That's right.

Q. In the absence of a treaty then it had no rights whatever below low water mark?

A. That's right.

1856 Q. In either the sea, the surface of the sea, or the seabed?

A. Save for whatever rights would be territorial, in territorial waters. I would exclude territorial waters.

Q. Oh –

A. That's right.

Q. What do you mean by territorial waters?

A. Well, in the 18th century, as the previous testimony has shown, territorial waters might be gunshot, might be three miles offshore.

Q. So, you are saying that there were rights in the sea below low water mark in the 18th century?

A. In territorial waters.

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CROSS-EXAMINATION OF W. KEITH KAVENAGH

BY MR. CLAGETT:

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2085 Q. Does the grant to Arlington and Culpepper include "all other royal fishes as all others whatsoever in the said seas?" Does it include "together with the royalty of the said seas and bays aforegranted?"

A. I am sorry, are you reading from the grant itself?

Q. Yes. Do those two phrases occur in the grant?

2086 A. I don't have the grant in front of me, but if you have read from the grant I will trust your reading of it.

Q. I am showing you the language, "and all other royal fishes as all others whatsoever in the said seas, bays, lakes, rivers and waters," and I now show you the language "together with the royalty of the said seas and bays aforegranted."

A. Yes.

Q. Do you see that language?

A. Yes.

Q. Now, you testified previously that in your prepared testimony you have sought to quote all language from the charters which you thought might be helpful to the court in resolving this case. You didn't feel that language might be helpful or relevant?

A. Evidently at the time, no.

Q. Do you now? Do you think that's something the court might want to look at in deciding this case?

A. It is very possible, yes.

Q. When the charter says "together with the royalty of the said seas," do you know what it means by "the said seas"? What seas have been referred to before? Would you like to see the charter again?

A. I assume that it means the Atlantic Ocean, those being the only seas there.

Q. Has the Atlantic Ocean been referred to previously in the charter?

A. I have not read the charter recently. I don't know if they use specifically that language.

Q. I would request you to read it and tell me what you think the antecedent of "the said seas" is.

A. Do you want me to read the entire charter?

Q. That's up to you. I am asking you what you think the antecedent of the term "the said seas" is.

A. They use the phrase the great ocean. Isn't that what you are referring to?

Q. I am asking you what you think the antecedent of the term "the said seas" is.

A. There are two seas mentioned. The great ocean of the east and the great ocean of the west. There are two, this is why he would then say seas, plural. Would you like me to read you the phrases?

Q. I only asked you, for the fourth time, what you thought the antecedent of "the said seas" was. Your testimony is that the antecedent is the great ocean and –

A. The great sea to the west.

Q. The great sea to the west?

A. Yes.

Q. So, when the charter later refers to the said seas, those two are what you think it has in mind?

A. Yes.

Q. Now, the charter says "the said seas and bays aforegranted." Did the charter previously grant the great ocean and the great sea to the west?

A. Not as I recall.

Q. Then what do you think the reference means?

A. They were granting royalties in those seas.

Q. The passage that I just read said "together with the royalty of the said seas and bays aforegranted." That is, in this passage, they are granting the royalties. Where are they granting royalties? They are granting royalties "in the seas and bays aforegranted." That's what it says, isn't it?

A. Yes.

Q. All right. What are the seas aforegranted?

A. That would be the Atlantic Ocean and the Pacific Ocean.

Q. Is there previously in the charter a grant of the Atlantic Ocean?

A. Not that I can recall offhand.

Q. Would you like to check your recollection?

2089 A. Yes. I am sorry, up to that point I don't see where he granted the sea.

Q. Then what do you think that language means?

A. A strict reading of the statement "royalties of said seas and bays aforegranted" implies very strongly that somewhere in this the Crown granted the seas and the bays, but I see no where where he did.

Q. How do you solve this conundrum, do you have any suggestions, solutions?

THE SPECIAL MASTER: I suppose that's one I have to solve, not this witness.

MR. CLAGETT: I thought the witness might be able to assist you.

THE WITNESS: I can try.

THE SPECIAL MASTER: I am looking to you to assist me, Mr. Clagett.

BY MR. CLAGETT:

Q. Is it at all possible, Dr. Kavenagh, in the absence of any other suggestion from you as to what the antecedent might be, that the antecedent was intended to go back to the language "as also all islands whatsoever within all or any of the limits and precincts aforesaid, or within 10 leagues of any of the coasts of any of the said territories together with the
2090 soil of all and singular the premises and all waters within those premises"? Could that possibly have been what the reference back was to?

A. No, because I had been construing the term waters as inland waters and not high seas.

Q. So, if you insist on that construction that leaves you utterly without an explanation as to what "the seas and bays aforegranted" might mean in that charter, doesn't it?

A. The only other way that that could be read is that royalties before granted in the said seas and bays reverse the phrase. However, obviously it's not reversed in the charter and I couldn't offer that.

* * * * *

2095 Q. . . . . What do you think the Maryland charter means by the term "the sea within the premises"? I am quoting from line 1 of page 1496.

A. For the premises you would have to literally read the charter up to the habendum clause because, as I under-

stand it, that is the premises. The premises in the charter being that portion of the document which names the grantor, the grantee, the reason for the grant, and in general terms that which is to be granted. That is the premises.

Q. Do you think the term "sea within the premises" included the sea within 10 miles of the coast?

A. I would have to read the charter to make sure. I don't repeat the premises here, so I don't have them readily at hand to answer that.

Q. Excuse me, I said 10 miles. I meant 10 leagues. At page 1495 you quote the language about 10 leagues, at line 17, and you go right on in your quote, there is no ellipsis, until you get to line 2 of 1496 and the words "within the premises" are in the same sentence. My question is whether, when you find the words "sea within
2096 the premises," you would interpret that as reading back to the 10 marine league boundary earlier in the same sentence?

A. No. The seas within the premises, that portion which you are discussing, refers to fishing, and it mentions the fish. That has to do strictly with that, the fish, the royal fish, and so forth, in the seas, bays, straits, rivers, and so forth. Within the premises, I would have to again look at the first one. Is this in the habendum section, or is this in the major section, in the first part of the document?

Q. I will be glad to show you the whole text of the charter, if you want. Since both terms are in the same sentence I thought that might be adequate.

A. Now, what is the question?

Q. My question is whether the term "sea within the premises" includes the sea within 10 marine leagues from the shore.

A. My answer is no because the initial statement of boundaries only mentions to the sea plus the islands.

Q. Then what do you think "sea within the premises" means?

A. Again, you have the same kind of composition you pointed out in the other, you have to assume that
2097 they were referring to the sea between the islands and the mainland.

Q. Is that the way you construe it?

A. There is no other sea in the area that I know of.

Q. So, it is your testimony that "sea within the premises" does mean sea within 10 leagues of the mainland?

A. I still balk at the word premises because it is still my position you could not grant the sea. I cannot explain why you suddenly include sea in the premises because from what I construe the premises the original main grant and the reasons therefor, sea was not mentioned. And he is in addition referring to royal fishes and things of that nature, which means he may not be granting the sea but that which is in the sea.

Q. What about "sea . . . of the province," which is used at lines 21 and 22 of page 1496, does that include, does that include in your interpretation the sea out to 10 leagues?

MR. RASHKOW: There is no reference to sea in the province in that sentence.

MR. CLAGETT: It's line 21, "sea"; line 22, "of the province."

THE WITNESS: It divides it into two areas. Seas, bays, straits, and navigable rivers; and also harbors, bays,
2098 and creeks of the province, if you wish to read it strictly.

BY MR. CLAGETT:

Q. You don't think "sea . . . of the province" refers

back to the sea, bays, straits and rivers?

A. Not in a very strict reading of that sentence, no, if you are reading it strictly, as others have been read.

Q. You did not read it in that strict way, did you, on page 1497 when in the sentence beginning on line 10 you interpret this clause as dealing with the sea within 10 leagues of the coast? You weren't being quite so strict there, were you?

A. I am sorry, I don't follow you.

Q. On page 1497, in the sentence beginning at line 10, you interpret the clause we have just been looking at, which deals with liberty of fishing, as concerning itself with the sea within 10 leagues of the coast. Therefore, are you not on page 1497 construing the phrase "sea . . . of the province" to mean all those seas within 10 leagues of the coast?

A. I see what you are getting at, but I was referring to fishery rights and not the sea itself.

Q. In the sentence beginning on page 1497, line 10, you are interpreting, are you not, the prohibition in the charter on Lord Baltimore from excluding subjects from
2099 fishing? That's the clause you are interpreting in that sentence, aren't you?

A. Yes.

Q. Now, you quote that clause, do you not, the language of it, beginning at line 18 on page 1496?

A. True.

Q. So, on page 1497, you are interpreting the clause which you quote in the paragraph immediately preceding, is that not correct?

A. Yes.

Q. That is correct. Now, in your interpretation paragraph you say that Lord Baltimore was prohibited from excluding subjects of the Crown of England from

fishing in the sea within 10 leagues of the coast. What language in the paragraph of the charter do you interpret as dealing with the sea within 10 leagues of the coast?

A. You are referring back to 495, that section going up to 1496, yes. But –

Q. I am referring to the paragraph you quote from the charter on page 1496, line 18, through page 1497, line 9, and I am asking you what language is it in that paragraph which, in the immediately following paragraph, you interpret as prohibiting Lord Baltimore from excluding subjects of the Crown of England from fishing in the sea
2100 within 10 leagues of the coast?

A. Lines 18 through 21 at least, "Saving always to us, our heirs and successors, and to all the subjects of our kingdoms of England and Ireland, of us, our heirs and successors, the liberty of fishing for sea fish, as well in the sea, bays, straights, and navigable rivers, as in harbors, bays, and creeks of the province."

Q. So, what language are you interpreting as incorporating the 10 league concept? Isn't it the language "the sea . . . of the province," isn't that what you are interpreting as incorporating the 10 league concept? If not, what language are you interpreting as incorporating the 10 league concept?

A. It would be that.

* * * * *

2146 Q. How about a submerged bank five miles offshore where there were shellfish and pearls?

A. It would have to be an extremely shallow bank.

Q. Yes, it would. There are such banks, are there not?

A. Covered with less than five feet? I don't know frankly. My geographical knowledge doesn't extend that far.

Q. Suppose there was such a bank with pearls or shellfish in it five miles off the coast of any of the American colonies in the 17th century, do you think that the King or the palatine grantee would have asserted exclusive jurisdiction over it?

A. My reaction would be yes, having been given the jurisdiction. Yes.

* * * * *

2161 Q. My question was whether there were not regulations for the Pemaquid settlement which involved the prohibition of vessels not belonging to this government from making herring voyages at certain areas?

A. Where is that?

Q. Right here (indicating).

A. Yes, it says that.

Q. Was there also a regulation providing that all vessels coming to fish in the Pemaquid area must first go into the harbor at Pemaquid to report to the government, and that they could then proceed to fish only as license or permit might be granted?

2162 A. The article says, "All vessels out of any government if they come to trade or fish, shall first enter at Pemaquid or the places appointed; and that they shall not go into any other harbor except by stress of weather, but first to clear and give an account of their design and not to break bulk before they have so cleared, and then proceed to trade or fish as license or permit may be granted, on penalty." That is what you are referring to?

Q. Yes. Doesn't that say that fishing vessels wishing to fish in Pemaquid waters can't do so without getting a license or permit first?

A. Yes, he is exercising the jurisdiction.

Q. Did the regulations also provide that no fishing boats whatsoever shall throw overboard any garbage that tends to do damage to the fishery banks?

A. It does.

Q. By no fishing boats whatsoever, do you think those regulations meant only English or only colonial fishing boats, or do you think they meant all fishing boats whatsoever?

A. The language is such that it means any boat in the area.

Q. Do you know where the fishing banks referred to
2163 in that regulation are?

A. Quite frankly, no.

Q. Do you think they were internal waters?

A. By the nature of the coastline there were a number of harbors, bays and river mouths; it could possibly be inland as well as at sea. I frankly don't know which they are referring to.

* * * * *

2255 Q. I am going to ask you a somewhat complicated hypothetical question, not very complicated, but a little. If you were shown evidence which convinced you that in English law in the 17th century it was well recognized that a coastal sovereign had rights of sovereignty and
2256 ownership, by virtue of his coastal sovereignty, in the sea, seabed and subsoil adjacent to the coast, and that these rights were customarily referred to in legal documents as royalties, as jurisdiction, as preheminences, and similar words, would you then be led to give any different construction to any of the charter language which you have interpreted in your testimony?

A. I would be dishonorable to the historical profession if I didn't so do.

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CROSS-EXAMINATION OF RICHARD B. MORRIS

BY MR. CLAGETT:

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2345 Q. Let's assume for the moment – I know you don't believe it – but let's assume a hypothetical that you think is contrary to fact, that the English common law in the 17th century gave the sovereign of the coast rights of ownership or paramountcy in the surrounding waters and the bed and subsoil thereof. If that were the common law of England in the 17th century, can you think of any motive which the colonists might have had to change it, or to deviate from it?

A. The only motive they might have to change it or deviate from it was their very strong opposition to the navigation laws which involved English control of the sea and seaports; and there was violent opposition between 1644 and 1681. This could be a motive.

Q. That would be a motive, I take it you mean against recognizing Crown control of the sea?

2346 A. That's right.

Q. It wouldn't be a motive against recognizing their own control of the sea, would it?

A. No.

Q. And it wouldn't have anything at all to do with the seabed, would it?

A. No.

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CROSS-EXAMINATION OF LOUIS HENKIN

BY MR. CLAGETT:

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2624 Q. At page 1905 you say that there is nothing in the colonial charters and grants to suggest that Great Britain was asserting territorial rights in the waters of North American waters.

* * * * *

Q. And you say there is every reason why such rights were not claimed. And you go on to talk about a growing recognition that new sovereign rights could not be had in seas beyond the reach of coastal cannon. Can you cite me one authority in England in the 17th century which talks about a cannon shot rule? We are talking about 17th century charters.

2625 A. No – are we talking about 17th century charters, is this the period?

Q. Certainly.

A. Well, no, I can't. I don't know anybody, as I say, before Grotius who suggests that. And I don't know any British authorities that state this. I can only say these charters, it seems to me, are sort of internal documents and grants rather than assertions in international law, and I don't know whether anybody challenged them or had any basis for challenging them.

Q. That is not what you are saying here at all, Professor Henkin. It is not a fair paraphrase of what you are saying here that given the legal climate in 17th century England you don't see how the charters and grants can be

construed as attempting to convey territorial rights in the sea?

A. Well, I guess I may have been mistaken just as to the dates of those charters, Mr. Clagett. I would have to see what dates – what dates were those charters? I don't remember.

Q. Virginia of 1607, 1609; Maryland, 1633; New England, 1620.

A. 1607 is within a few years of Elizabeth's statement to the Danes which I just quoted. If Elizabeth
2626 was saying to the Danes that she doesn't recognize these sovereign rights in coastal waters there I would be surprised that she was claiming them off the coast of North America.

Q. Was Elizabeth on the throne in 1607?

A. She went off in 1603.

Q. Isn't it a rather well known fact taht her successor took a radically different view of territorial rights in the sea than Elizabeth did?

A. Yes, although I am not sure he took – there is evidence of that by 1607. The bigger claims were made by Charles, which were substantially later in the 17th century.

Q. Are you familiar with James' fishing proclamation of 1609?

A. I have seen references to it here.

Q. Are you aware that at least a first draft of Selden's *Mare Clausum* was written and known to the King by 1615?

A. That's my impression.

Q. It is not the fact then that the period of issuance of these colonial charters coincided precisely with the period in which the English sovereigns were most intensely aware of sovereignty over the sea and making the most
2627 expansive claims to that sovereignty?

A. Well, it is obvious, so there is some coincidence of the two events, yes.

Q. That being the case, can you think of any conceivable reason why they would not have wished to make claims off the North American coast similar to the claims they were making around England?

A. If they were made around that period then I would withdraw that: I don't have the expertise on the history of the period, but I was assuming that these claims were dated at a later period when Great Britain had already abandoned these claims.

* * * * *

2640 Q. . . . . Can you give me a single example from anywhere in the world within, say, the last 300 years where a valuable resource has been discovered on the seabed within, say, 60 miles of the coast of one state and no closer to the coast of any state, when the coastal state has not claimed and exercised the exclusive right to exploit it?

A. I don't know of any such examples.

* * * * *

2642 Q. What do you think in fact would have happened in, say, 1765 if French boats had anchored four miles off the American coast and started dredging for oysters there?

A. There might have been a controversy. Whether France would necessarily have conceded it, I have no idea. It depends a little on the power situation. But there was nobody asserting in 1765, that I know of, that the coastal state automatically had that right.

Q. That wasn't my question.

A. I understand.

Q. I asked you a question about what would have happened, and you said something might have happened.

Do you think there would have been a controversy?

A. I would have to see who had stronger naval power in the area at the time.

Q. Who did?

A. Well, presumably Great Britain did, but I suspect it is an irrelevant question.

Q. I thought you said it was relevant to our question.

A. Well, it is irrelevant to our legal question. It is relevant to what would have happened, a controversy.

Q. Suppose we just talk about the question I asked for a moment, and I think the court will decide what is
2643 relevant and what isn't.

A. All right.

Q. So, since in your view Great Britain had the greater naval power you are pretty confident that in 1765 if a French boat had started dredging for oysters there it would have been driven off, would it not?

A. That is likely.

Q. At page 1908 of your testimony I got a certain implication that you are saying that international law resolves the question of Federal versus state ownership in this case, that somehow the international law of today requires that the Federal Government and not the States have the exclusive right to exploit continental shelf resources. Is that you position, or am I misreading?

A. No, I don't think it takes any position between the United States and the states. They can do as they like. They can give it all away if they want to.

Q. The Supreme Court clearly so held in the second Louisiana case, did it not?

A. Yes.

* * * * *

45 Q. Is the ownership of property within one's boundaries a matter of external or internal sovereignty?

A. Within one's boundaries?

Q. Yes.

A. I guess that's internal.

Q. But not the ownership of property outside one's boundaries?

A. Well, it depends where. If I claimed to own property in France, I would probably be subject to French law and not international law necessarily.

Q. Well, suppose the State of Virginia had owned a manor in England in 1776, or 1783; is it your view that by the Peace of Paris or the Constitution or something
46 the United States succeeded to fee simple title to that manor?

A. Not necessarily; if Virginia owned this in the same capacity which an individual owns property, I guess I could own a house in England and no one succeeds to it.

Q. I am stating you the facts. The facts are that the deed books of the County of Middlesex show that the manor of West Twichingham has been deeded in title fee simple absolute to the Commonwealth of Virginia. Then the Peace of Paris intervenes and the Constitution intervenes; is fee simple title now in the Commonwealth of Virginia, or in the United States?

A. No, I would think it would remain in the Commonwealth of Virginia.

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CROSS-EXAMINATION OF SAMUEL E. THORNE

BY MR. CLAGETT:

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2689 Q. I found a statement in Pitman Potter that Bracton says the four seas are part of the realm, and that the King had the right to charge tolls for fishing.

A. Yes, I think that's so.

Q. Is that so?

A. I think so. Where was that, Mr. Clagett?

Q. I found the statement at page 45 of Potter. I have not been able to locate the passage in your edition,
2690 although I can't say I have exhausted it.

A. Whether he said it or not, I don't know. But I think that that is true, that they did collect tolls.

* * * * *

Q. What was the document, *De Prerogativa Regis*?

A. Well, it is another difficult question, an unsolved one. It appears among the statutes, but it really isn't a statute. It looks like a document drawn up sometime in the reign of Henry, III, maybe early Edward, I. It is a list of the King's prerogatives as understood at that time. It is very hard to date it precisely because some of them are earlier, some later.

Q. Is it correct that among the prerogatives of the
2691 Crown listed in that document is royal fish "taken in the sea or elsewhere within the realm?"

A. I should know – I edited that book, as you know, but I don't recall the precise words.

Q. The Latin words, as I read them in the Statutes of the Realm, are *wallenas et sturgeones captos in mari vel alibi infra regnum.*

A. Right.

Q. That is translated "taken in the sea or elsewhere within the realm"?

A. Yes.

* * * * *

Q. That implies, does it not, that the author of that document believed that the seas were themselves within the realm, since he says within "the sea or elsewhere within the realm"?

A. Yes, I never thought of that, but it sounds right.

Q. Do you agree with Fenn's statement at page 122 that before the full doctrine of ownership of the sea and seabed became explicit in the early 17th century the law "at least permitted the monarch to grant exclusive
2692 rights of use over a thing in which he had no ownership"?

A. This is 122?

Q. Yes.

A. I think kings did do that, I think they granted rights of use over things. It largely depended on whether they could get away with it or not.

Q. I would assume that Fenn is talking there perhaps, among other things, of grants by the King of exclusive rights to fisheries in the sea?

A. I think so.

Q. You agree that there were such grants and the King did take that approach?

A. I think so. Yes, if he could he did.

Q. As a matter of English law in the 17th century, what acts were required to extend English sovereignty or

English dominion over new areas? Did it take an Act of Parliament, or a statute, or was it done by the Crown solely?

A. In newly discovered things, you mean? Newly discovered land, say?

Q. Yes, perhaps.

A. I think not very much was required. I think simply a statement was required. You couldn't do very much more than that if you landed on a strange shore. A claim
2693 made in the name of the King.

Q. No statute or court decision would be necessary for that area to become part of the English dominion?

A. Make a claim for it.

Q. As a matter of English law?

A. I think –

Q. Which a court would later recognize if the issue arose?

A. I don't know the answer to that, but I think that was all that was required. That is my general impression. Sir Francis Drake did nothing more than that.

Q. So that the executive, the Crown, could assert and take possession of areas as a part of the English sovereignty, and later if the issue arose the common law of course would recognize, yes, if the King did that that area became a part of the English dominion?

A. I know of nothing that supports it, but it seems reasonable, yes. If they wanted it and they could hold it.

Q. You know of nothing that supports it?

A. No, except I know such claims were made in newly discovered territories.

* * * * *

2697 Q. Was there any other decision of the common law courts in the 17th century, to your knowledge, which

passed on whether the Crown owned fisheries in the sea or not?

A. Not to my knowledge, no.

Q. How about opinions of law officers of the Crown?

A. I don't know.

Q. You don't know of any?

A. No.

Q. Didn't both James I and Charles I seek and receive opinions from the law officers of the Crown prior to the fishing proclamations?

A. Oh, yes. The law officers of the Crown of James and Charles were apt to do what James and Charles thought were proper.

Q. In other words, under the Stuart constitution the monarch had a good deal to say about what the law was, didn't he?

A. If his attorneys didn't believe it they were out of jobs.

2698 Q. Is it the case that before issuing his proclamation in 1635 as to exclusive fisheries Charles solicited the opinion not only of the law officers of the Crown but also of the admiralty judges, and they gave their opinions that by the law of England the Crown had an exclusive right to the fisheries off the English coasts?

A. Did they? I don't know. But if you say they did I believe that. And so did Selden, of course, who wrote his book the same year.

Q. Would such an opinion by the admiralty judges have any legal status; would someone be justified in relying on it as a source of law?

A. Absolutely.

Q. How about a decision of the Lords of Admiralty, are they any different from the admiralty judges?

A. I believe they were, yes.

Q. Would a decision by the Lords of Admiralty couched in legal terms have any authority as a legal matter?

A. Admiralty as I remember them, were not judges, but – weren't they officers of the admiralty? I mean, admirals themselves? That is quite apart from that, I am sure their opinions would be authenticated. It could be that the Lords of the Admiralty sat in cases here. It
2699 could be. I don't know.

Q. What about acts taken by the King in Council; did they have any legal force in the 17th century?

A. Oh, sure.

Q. So, if the King in Council had determined that the Crown owned the fishery in the British seas and asserted the right to exclude foreigners, that would have been an act having legal force?

A. I think so, yes.

Q. Do you know whether the King in Council in fact took such action in the 17th century?

A. No. The King in Council were very strongly in favor of this, so I wouldn't be surprised if they took action many times. They were intent on proving an exclusive right to fish in the sea, a British right. But if you can establish it by four or five people sitting around the table then they did it.

Q. It takes five down at the Supreme Court building in Washington, doesn't it?

A. (No audible answer.)

Q. Do you know of any acts of Parliament in the 17th century which referred to his Majesty's ancient and undoubted sovereignty and dominion in the seas?

2700 A. No, but I wouldn't be surprised if there was such.

Q. Would such a declaration have authority for what the law of 17th century England was?

A. It would be their opinion, of course. But the

preamble of the statutes it would be, yes.

Q. How about an Act of Cromwell's Council of State; that performed, did it not, the functions of King in Council and Parliament, both, did it not?

A. Right.

Q. So, would I be correct in assuming that that was the highest law giving power in England de facto while it sat?

A. It would certainly be authoritative.

Q. Do you know whether the Council of State had anything to say about whether England owned its seas and the fisheries therein?

A. I don't, but I am sure they must have said something about it.

Q. You would assume that they asserted that right of ownership?

A. Yes.

Q. And that assertion, in your view, would have legal
2701 force?

A. Yes, it would be an assertion.

Q. It would have the force of law, would it?

A. For binding others outside of England, no. But binding Englishmen.

Q. No, as a matter of English law.

A. Binding Englishmen. Was it concerned with foreigners fishing in English waters?

Q. Oh, yes.

A. Would it bind them? That is the question, of course.

Q. That is the question I am asking. As a matter of English law would it bind them?

A. It would try to. It would, if you could bind them, if it could be done. If you sent the sheriff out there and stopped them.

Q. Attempts were made to do that quite frequently, were they not?

A. If you send the fleet out you could stop them from fishing there. But sitting around the table and saying you couldn't do it wouldn't be very effective.

Q. It would be enough to create English law, would it not, if the right people sat around and did it? Whether the English law were then enforced would be another
2702 matter, would it not?

A. Yes.

Q. So, it is your position that the law of England in the 17th century was that the Crown had the ownership or the exclusive right to the fisheries in the English seas?

A. Yes, they thought that – as they themselves determined it. Yes.

Q. Did Selden's book have, or was it given, any sort of official status?

A. Yes, it was deposited by the King in the Exchequer.

Q. Is that the only place?

A. That is the only place I know it was deposited.

Q. Wasn't it also deposited in the Privy Council and in the Admiralty?

A. No. I don't know.

Q. You don't know?

A. No, I don't. I do know it was deposited in the Court of the Exchequer.

Q. Do you know of any decisions of common law courts in which Selden was cited as a legal authority?

A. Sure, the Oldsworth case is one.

Q. Any others?

2703 A. I don't know of any others, but since it became the leading book on the subject I am sure it must have been.

Q. Would you agree with Fulton's description of it as the "approved embodiment of British public policy"?

A. Yes, I think so.

* * * * *

2708 Q. Professor Thorne, if at any time during the 17th century a French or Dutch ship had come one mile or four miles off the English coast and started dredging for oysters, do you have the slightest doubt that the Crown would have asserted the right to exclude them?

2709 A. That is the same question you asked this morning. I will attempt to answer, but you asked that question. They wouldn't have found any, it is too far down – they wouldn't have found any oysters at all – let me have that again, once more. A mile off shore?

Q. Yes, one mile or four miles.

A. That they would have been stopped by the British?

Q. Yes.

A. No, I think that would have happened.

Q. You think the British would have stopped them?

A. Yes.

Q. The Crown would have asserted the legal right to exclude them and would have attempted at least to do so?

A. A mixture of legal and actual right, but yes, I think so.

THE SPECIAL MASTER: I suppose the Crown might not have stopped to examine the authority before acting.

THE WITNESS: I believe that would be so.

BY MR. CLAGETT:

Q. I suppose the Crown had already examined the authority to its own satisfaction anyway in the inquiries it made before the fishing proclamations. Wouldn't the Crown have regarded, didn't it in fact regard, sedentary

fisheries as just as much a subject of this exclusive right
2710 as surface fisheries as against foreigners?

A. By that do you mean fishing grounds ordinarily occupied by Englishmen?

Q. Or any other fishing ground in the English seas as the Crown construed them?

A. Yes, I think so.

Q. Do you have any doubt that if a case putting at issue the Crown's right to exclude foreigners from such sedentary fisheries had come before a common law court in the 17th century the common law court would have upheld the Crown right?

A. I think they would have.

Q. You think they would have upheld it?

A. Yes.

Q. Even though you say Hale had some doubt as to whether the seabed belonged to the King while it was still under water, do you have any doubt that Hale would have upheld the Crown right to exclude foreigners from oysters and fisheries?

A. Hale was very strong for the Crown. He was one of the chief advocates of the Crown view that they owned the seabed in this later time, in this later period. And I
2711 think he was obliged to share this with the architect of this, with Selden, his great friend. I think he would tend to back up the Crown right substantially – but sometimes he couldn't make it stick – but I think he tried to do it. What would have been his view in this case? Like the rest of the states – I think he in fact is your only real proponent, or the strongest proponent, the English law has for the ownership of the seabed. And if you assume that that is so, which I think is so, then he would have backed it up. If there had been such a case.

Q. You are not really saying Hale was the only proponent, are you?

A. No, not the only one, but one of the strongest. Maybe the strongest.

Q. Dr. Kavenagh, during his testimony, said that he had an impression that in the 17th century under English law the sea was not susceptible of ownership. And, when he was asked on what authority he based that impression, he listed Lord Hale, among others.

A. I think there is a passage in there – I quote it, too, I believe – in which he said that the sea is fluid and it can't be possessed because it is shifting all the time, it is not like a piece of ground which you can measure and know where it is. But whether that was his
2712 final view, or just one of his views, I am not prepared to say. He does say that because it is fluid it can't be possessed.

Q. Yes, but he makes it quite clear, doesn't he, even though he might not own the water in terms of fee simple title to water which can move, that certainly the Crown did have an exclusive right over what was in the water and what was on the seabed?

A. That was his claim, that's right. I think the reason for the seabed claim was because the other proved untenable. I mean, the claim to owning water proved untenable, and the only way you could make that stick was to say well, you own what is below it, too, and therefore everything above it.

Q. Suppose it hadn't been fishes that French ships tried to extract a mile or four miles off the English coast but a mineral of some sort, say they found a gold mine down there, tried to take that, do you have any doubt that the Crown would have attempted to exclude them and would have claimed that gold as its exclusive right?

A. No, I think they would have attempted to, sure.

Q. Do you have any doubt that if that issue had come before an English common law court the court would have

2713 upheld the Crown's claim?

A. No, I think they would have. It depends on how much of a good lawyer the other side had, of course. Does that trouble you?

Q. I wouldn't say it troubles me, no. I find it hard to conceive that, no matter how good the lawyer for the defense was, the Crown would not have prevailed in that case.

A. Do you think they would have found for the British side?

Q. Yes, I think so. Don't you?

A. I think so.

* * * * *

2727 Q. Given the state of English law, say, between the accession of James in 1603 and the Oldsworth case in 1637, is it likely prima facie that a colonial charter issued at that time would have attempted to convey exclusive fishing rights off the coast of the land areas being conveyed?

A. If they considered themselves to have it, yes, I think so.

Q. If who considered?

A. If the Crown considered themselves to have it.

Q. Do you think the Crown did consider itself to have it?

A. Exclusive in North America?

Q. Yes.

A. I don't know.

Q. You don't know?

A. They considered themselves to have it in the British seas.

Q. Can you think of any reason why the Crown, given its frame of mind in that era, would not have asserted its exclusive fishing rights off the North American coast?

A. No, I think they would have tried to do it if they could, yes.

2728 Q. So that it is logical to assume that they would have tried to convey exclusive fishing rights by charter?

A. Right, that's true.

* * * * *

2733 Q. . . . Do you know of any document authority in the 17th century which refers to either ownership of the sea, or ownership of the seabed, or the right to exclude or license foreign fishermen as a royalty?

2734 A. Well, I don't know of one, but it could easily be.

Q. You don't know of any?

A. No.

Q. Would it surprise you if quite a number of them existed?

A. No.

Q. It would be the natural way to refer to such a right, would it not?

A. Royal rights?

Q. Yes, part of the regalia, one of the royalties, that would be the normal way an English lawyer would think of such rights in the 17th century, as royalties, would it not?

A. These rights we have been talking about?

Q. Yes, the rights I just mentioned.

A. I guess so.

* * * * *

CROSS-EXAMINATION OF KINVIN L. WROTH

BY MR. CLAGETT:

* * * * *

2746 Q. Could royalties in the sea be granted to a subject in the 17th century?

A. Rights such as wreck, royal rish and the like?

Q. Yes.

A. Yes.

Q. Do you know of any authority or commentator in the 17th and 18th centuries who described the right to exclude or license foreign fishermen in the English
2747 seas as a royalty or regality?

A. Did you say any commentators –

Q. Any authority, any organ of government, or any commentators.

A. I can't recall at the moment any such source specifically describing the right to exclude as a royalty. If you mean to differentiate the right to exclude from the right to fishery itself –

Q. A right to a fishery itself implies the right to exclude others.

A. You do not mean to differentiate?

Q. No, I don't.

A. Then the proclamation of James I of 1609, which is in my testimony at pages 2517 and 2518, is an example of that.

Q. Do you know of any others?

A. Dr. Dee's work, although available only in paraphrase, also appears to take that position. It is cited by me on page 2517.

Q. Any others?

A. I don't recall others specifically, but I believe there are others cited in Fenn's work.

2748 Q. Yes. Didn't Fenn in fact say that the *jus piscandi* was always regarded as part of the regalia?

A. He did describe it as considered by some at least as part of the regalia. My recollection of his discussion.

Q. Didn't the common law courts describe the right to a fishery as a regality in the case of the Fishery of the Banne?

A. I don't recall that specifically.

Q. Are you aware that Henry Stubbe referred to the exclusive right to a pearl and coral fishery, or pearl and coral fisheries, as a royalty?

A. No, I don't recall that.

Q. That Lord Shaftesbury referred to exclusive fishing rights as a royalty?

A. No.

Q. That John Boroughs did the same?

A. I don't recall that reference.

Q. That Dudley Carleton so stated in 1617?

A. No.

Q. If, as Professor Thorne has testified, at least one theory of why the King owned the fisheries in the sea was that it was by his prerogative, then the normal and natural way for an English lawyer to describe the owner-

2749 ship of a fishery, or exclusive right to a fishery, or a right to exclude or license others in a fishery in the 17th century, would be to call it a royalty, would it not?

A. I don't know that I can agree that that would necessarily be the normal way. But I have asserted myself in the pages of the testimony to which we are referring that the right to fishery was considered an assertion of the prerogative.

Q. Weren't royalties defined as those things which the King had by his prerogative?

A. Yes.

Q. Therefore, wouldn't it be the normal way to refer to it?

A. Well, I think there are other theories, as my testimony suggests, other theories of the nature of the Crown's right in the right to fishery. Theories of prescription, for example, which I also advert to.

Q. You wouldn't find it at all surprising or extraordinary to find lawyers referring to fishing rights as a royalty in the 17th century?

A. As I have indicated, I have no difficulty with that, no sir.

* * * * *

No. 35, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, Plaintiff,

v.

STATE OF MAINE, ET AL., Defendants.

APPENDIX TO EXCEPTIONS AND BRIEF OF THE COMMON COUNSEL STATES
VOLUME II - EXHIBITS

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LIST OF EXHIBITS SUBMITTED BY COMMON COUNSEL STATES

1. Petition for Charter of New England (1620), in *Collections of the Maine Historical Society Library*, 1 *Farnham Papers* 15-18.

2. Charter of Maine to Gorges and Mason (1622), in 3 Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming The United States of America* 1621 (1909) [hereinafter "Thorpe"].

3. Grant of Province of Maine (1639), in 3 Thorpe 1625.

4. Charter of Maine to Massachusetts Bay (1691).

5. Deed from Ferdinando Gorges to John Usher (1678), in II *Collections of Maine Historical Society* 657-60.

6. Deed from John Usher to Massachusetts Bay (1678), in II *Collections of Maine Historical Society* 661-64.

7. Act of United States Congress, March 3, 1820.

8. Maine Revised Statutes of 1916, Ch. 133, Sec. 3.

9. Maine Revised Statutes of 1930, Ch. 143, Sec. 3.

10. 1 Maine Revised Statutes Annotated, Secs. 1-5.

11. Charter of New England (1620), in 3 Thorpe 1827.

12. Grant of "Mariana" to Mason (1621), in XXIX *New Hampshire State Papers* 19 (Albert S. Batchellor, ed., Concord, N. H. 1896).

13. Grant of New Hampshire to Mason (1629), in 4 Thorpe 2433.

14. Grant of "Laconia" to Gorges and Mason (1629), in XXIX *New Hampshire State Papers* 33.

15. Hilton or Squamscott Patent (1629), in XXV *New Hampshire State Papers* 698 (Albert S. Batchellor, ed., Concord, N. H. 1895).

16. Grant of "Piscataway" to Gorges, Mason, *et al.* (1631), in XXIX *New Hampshire State Papers* 39.

17. Grant of New Hampshire to Wollaston (1635), in 4 Thorpe 2437.

18. Grant of New Hampshire (under name of "Masonia") to Mason (1635), in 4 Thorpe 2441.

19. Grant of New Hampshire to Mason (1635), in 4 Thorpe 2443.

20. Grant of New Hampshire from Wollaston to Mason (1635), in 4 Thorpe 2439.

21. Agreement of Settlers at Exeter (1639), in 4 Thorpe 2445.

22. Combination of Piscataqua River Inhabitants (1641), in 4 Thorpe 2445.

23. Petitions of Dover and Portsmouth, and Act of Union with Massachusetts (1641), in 1 *Laws of New Hampshire* xxx (Albert S. Batchellor, ed., Manchester, N. H. 1904).

24. Charter of Massachusetts Bay (1629), in 3 Thorpe 1846.

25. Commission of Cutt (1680), in 4 Thorpe 2446.

26. Commission of Cranfield (1682), in 1 *Laws of New Hampshire* 48.

27. Commission of Dudley (1685), in 1 *Laws of New Hampshire* 93.

28. First Commission of Andros (1686), in 1 *Laws of New Hampshire* 144.

29. Second Commission of Andros (1688), in 3 Thorpe 1863.

30. Commission of Allen (1692), in 1 *Laws of New Hampshire* 501.

31. Commission of Earl of Bellomont (1699), in 1 *Laws of New Hampshire* 607.

32. Commission of Dudley (1702), in 2 *Laws of New Hampshire* 4 (Albert S. Batchellor, ed., Concord, N. H. 1913).

33. Commission of Shute (1716), in 2 *Laws of New Hampshire* 210.

34. Commission of Burnet (1728), in 2 *Laws of New Hampshire* 410.

35. Commission of Belcher (1729), in 2 *Laws of New Hampshire* 459.

36. Commission of Benning Wentworth (1741), in 2 *Laws of New Hampshire* 600.

37. Commission of John Wentworth (1766), in 3 *Laws of New Hampshire* 411 (Henry H. Metcalf, ed., Bristol, N. H. 1915).

38. Constitution of New Hampshire (1776), in 4 Thorpe 2451.

39. An Act for the Re-establishing the General System of Laws Heretofore in Force in this State (1777), in 4

Laws of New Hampshire 87 (Henry H. Metcalf, ed., Bristol, N. H. 1916).

40. Constitution of New Hampshire (1784), in 4 Thorpe 2453.

41. First Charter of Virginia (1606), in 7 Thorpe 3783.

42. Second Charter of Virginia (1609), in 7 Thorpe 3790.

43. Third Charter of Virginia (1612), in 7 Thorpe 3802.

44. Charter of Massachusetts Bay (1691), in 3 Thorpe 1870.

45. Grant to Sir Henry Roswell (1629).

46. Deed by Grandson of Ferdinando Gorges to the Governor and Company of Massachusetts (1667).

47. 1760 Acts and Laws of Massachusetts, Ch. 11, at 523-26.

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506. An Act For The Reviving And Re-Enacting A Clause In . . . "An Act For The Regulating And Encouragement Of Fishery" . . . (Nov. 11, 1702), Chap. 12, Acts of 1702, *Mass. Bay Acts And Resolves* 507-508.

507. An Act To Prevent The Annoying Or Stopping Up Of Harbours And The Unjust Taking Off Ballast From The Shoar[e] (Nov. 6, 1713), Chap. 10, Acts of 1713/14, *Mass. Bay Acts And Resolves* 723.

508. An Act For Building And Maintaining A Lighthouse Upon The Great Brewster (Called Beacon Island) At The Entrance Of The Harbour Of Boston (July 23, 1715), Chap. 4, Acts of 1715/16, *Mass. Bay Acts And Resolves* 7-8.

509. An Act For Regulating The Ferr[ie][y]s Between The Count[ie][y]s of Barnstable And Dukes County (Dec. 16, 1729), Chap. 7, Acts of 1729/30, *Mass. Bay Acts and Resolves* 544-545.

510. An Act In Addition To An Act . . . For Building And Maintaining A Light-House . . . (June 22, 1751), Chap. 2, Acts of 1751/52, *Mass. Bay Acts and Resolves* 567.

511. An Act For The Better Regulating The Fishery (Feb. 14, 1757), Ch. 27, Acts of 1756/57, *Mass. Bay Acts And Resolves* 1030.

512. An Act to Prevent the Destruction of Oysters in the Several Bays and Rivers Hereafter Mentioned, Within this Province (February 28, 1765), Chap. 25, Acts of 1764/65, *Mass. Bay Acts and Resolves* 743.

513. An Act to prevent the destruction of Oysters in the several places therein mentioned, Chap. 6, Acts of 1790, Massachusetts.

514. An Act to revise and continue an Act entitled an Act to prevent the Destruction of Oysters in the several Places therein mentioned, Ch. 16, Acts of 1793, Massachusetts.

515. An Act to prevent the destruction of Oysters & other Shellfish in this Commonwealth, Chap. 71, Acts of 1796, Massachusetts.

516. An Act to prevent the destruction of the Lobster Fishery in the town of Provincetown in the county of Barnstable, and to preserve and regulate the same in the waters and shores of said town, Chapter 27, Acts of 1812, Massachusetts.

517. An Act regulating the Pilotage of the Port of Boston, Chap. 45, Acts of 1819, Massachusetts.

518. An Act for establishing the compensation for piloting vessels through the Vineyard Sound, over Nantucket Shoals in Certain Cases, Chap. 155, Acts of 1820, Massachusetts.

519. An Act for the preservation and regulation of the Fishery in the towns of Fairhaven, New Bedford, Dartmouth & Westport, Chap. 97, Acts of 1822, Massachusetts.

520. An Act in addition to . . . "an act to prevent the destruction of the Lobster Fishery, in the town of Provincetown," Chap. 102, Acts of 1822, Massachusetts.

521. An Act for the preservation and regulation of the Fishery in the Town of Falmouth, Chap. 63, Acts of 1826, Massachusetts.

522. An Act to prevent the destruction of fish in the harbor of Edgartown by seining thereof, Chap. 54, Acts of 1827, Massachusetts.

523. An Act To regulate pilotage from the sea into New Bedford and Fairhaven, Chap. 88, Acts of 1827, Massachusetts.

524. An Act To Regulate the Pilotage for the Harbour of Boston, Chap. 2, Acts of 1829, Massachusetts.

525. An Act, in addition to an Act, to regulate Pilotage from the Sea into New Bedford and Fairhaven, Chap. 37, Acts of 1830, Massachusetts.

526. An Act to prevent the destruction of fish by cocculus indicus, or other poisonous articles, Chap. 43, Acts of 1831, Massachusetts.

527. The Body of Liberties, Sec. 16 (1641), *Colonial Laws of Massachusetts, Reprinted from the Edition of 1660, with the Supplements to 1672, Containing Also, The Body of Liberties of 1641* 37 (1889) (hereinafter "*Col. Laws Mass.*").

528. The Body of Liberties, Sec. 90 (1641), *Col. Laws Mass.* 53.

529. Order of May 23, 1650, *Col. Laws Mass.* Intro. 93.

530. Order of October 23, 1651, *Col. Laws Mass.* Intro. 94.

531. Law concerning Ballast (1646), General Lawes, 1658, *Col. Laws Mass.* 125.

532. Law concerning Publicke Charges, Sec. 3, General Lawes, 1658, *Col. Laws Mass.* 134.

533. Law concerning Common Liberties (1641, 1647), Sec. 2, General Lawes, 1658, *Col. Laws Mass.* 170.

534. Law concerning Masters, Servants, Labourers (1630, 1633, 1635, 1636, 1641), Sec. 3, General Lawes, 1658, *Col. Laws Mass.* 174.

535. Law concerning Ships, Ships-Carpenters (1645), Sec. 2, General Lawes, 1658, *Col. Laws Mass.* 192.

536. Law concerning Treasurers (1648, 1654, 1657, 1658), Sec. 1, General Lawes, 1658, *Col. Laws Mass.* 196.

537. Law concerning Wharfage (1647), Sec. 2 and 3, General Lawes, 1658, *Col. Laws Mass.* 200.

538. Law concerning Wrecks of the Sea (1641, 1647), General Lawes, 1658, *Col. Laws Mass.* 203.

539. Law concerning Repeal of Lawes about Shipping and Fishing Aug. 7, 1661, Supplements 1661-1668, *Col. Laws Mass.* 220.

540. Law concerning Drinking of Healths, Etc., October 20, 1663, Supplements 1661-1668, *Col. Laws Mass.* 225.

541. Law concerning Maritime Affaires, Oct. 14, 1668, Supplements 1661-1668, *Col. Laws Mass.* 251-256.

542. An Act in addition to "An Act to regulate the pilotage for the harbour of Boston," Chap. 10, Acts of 1834, Massachusetts.

543. An Act to prevent obstructions in the Harbor of Salem, Chap. 12, Acts of 1838, Massachusetts.

544. An Act concerning the Sea Coast Fisheries, Ch. 85, Acts of 1839, Massachusetts.

545. An Act to protect the shad fishery in Monomoy Bay, Chap. 62, Acts of 1842, Massachusetts.

546. An Act relating to Pilotage, Chap. 45, Acts of 1841, Massachusetts.

547. Letter dated November 8, 1945 from United States Coast Guard to New York Department of State, Division of the Land Office and Drawing No. NYCD-C-328, sheets 1 and 2.

548. Report of the Attorney-General In the Matter of the Application of United States of America for a grant of easement for submarine cables between Rockaway Beach, Queens County and Monmouth Beach, New Jersey, *Proceedings of the Board of Commissioners of the Land Office for 1945* 79-80.

549. Easement from the State of New York to the United States of America to install, maintain and operate two communication cables under the waters of the Atlantic Ocean, February 25, 1946 as recorded at pages 354-355, Book 71 of Letters Patents, filed in the office of the State of New York Department of State.

550. An Act in addition to the Act entitled An Act to prevent the distruction [*sic*] of Oysters and other shell fish in this Commonwealth, Chap. 14, Acts of 1798, Massachusetts.

551. An Act, in addition to an Act, entitled, an Act to prevent the distruction [*sic*] of Oysters & other shell fish in this Commonwealth, Chap. 19, Acts of 1799, Massachusetts.

552. An Act to preserve the Eel Fishery, and to prevent the destruction of Oysters and all other shell fish in the Town of Harwich, Chap. 66, Acts of 1825, Massachusetts.

553. An Act, in addition to "An Act to prevent the destruction of Oysters, and other Shell Fish in this Commonwealth," Chap. 2, Acts of 1830, Massachusetts.

554. Indian deed of Southhampton, Dec. 13, 1640, *The First Book of Records of the Town of Southampton with Other Ancient Documents of Historic Value* title page, publisher's notice and 12-14 (1874).

555. Affidavit of David H. Flaherty.

556. Certificate of David H. Flaherty concerning translations from the French.

557. Certificate of Marcella Jane Charlton concerning translations from the Latin.

558. William Ryley, Senior, "The Soveraigntie of the English Seas Vindicated and Proved, by Some Few Records (Amongst Many Others of that kynd) Remayning in the Tower of London" (MSS 1652), Harleian MSS 4314, British Museum (hereinafter "Ryley Treatise"), title page and table of contents and 409-410 Fulton, *The Sovereignty of the Seas* (London, 1911).

559. "A License to the Men of Holland, Zeland and Frisland to Fish . . . Anno. 23, Edward I" [1295], Ryley Treatise, fol. 2.

560. "A Security Granted to the Fishermen of France to Fish in the Sea Neare the River of Sarme for a Season in 5 Henry 4 [?]" [1404], Ryley Treatise, fol. 19.

561. "The like was granted by treaty between Hen 6 and those of Brabant and Flanders 18 Henry 6" [1440] Ryley Treatise, fol. 21.

562. "The Custody of the Sea Granted to Henry Duke of Exeter Anno 38 Hen. 6" [1461], Ryley Treatise, fol. 25.

563. "In a Truce between Edward 4th and Francis Duke of Brittaine a Protection is Granted to the Fishermen of the Duke of Brittaine" [1468], Ryley Treatise, fol. 27-28.

564. "Sir John Hemingham Knight . . . Appointed Wafters to Guard the Fishers not onely of England by Foraigners and to take a reasonable proportion of every ship towards their Costs and Expenses . . . ." [1483], Ryley Treatise, fol. 29.

565. "The Reasons of the Strangers answered . . . fishing in His Majesties Seas . . . ." [circa 1605-1615] Papers of Sir Julius Caesar, Admiralty, Lansdowne MSS 142, fol. 367-368, British Museum (hereinafter "Caesar Papers"). *See also,* Maine *et al.,* Exhibit No. 595.

566. "The Case Between Browne the Scottish Man and the Dutch Captaine" and "The . . . Case between His Majesty and the States of the United Provinces . . . ." [1617], Caesar Papers, fol. 398, 400.

567. Memorandum of Mr. Dudley Carleton to the States-General, 6 September 1617, from "Netherland Transcripts, 1615-1619. Presented by Viscount Palmerston." Additional MSS 17,677, I, fol. 213 recto to 215 verso, British Museum.

568. Collection relating to naval matters, copies from the papers of Samuel Pepys; "Observation on the Dominion and Sovereignty of the Seas, by Sir Philip Meadows, with papers . . . relating to admiralty jurisdiction" (hereinafter "Pepys Papers"), Additional MSS 30,221, fol. 43 verso, British Museum. [Lords of the Admiralty Order for Composing a Reglement for the Narrow Seas 1633].

569. "Reglement for Preventing Abuses in and about the Narrow Seas and Ports" [1634], 759-761 Fulton, *The Sovereignty of the Seas* (London, 1911).

570. SP 16/307, no. 48. State Papers Domestic, Charles I. [Draft of a proclamation, circa 1635.]

571. SP 16/313, no. 24. State Papers Domestic, Charles I. [Lords of Admiralty to the King, February 1636.] *See also,* Maine *et al.,* Exhibit No. 604.

572. SP 16/319, no. 81. State Papers Domestic, Charles I. [Agenda for Lords of the Admiralty, April 30, 1636.]

573. SP 16/320, no. 14. State Papers Domestic, Charles I. [Record of Agenda of Lords of Admiralty, May 3, 1636] and *CSP, Dom.* 1635-36, p. 405.

574. SP 16/326, no. 32. State Papers Domestic, Charles I. [Admiralty directive to Northumberland concerning fishing licenses, June 14, 1636.] *See also,* Maine *et al.,* Exhibit No. 607.

575. SP 16/329, no. 78. State Papers Domestic, Charles I. [Draft form of license for Calais fishermen, 1636.]

576. SP 16/330, no. 41. State Papers Domestic, Charles I. [Letter from Northumberland to Secretary Windebank, August 16, 1636.]

577. SP 16/333, no. 26. State Papers Domestic, Charles I. [Letter from Northumberland to Secretary Windebank, October 6, 1636.]

578. SP 16/343, no. 72, fol. 193 recto, 194 verso, 195. State Papers Domestic, Charles I (1636). [Admiral Northumberland's Instructions to the Fleet, 1636.]

579. SP 16/343, no. 72, fol. 201-202, 205-210, 215. State Papers Domestic, Charles I. [Text of Journal kept during Admiral Northumberland's summer voyage, May 15 to Oct. 9, 1636.] *See also,* Maine *et al.,* Ex. Nos. 606 and 607.

580. SP 16/346, no. 23. State Papers Domestic, Charles I. [Letter from Stephen Goffe to Archbishop Laud, February 2, 1636.]

581. SP 16/348, no. 62. State Papers Domestic, Charles I. [Letter from Laud to the Queen of Bohemia, February 28, 1636.]

582. SP 16/351, no. 1. State Papers Domestic, Charles I. [Letter to Archbishop Laud from the Queen of Bohemia, March 25/April 4, 1637.]

583. SP 16/364, no. 45. State Papers Domestic, Charles I. [Letter to Secretary Windebank from Captain Fielding, July 24, 1637.]

584. SP 18/71, no. 78. State Papers Domestic, Interregnum. [Letter to the Commissioner for the Admiralty from Vice Admirall Lawson, May 13, 1654.]

585. SP 18/71, no. 79. State Papers Domestic, Interregnum. [Letter to Secretary Blashbourn of the Admiralty from Vice Admirall Lawson, May 13, 1654.]

586. SP 25/75, paragraphs 9 and 10. State Papers, Interregnum. [Record of meeting of Council of State, June 9, 1654] and *CSP, Dom. Commonwealth 7, 1654*, p. 205.

587. SP 29/178, no. 172. State Papers Domestic, Charles II. [Gysbert Peterson's lycense to fish.]

588. SP 44/23, p. 283. State Papers Domestic, Charles II, Entry Book 23, [Fishing License to Gysbert Peterson, November 21, 1666] and *CSP, Dom.* Charles II, 1666-67, page 277.

589. SP 44/23, p. 475. State Papers Domestic, Charles II, Entry Book 23. [Fishing License to Gysbert Peterson, June 7, 1667.]

590. SP 44/18, p. 213. State Papers Domestic, Charles II, Entry Book 18, paragraph 3. [Recommendation that a fishing license be issued. July 12, 1666.]

591. SP 44/23, p. 217. State Papers Domestic, Charles II, Entry Book 23, final paragraph. [Concerning a license for Bruges fishing boats. July 17, 1666.]

592. Pepys Papers, Additional MSS 30,221, fol. 67 verso. [Record of a Meeting of the King in Council, April 8, 1677.]

593. Pepys Papers, Additional MSS 30,221, fol. 66 verso. [Record of a royal order in Council, 1687.]

594. Miscellaneous Admiralty 7. "Compilation of miscellaneous documents relating to the history of the Navy, the Dominion and Sovereignty of the seas, salutes, etc.," Public Record Office. Vol. 730, "A Collection of Several Manuscripts taken out of Sir William Penn's Closet Relating to the Affairs of the Navy Humbly Dedicated and Presented to the King by his son William Penn," p. 279.

[Maine *et al.*, Exhibit Nos. 595-612 are portions of SP 29/339 of the State Papers Domestic, Charles II. The title of the volume is "A Collection of Divers Particulars Touching the Kings Dominion and Sovereignty in the Fishings as well in Scotland." It contains material prepared for the English plenipotentiaries to the Cologne peace negotiations with the Dutch held in August, 1673.]

595. SP 29/339, p. 17. State Papers Domestic, Charles II. [Arguments of Strafford.] *See also*, Maine *et al.*, Exhibit No. 565.

596. SP 29/339, pages 145-147, 151-152. [Excerpts from materials for 1673 negotiators entitled "At What Distances from the Coasts of England the Holland Fishers have Used to be Kept by His Majesties Men of Warr, in their Herring Fishing."]

597. SP 29/339, p. 161. [Summary of Restrictions Placed Upon Dutch Fishermen.]

598. SP 29/339, pages 211-212. [Notes and instructions on the fisheries issue for the 1673 negotiators.]

599. SP 29/339, pages 223-224. [Report concerning capture of Browne, the herring-assize collector.] *See also*, Maine *et al.*, Exhibit Nos. 566 and 567.

600. SP 29/399, pages 347-350. [License to French fishermen.]

601. SP 29/339, pages 355-358. [Letter from Dudley Carleton, English negotiator at The Hague to Secretary Naunton in England, Dec. 30, 1618.]

602. SP 29/339, p. 381. [A statement concerning fishing.]

603. SP 29/339, p. 393. [1626 Request from Governor of Dieppe for Renewal of Fishing Licenses.]

604. SP 29/339, pages 401-405. [Admiralty judges' opinion, February 25, 1635.] *See also*, Maine *et al.*, Exhibit No. 571.

605. SP 29/339, pages 437-440. [Excerpts from letters from Sir Francis Windebank and Sir William Boswell concerning licenses for the Dutch to fish. 1636-37.]

606. SP 29/339, pages 441-442. [Extracts from the Earl of Northumberland's Journal, 1636.] *See also*, Maine *et al.*, Exhibit No. 579.

607. SP 29/339, pages 445-446, 449-50, 467. [Directive to Earl of Northumberland and his accounts from issuance of fishing licenses.] *See also*, Maine *et al.*, Exhibit Nos. 574 and 577.

608. SP 29/339, p. 543. [Letter from Secretary Windebank to Mr. Gerbier, Nov. 17, 1637.]

609. SP 29/339, p. 551. [Letter from Secretary Windebank to Sir Balthasar Gerbier, Dec. 29, 1637.]

610. SP 29/339, p. 571. [Communication from Secretary Windebank, July 15, 1639.]

611. SP 29/339, pages 591-592. [Communication from people of Bruge to Charles II requesting permission to fish in seas belonging to his kingdom.]

612. SP 29/339, pages 589-590. [Grant of fishing licenses to Bruges fishermen, 1666.]

613. Captain Cyprian Southack, Map entitled "The New England Coasting Pilot from Sandy Hook, New York, unto Cape Canso." [1720?], CO 700, North America, New England 5, Public Record Office, London. (Southack also published at Boston in 1717 an engraved *Chart of the English Plantations in North America.* This map has the following notation on its face: "As far as the Prickt Line runs I have been Cruising in the Service of the Crown of Great Britain from the Year 1690 to the Year 1712. Which General Chart distinct from this will be Compleated with the Maps of the Harbour in Six Months time Fit to

be Printed for the Use of my Brother Mariners it being my twenty two Years hard Labour and Pain.")

614. William Faden, Map of "The United States of North America with the British and Spanish Territories, according to the treaty of 1784 (sic) Engraved by Wm. Faden, Geographer to the King. Publ'd. Feb. 11, 1785." CO 700, North America, General No. 16, Public Record Office, London.

615. "Map of New England relating to the dispute over the boundaries of New Hampshire and Maine," Ms. map, 1726. CO 5/869 fol. 346 (MPG 19), Public Record Office, London.

616. Map of southern part of New Hampshire, 1733, CO 5/875/84 (MPG 363), Public Record Office, London. (Submitted by John Rindge, agent for the New Hampshire Assembly, concerning a boundary dispute with Massachusetts.

617. "Map of the Coast-line of Maine showing boundaries, 1779, CO 217/54/211 (MPG 216), Public Record Office, London, *see also,* Maine *et al.,* Exhibit No. 619.

618. Affidavit of David H. Flaherty.

619. CO 5/54, pp. 239-243. [Remarks of Charles Morris concerning Nova Scotia.] *See also,* Maine *et al.,* Exhibit No. 617.

620. SP 25/68, pp. 138, 157, 160, State Papers Domestic, Interregnum Council of State, and SP 25/132, pages 14-15, State Papers Domestic, Interregnum. "Committee for Foreign Affaires." [Entries concerning licensing of Diep fishermen, 1652.]

621. HCA 1/10/Part I/No. 23. Admiralty Records. [Indictment of Bartlet, Heritson and Marshall for Failure to Salute the English Flag. December 30, 1674.]

622. HCA 1/10/Part I/No. 32. Admiralty Records. [Petition of Bartlet, Heritson and Marshall for release from Newgate. January 1674/75.]

623. HCA 1/11/No. 17. High Court of Admiralty. Oyer and Terminer Records. Public Record Office, London. (Hereinafter "Admiralty Records.") [Indictment of Peter Giraudeau, for failure to salute the English flag, @ December/January 1676/77.]

624. HCA 1/10/Part II/No. 141. Admiralty Records. [Trial of Peter Giraudeau, January 1676/77.]

625. HCA 1/11/Part I/No. 3. Admiralty Records. [Original information against Selingue and De Ville for failure to Salute the English Flag. March 1676/77.]

626. HCA 1/11/Part I/No. 4. Admiralty Records. [Warrant from the Lords of the Admiralty to the Marshall of the Court for taking Selingue and De Ville into custody, June 1677.]

627. HCA 1/11/Part I/No. 14. Admiralty Records. [Indictment against Selingue and De Ville, 1677.]

628. HCA 1/11/Part I/No. 18. Admiralty Records. [Latin minutes of trial of Selingue and De Ville, August 27, 1677.]

629. HCA 1/11/Part I/No. 20. Admiralty Records. [Crown warrant for pardon of Selingue, August, 1677.]

630. SP 9/53, fols. 53 and 57. State Papers Miscellaneous. [Excerpts concerning "Defence of the Narrow Seas.

May, 1576," from bound Mss Volume "of Memoranda and copies of documents, partly in Sir Joseph Williamson's (Keeper of the State Papers, 1661-1702) hand, relating to the Navy and Sovereignty of the Seas" (hereinafter "Williamson Mss.").]

631. SP 9/53, fols. 33-35. State Papers Miscellaneous. [Williamson Mss., Instructions to Admirals, dated 1557, 1626, 1628, 1633.]

632. Miscellaneous Admiralty 7. "Compilation of miscellaneous documents relating to the history of the Navy, the Dominion and Sovereignty of the seas, salutes, etc." Public Record Office. (Hereinafter "Admiralty 7") Vol. 730, "A Collection of Several Manuscripts taken out of Sir William Penn's Closet Relating to the Affairs of the Navy Humbly Dedicated and presented to the King by his son William Penn," @ 1680 (hereinafter "Vol. 730") fols. 97, 103-107, 116. [Excerpts from Instructions of Lords of Admiralty and Cinque Ports, 1647.]

633. Admiralty 7; Vol. 729, "A Collection of Papers and Notes upon the Subject of the Dominion and Sovereignty of the British Seas, the Right of the Flag and all Matters relating to Salutes and Colours," (hereinafter "Vol. 729") fols. 149-150. [Copy of the 32nd Article of the General Printed Instructions annexed to the Commanders of His Majesty's Ships Commissions, touching Salutes, 1660's or 1670's.]

634. Pepys Papers, Additional Mss. 30,221, fols. 46 verso to 47 verso. British Museum. [Draught by Sir Leoline Jenkins about the King's Sovereignty in the British Seas, circa 1672.]

635. Admiralty 7; Vol. 729, fols. 126-127. [Letter from Trinity House concerning the extent of the British seas, 1671.]

636. Admiralty 7; Vol. 729, fols. 221, 227-28. [Trinity House Resolution concerning westward boundary of English Channel, 1668 and excerpt from Opinion of the Extent of the Jurisdiction of the Cinque Ports, 1686.]

637. CO 388/90, fols. 29-31. Board of Trade. [A copy of Sir Henry Penrice's Report on the extent of the British Seas, 1721.]

638. Admiralty 7; Vol. 723, fols. 1-23. [Translation of the Patent to Earl of Pembroke to be Lord High Admiral, January 26, 1701.]

639. Admiralty 7; Vol. 723, fols. 168-183. [Patent to a Vice Admiral of Jamaica, September 11, 1727.]

640. Admiralty 7; Vol. 723, fols. 143-155. [Translation of the Patent of Sir Henry Penrice as Judge of the High Court of Admiralty, November 10, 1727.]

641. Admiralty 7; Vol. 724, fols. 1-7. [Excerpt of Patent to Duke of York as Lord High Admiral of England, probably 1670's.]

642. Admiralty 7; Vol. 724, fols. 23-29, 44. [Excerpt of Patent to Duke of York as Lord High Admiral of Dunkirk, New England, etc., 1674.]

643. Calendar of the Patent Rolls Preserved in the Public Record Office, Elizabeth I. V. 1569-1572 (London, 1966), p. 297. [Patent Conveying land recovered from the sea to Thomas Digges, 1571. *See*, tr. p. 144.

644. SP 14/5, No. 55. [James I grant of Marsh land and land gained from the sea, 1603. *See*, tr. p. 144.]

645. SP 38/12. Entry Book, James I and *CSP, Dom. 1619-1623* James I, p. 625. [Warrant Conveying derelict land to Charles Barrett, June 30, 1623. *See*, tr. p. 145.]

646. C 205. Chancery Petty Bag. Special Commissions. (1607-1889). Title page, conspectus of special commissions and itemized description of bundle 6, concerning derelict lands.

647. C 205/6, Chancery Petty Bag. Special Commissions. Derelict Lands (hereinafter "C 205/6"), No. 1. [Transcription of inquisition before crown commissioners, 1636.]

648. C 205/6, No. 2. [Transcription of Articles and Interrogations before Commissioners concerning derelict lands in Essex and Kent, 1688.]

649. C 205/6, No. 4. [Transcription of Depositions before Commissioners concerning derelict lands in Sussex, 1695.]

650. T 1/29. Treasury Papers, August 4, 1694, pp. 16-20 and *Cal. Treasury Papers, 1557-1696*, p. 383. [Report of the Attorney General on Lady Anglesey's petition for derelict lands, her petition and Affidavit of Thomas Young, 1694. *See*, tr. p. 145.]

651. T 1/39, fols. 148-156, May – August, 1696. Treasury Papers. [Petition of Percival Bunskill for derelict lands reports of Attorney General and Surveyor General and affidavits.]

652. T 29/9, Minute Book, Treasury, pp. 230-34 and *Cal. Treasury Papers, 1557-1696*, p. 537. [Minutes of a hearing concerning a grant of derelict lands. July 28, 1697.]

653. T 1/47, No. 32. Treasury Papers. [Petition of Percival Bunskill to Lords Justices seeking a hearing concerning his petition for derelict lands and reference of matter to the Lords Commissioners of the Treasury, 1697.]

654. T 1/57/No. 32. Treasury Papers. [Papers relating to petition of Joseph Ayloff concerning Derelict lands in Sussex and Kent, 1698.]

655. T 1/57, fols. 54-66, Oct. 25, 1698. Treasury Papers. [Report of the Attorney General on Petition of Francis Geary concerning derelict lands and supporting affidavits.] *See*, tr. p. 145 and Maine *et al.*, Ex. No. 219.

656. DL 44/1272 3 George I, 1717. [Survey and Commission for derelict lands in the Duchy of Lancaster.]

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659. CO 5/885. New England. Board of Trade. Original Correspondence, 1744-1747. [Copy of a letter from Massachusetts Governor Shirley to Lords of Trade, March 27, 1745.]

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826. Memorandum in support presented by the States of New South Wales, Victoria, South Australia and Western Australia, dated June 5, 1973.

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Maine *et al.* Ex. No. 2

Charter of Maine to Gorges and Mason (1622), in 3 Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming The United States of America* 1621 (1909)

621 This indenture, made the 10th day of August, Anno Dom. 1622, and in the 20th yeare of the reigne of our Sovereigne Lord James, by the grace of God King of England, Scotland, France and Ireland, Defender of the Faith, &c. Between the President and councill of New-England on the one part, and Sir Ferdinando Gorges, of London, Knight, and Captain John Mason, of London, Esquire, on ye other part: *Witnesseth*, that whereas our said Sovereigne Lord King James, for the making of a plantation and establishing a colony or colonyes in ye country called or knowne by ye names of New-England in America, hath, by his Highness' Letters Patents, under the Great Seale of England, bearing date at Westmr. the 3d day of November, in the 18th yeare of his reigne, given, granted and confirmed unto the Right Honorable Lodowick, Duke of Lenox . . . and divers others . . . [1622] and also hath, of his especiall grace, certaine knowledge and meer motion, for him, his heyres and successors; and given, granted and confirmed unto the said President and councill, and their successors, under the reservacons, limitacons and declaracons in the said Letters Patents expressed, all that part or porcon of that country now commonly called New-England wch is situate, lying and being between the latitude of forty and forty-eight degrees northerly latitude, together with the seas and islands lying within one hundred miles of any part of the said coasts of the country aforesaid; and also all the lands, soyle, grounds, havens, ports, rivers, mines, as well royal mines of gold and silver, as other mines, minerals, pearls and pretious stones, woods, quaries, marshes,

waters, fishings, hunting, hawking, fowling, commodities and hereditaments whatsoever, together with all prerogatives, jurisdictions, royaltys, privileges, franchises and preliminaries within any of the said territories and precincts thereof whatsoever. . . .

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Maine *et al.* Ex. No. 12

Grant of "Mariana" to Mason (1621) in XXIX *New Hampshire State Papers* 19 (Albert S. Batchellor, ed., Concord, N. H. 1896)

19 A Grant of Cape Anne in New England from the President & Council of New England to John Mason Esqr.

This Indenture made ye Ninth day of March in ye 19th yeare of the Reigne of Our Sovereigne Lord James by ye Grace of God King of England, Scotland, France & Ireland, Defender of the Faith. Betweene ye President & Councell of New England of the one parte and John Mason Gent, and inhabitant of the Citty of London of ye other parte. Witnesseth that whereas Our Said Soveraigne Lord King James for ye makeing a Plantac'on & Establishing a Colony or Colonyes in the Country called or knowne by the Name of New England in America hath by his Highness Letters Patents under the Great Seale of England bearing Date at Westminster the 3d day of Novembr given granted & confirmed unto the Rt Honble Lodwick Lord Duke of Lenox, . . . & divers others . . . And alsoe hath of his especiall Grace certaine knowledge meer motion for him his Heirs & Successors given granted & Confirmed unto the Said President & Councill & their Successors under the Reservac'ons limitac'ons & Declarac'ons in the Said Letters Pattents expressed. All that parte & Porc'on of the Said Country Now commonly called New England

which is Scituate lying & being betwixt the Latitude of 40. Degrs. & 48 of Northerly Latitude togeather wth the Seas & Islands lying wthin One hundred Miles of any parte of the said Coast of the Country aforesaid. And alsoe all ye Lands Grounds Soyle havens Ports Rivers Mines as well Royall Mines of Gold & Silver as others Mines Mineralls pearles and pretious Stones woods quarreys Marshes Waters fishing hunting hawking fowling Commodities & Herediatam's whatsoever togeather wth all the prerogatives Jurisdic'ons Royaltyes priviledges, Franchises and preheminences wthin any of ye said Territoryes and ye precincts thereof whatsoever. . . .

NOW THIS INDENTURE further witnesseth that ye said President and Councell of their full free and Mutuall consent as well to ye end that all the Lands woods, waters, Islands & fishings wth all other the profitts and Comodityes whatsoever to them or any of them and hereafter in These presents menc'oned may be wholy & intirely invested appropriated Severed and Settled in & upon the Said John Mason his heirs and assignes for Evar, as for divers Speciall services for ye advancemt of ye said Plantac'on & other Good causes & considerac'ons them especially thereunto moveing have given granted bargained Sold assigned aliencd Enfeoffed Sett over & confirmed, And by these presents doe give grant bargaine sell assigne alien Enfeoffed Sett over & confirme unto ye said John Mason his heirs and assignes, All that part of the Sea Coast of New England being a great headland or Cape & lying in ye Northermost parts of the Massachusetts Country. . . . [21] togeather alsoe wth all the Seas Isles or Islands adjoyning to any part of ye precincts of the Lands aforesaid or lying wthin 3 Miles of any parte of ye same, as alsoe all ye Lands Soyle Grounds havens Ports Rivers Mines Mineralls pearls & pretious Stones woods Quarreys Marshes Waters Lakes

fishings hunting hawking ffowling Com'odityes & hereditamts whatsoever wth all & Sing'ler their appurtenances togeather wth all prerogatives rights royaltyes jurisdictions priviledges francheses prheminences libertyes Marine power as alsoe ye Escheats and casualtyes thereof, ...

* * *

Maine *et al.* Ex. No. 13

Grant of New Hampshire to Mason (1629), in 4 Thorpe 2433.

2433 This Indenture made ye Seaventh day of Novembr Anno Dom'y 1629 & in ye ffifth yeare of ye Reigne of our Soveraigne Lord Charles by ye Grace of God King of England Scotland ffrance & Ireland Defender of the ffaith &c Between ye President & Councell of new England on the one partie & Capt John Mason of London Esqr on ye other partie Witnesseth yt whereas our late Soveraigne Lord of ffaimous Memory King James for ye makeing a Plantation & establishing of a Colony or Colonyes in the Countrey called or knowen by ye name of New England in America did by his highness letters patents under ye greate Seale of England bearing date att Westminster ye third day of Novembr in ye Eighteenth yeare of his Reigne give grant & confirme unto ye Right honble Lodowick Duke of Lenox . . . & divers others . . . and also did of his especiall Grace certaine knowledge and meer motion for him his heyres & Successors give grant & confirme unto ye said President & Councell & their Successors under ye reservac'ons limitac'ons & declarac'ons in ye
2434 sd letters patents expressed. All yt part & porc'on of yt Countrey now commonly called New England wch is scittuate lying & being between ye latitude of fforty degrees & ffourty Eight of Northerly latitude together with ye

Seas & Islands lying wthin one hundred miles of any part of ye sd Coaste of ye Countrey aforesd & also all ye lands Soyle grounds havens ports rivers mines as well Royall mignes of Gold & Silver as other mines mineralls pearls & pretious Stones woods quarryes marshes waters ffishings hunting hawking fowling commodityes & hereditaments whatsoever together wth all prerogatives Jurisdicc'ons Royaltyes priviledges franchises & preheminences within any of ye sd Territoryes & ye precincts thereof whatsoever. . . .

* * *

Maine *et al.* Ex. No. 141

Proprietary Charter and Grant to Caecilius Calvert, Lord Baltimore (1632), in 3 Thorpe 1677

1677 Charles, by the Grace of God, of England, Scotland, France, and Ireland, king, Defender of the Faith, &c. To all to whom these Presents come, Greeting.

* * *

1678 IV. Also We do grant and likewise Confirm unto the said Baron of Baltimore, his Heirs, and Assigns, all Islands and Inlets within the Limits aforesaid, all and singular the Islands, and Islets, from the Eastern Shore of the aforesaid Region, towards the East, which had been, or shall be formed in the Sea, situate within Ten marine Leagues from the said shore; with all and singular the Ports, Harbours, Bays, Rivers, and Straits belonging to the Region or Islands aforesaid, and all the Soil, Plains, Woods, Marshes, Lakes, Rivers, Bays, and Straits, situate, or being within the Metes, Bounds, and Limits aforesaid, with the Fishings of every kind of Fish, as well of Whales, Sturgeons, and other royal Fish, as of other Fish, in the Sea, Bays, Straits, or Rivers, within the Premises, and the fish there taken;

And moreover all Veins, Mines, and Quarries, as well opened as hidden, already found, or that shall be found within the Region, Islands, or Limits aforesaid, of Gold, Silver, Gems, and precious Stones, and any other whatsoever, whether they be of Stones, or Metals, or of any other Thing, or Matter whatsoever; . . . with all, and
1679 singular such, and as ample Rights, Jurisdictions, Privileges, Prerogatives, Royalties, Liberties, Immunities, and royal Rights, and temporal Franchises whatsoever, as well by Sea as by Land, within the Region, Islands, Islets, and Limits aforesaid, to be had, exercised, used, and enjoyed, as any Bishop of Durham, within the Bishoprick or County Palatine of Durham, in our Kingdom of England, ever heretofore hath had, held, used, or enjoyed, or of right could, or ought to have, hold, use, or enjoy. . . .

* * *

Maine *et al.* Ex. No. 170

"Territorial Waters Jurisdiction Act"
41 & 42 Vict. Ch. 73 (1878)

579 **CHAPTER 73.**

An Act to regulate the Law relating to the Trial of Offences committed on the Sea within a certain distance of the Coasts of Her Majesty's Dominions.

[16th August 1878.]

WHEREAS the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions:

And whereas it is expedient that all offences committed on the open sea within a certain distance of the coasts of the United Kingdom and of all other parts of Her Majesty's dominions, by whomsoever committed, should be dealt with according to law:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Territorial Waters Jurisdiction Act, 1878.

2. An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried and punished accordingly.

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Maine *et al.* Ex. No. 172

Baker, Sir Sherston, *The Office of Vice-Admiral of the Coast* (1844)

* * *

124 . . . Some doubts, however, having arisen with respect to the jurisdiction of this court, the limits and extent thereof were at length fixed and ascertained by Statute, in 1681, cap. 82, the tenor whereof follows: –

Our Sovereign Lord, considering that the clearing and establishing the jurisdiction of the High Admiral of this kingdom will greatly tend to the advancement and encouragement of trade and navigation; therefore His Majesty, with advice and consent of the Estates of Parliament, doth ratify and approve the fifteenth Act of the twelfth parliament of King James the Sixth, in the whole heads, clauses, and articles of the same; and decerns and declares the High Court of Admiralty to be a sovereign judicature in itself, and of its own nature to import summar execution. And statutes and declares, That the said High Admiral, as he is His Majesty's lieutenant and justice-general upon the seas, and in all ports, harbours, or creeks of the same, and upon fresh waters or navigable rivers below the first bridges, or within the floodmarks, so far as the same does or can at any time extend; so the said High Admiral hath the sole privilege and jurisdiction in all maritime and seafaring causes, foreign and domestic, whether civil or criminal, whatever within this realm, and over all persons as they are concerned in the same: . . . .

* * *

Maine *et al.* Ex. No. 174

2 Blackstone, Sir William, *Commentaries on the Laws of England* Vol. 2 (1765)

* * *

261 [I]n case a new island rise in the *sea*, though the civil law gives it to the first occupant; yet ours gives it to the king. And as to lands gained from the sea, either
262 by *alluvion*, by the washing up of land and earth, so as in time to make *terra firma;* or by *dereliction*, as when the sea shrinks back below the usual watermark; in the these cases the law is held to be, that if this gain be by

little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex:* and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king: for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry. . . .

* * *

Maine *et al.* Ex. No. 175

Boroughs, Sir John, *The Soveraignty of the British Seas* (1633) (1920 ed.)

43 That Princes may have an exclusive property in the Soveraigntie of the severall parts of the Sea, and in the passage fishing & shores thereof, is so evidently true by way of fact, as no man that is not desperately impudent can deny it.

* * *

45 . . . And therefore the question being not as yet resolved amongst themselves, it were strange to thinke that Princes in the meane time will relinquish the possession of those Royalties which they and their Ancestors have held beyond all memory, without a judgement first agreed upon and affirmed in the case. And for his sacred Majesty our dread Soveraigne Lord the King, such is his cleare and indubitable right to the Superiority of the Seas of *England* derived and confirmed upon him by immemorable

prescription, and continued in possession even untill this very yeare 1633, that the hearts and consciences of all just men must necessarily subscribe to the evident truth thereof.

* * *

90 A child borne upon the Kings Seas is not an Alien by the common law.

* * *

92 By all which presidents it is manifest that by the common Law of the land the King is proprietory Lord of our seas; that the seas of *England* are under the legeance of the king; that the king is the soveraigne conservator of the peace as well upon the sea as land; That not onely things floating on the superficies of the water but such as lye upon the soile or ground thereof belong properly unto the king, whereupon I conclude, That *Rex Maris imperio Dominio et fundo possidet.*

* * *

Maine *et al.* Ex. No. 176

"De Superiorite Maris Angliae & jure offici Admirallatus in eodem," translated in Boroughs, Sir John, *The Soveraignty of the British Seas* (1633) (1651 ed.)[1]

55 "To our Lords Auditors deputed by the Kings of *England* & of *France* to redresse the damages done to the people of their Kingdoms and of other Territories subject to their Dominions by sea and by land, in time of peace and truce.

"The Procurators of the Prelates, Nobles, and Admirall of the sea of *England* and of the Comminalties of Cities and Townes and of Merchants, Marriners, Messengers, Pilgrims, and of all other of the said Kingdome of *England* and the Territories subject to the Dominions of the sayd King of England, and of other places, as of the Seacoasts of *Genoa, Cataloigna, Spaine, Almaigne, Zealand, Holland, Freezland, Denmarke* and *Norway* and of divers other places of the Empire, doe shew, That whereas the Kings of *England*, by reason of the sayd Kingdome, from time whereof there is no memory to the contrary, have been in peaceable possession of the Dominion of the Sea of England and of the Isles being in the same, in making and establishing Lawes and Statutes and restraints of Armes and of Ships otherwise furnished then to Ships of merchandize appertaineth, and in taking suretie and affording safeguard in all cases where need shall be, in ordering of all other things necessary for maintaining of Peace Right, and Equity amongst all manner of people, as well of other Dominions as of their owne, passing through the said Seas, and the Soveraign guard thereof, and in doing Justice, Right, and Law, according to the said Lawes Ordinances, and Restraints, and in all other things which may appertaine to the exercise of soveraigne dominion in the places aforesayd. And *A. de B.* Admirall of the Sea deputed by the King of *England*, and all other Admiralls ordained by the sayd King of *England*, had been in peaceable possession of the soveraigne guard, with the cognizance of Justice, and

all other the appurtenances aforesayd, except in case of Appeale, and of complaint made of them to their Soveraignes the Kings of *England* in default of Justice and for evill Judgement, and es-
57 pecially in making Restraints, doing of Justice, and taking surety of the peace of all manner of people using Armes in the said Sea, or carrying Ships otherwise furnished and set forth then to Merchants Ships appertaineth, and in all other points where a man may have reasonable cause to suspect them of Robbery, or of other misdemeanours. And whereas the Masters of the ships of the sayd Kingdome of *England*, in the absence of the sayd Admirall, have been in peaceable possession of taking Cognizance and judging all actions done in the sayd Sea, betweene all manner of people according to the said lawes, Statutes, restraints, and customes. And whereas in the said first Article of confederation lately made betweene the said kings in the treatie upon the last peace at *Paris* are comprised the words which follow in a Schedule annexed to these presents:

" 'First it is estreated and accorded betweene us and the messengers and Procurators aforesaid in the names of the said Kings. That the said Kings shall from this time forward be one to the other good true and loyall friends, and ayding against all men (save the Church of *Rome*)
58 in such manner as if any one or more, whatsoever they be, would disinherit hinder or molest the said kings in the Franchises, liberties, priviledges, rights, dueties, customes of them and of their kingdomes, they shall bee good and loyall friends, and ayding against all men that may live

and die, to defend keepe and maintaine the Franchises, liberties, priviledges, rights, duties, and customes abovesaid, except, to the King of *England*, Mounsieur *John Duke* of *Brabant* in *Brabant* and his heires descended of him, and of the daughter of the King of *England*, and except, to our foresaid Lord the King of *France*, the excellent Prince *Mounsieur Aubart* King of *Almaigne*, and *Mounsieur John* Earle of *Anhault* in *Anhault*, and that the one shall not be of Counsell or ayding, where the other may lose life, member, estate, or temporal honour,' –

"*Mounsieur Reyner Grimbald* master of the said Navy of the said King of *France*, who names himselfe Admirall of the said Sea, deputed by his Lord aforesaid in his warre against the *Flemmings*, after the said confederation made & established and against the forme and force of the said confederation and the intention of them that made it, wrongfully assumed the office of the admiraltie in the said Sea of *England*, by the commission of the King of *France*, and used the same one year & more, taking the people and Merchants of the kingdome of *England*, and of other places, passing through the said Sea with their goods, & delivered the people so taken to the prison of the said Lord the King of *France*. [and their goods and merchandise to the receivers of the said King of *France*] in the Ports of his said kingdome, as to him forefeited and accrewing. And the taking and detayning of the said people with their said goods and Merchandise, as also his said judgement, and award [ne] hath justified before

the Lords Auditors in writing by vertue of the authoritie of his said commission of the Admiraltie aforesaid by himselfe usurped, and during a restraint generally made by the King of *England* by reason of his power and according to the forme of the third article of the confederation aforesaid, which conteineth the words underwritten, requiring that he might be acquitted and absolved of the same, to the great dammage and prejudice of the King of *England*, the Prelates Nobles and others above named.

60 "Wherefore the said procurators, in the names of their said Lords, doe pray your Lordships Auditors aforesaid that you cause due and speedie deliverie of the said people with their goods and Merchandise so taken and detained to be made to the Admirall of the said King of *England* to whom the Cognizance of the same of right appertaineth (as is before expressed); So that, without the disturbance of you or any other, hee may take Cognizance thereof and doe that which appertaineth to his office aforesaid. And the said *Mounsieur Reyner Grimbald* bee condemned and constrained to make satisfaction to all the said parties dampnifyed, so far forth as hee shall be able, and in his default his said Lord the King of *France*, by whom he was deputed in the said Office; And that, after due satisfaction made to the parties dampnified, the said *Mounsieur Reyner* bee so duly punished for the violation of the sayd confederation, that his punishment may bee an example to others in time to come."

[1] The proceedings referred to give only the complaint submitted by the procurators for the countries mentioned. The Roll does not show that any decision was given. Selden, *Mare Clausum*, ii. 27, suggests that it was "a matter of such moment that it was thought more convenient to make an end by agreement." The document appears to be only a draft, but even then it is valuable as showing the attitude England took up in the dispute.

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Maine *et al.* Ex. No. 182

Coke, Edward, *The First Part of the Institutes of the Lawes of England* (London 1628)

Hors du Roialme. (id est) extra Regnum, as much to say, as out of the power of the King of England, as of his Crowne of England: for if a man be upon the Sea of England, he is within the Kingdome or Realm of England, and within the ligeance of the King of England, as of his Crowne of England. And yet altum mare is out of the jurisdiction of the common Law, and within the jurisdiction of the Lord Admirall, whose jurisdiction is verie ancient, and long before the raign of Edward the third, as some have supposed, as may appeare by the Laws of Oleron, (so called for that they were made by King Richard the first when he was there) that there had beene then an Admirall time out of mind, and by many other ancient records in the raignes of Henry the third, Edward the first, and Edward the second, is most manifest.

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Maine *et al.* Ex. No. 183

Coke, Edward, *The Fourth Part of the Institutes of the Lawes of England* (London 1644)

* * *

142 Now for the great prerogative and interest that the King of England hath in the Seas of England, and for the antiquity of the Court of the Admiralty of England, and of the name of the Admirall, we have seen an ancient and a notable Record, intituled, De superioritate maris Angliae & jure officii Admiralitatis in eodem. So much whereof as we finde in Archivis regis, we will transcribe de verbo in verbum, as it is in the Record it self.

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Maine *et al.* Ex. No. 184

Coke, Sir John, "*Propositions for Fishing*" (Manuscript) (1633) (first page only).

The greatnesse & glorie of this kingdom of great Brittaine consisteth not so much in the extent of his Mte territories by Land: as in the Soveraintie and command of the Seas. This command is in peace, over trade and fishing: and for warre in the power of his Mte Navie to incounter the sea-forces of anie foren prince. This power heretofore had no opposite but Spaine. Now the French pretend to question it: & must in time bee kept in order. For trade & fishing wee have given so much way to the Lowcontriemen of Late years, that we have more cause to bee ielous of them, then of the Spanish or the French. The fishing wch is the businesse now in hand hath three parts. The first in the west & norwest discoveries: the second in the north/eas: The third on his Mte coasts. The new discoveries of Virginia, New-England, New Scotland

and the rest, wch of late years imploied above 300 saile of our ships: have been often interrupted by the French: & now of late by the Dutch: . . . .

* * *

Maine *et al.* Ex. No. 185

4 Comyns, *Digest of The Laws of England* (1776 ed.)

(B) PREROGATIVE AS TO FOREIGN NATIONS.

(B. 1.) Sovereignty of the Sea.

388 All the King's Prerogatives relate to Foreign States, or to his own Subjects.

The King and his Progenitors have at all Times been Lords of the Sea. 2 *Rol. 168. l. 45. Vide Navigation.*

And therefore, the Dominion of the whole Sea which surrounds *England* belongs to the King. 1 *Rol. 528. l. 15.*

And this Dominion extends to both Shores of the Sea. (2 *Rol. 168. l. 45.*)

And the Ligeance or Dominion of the Sea belongs to the King, as to his Crown of *England.* 2 *Rol. 170. l. 42.*

And therefore, the King gives Licence to the Men of *Zealand, &c.* to fish in his Sea. 2 *Rol. 170. l. 30.*

To whom the Property and Soil of the Sea belongs, *Vide Navigation,* (A.–B.) – To whom, the Fishery, *Vide Post,* (D. 50.)

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Maine *et al.* Ex. No. 186

Elder, John Rawson, *The Royal Fishery Companies of the Seventeenth Century* (1912)

As is usually the case, it was the increased importance of Holland and particularly her growing maritime power which brought her into conflict with other nations. So long as the Low Countries had constituted merely a small province of the great Spanish Empire, both English and Scoch had been content to grant Dutch fishermen their protection and had willingly allowed them to fish in British waters, upon their acknowledging the sovereignty of the English king in the seas about Britain, and purchasing licenses permitting them to fish in these seas. The English kings had since the time of Edward III. definitely asserted their claim to sovereignty in the seas lying about the coasts of their kingdom. Edward III. issued a proclamation making this claim, and had his right admitted by the Treaty of Paris, 1360; this same right was upheld by Henry V., Henry VI., and Henry VII.

That this claim to sovereignty was much more than a mere idle assertion is clear from the fact that in the reign of Mary when the fishermen of the Low Countries wished to seek new fishing grounds, there was granted to King Philip's subjects in Flanders a twenty-one years' lease of the fishings about the North Coast of Ireland, this lease being granted in consideration of a fine and £1000 paid annually to Sir Edward Fitton, Treasurer for Ireland. A like privilege to fish in the Irish seas was granted under similar conditions by the same queen to "The Company of the old Hans." Foreigners desirous of fishing in English waters were, at this time, regularly granted licenses at Scarborough Castle.

* * *

No foreigners had fished off the island of Lewis till 1594, when the Hollanders began to fish in the seas about the island by virtue of a license, which kept them, however, at a distance of twenty-eight miles from the shore.

* * *

It had always been understood that for a certain distance from the shore the fishing was reserved for native fishermen; the exact distance had varied considerably with varying conditions. The French, for example, by a treaty made in the reign of Henry IV. of France, with regard to fishing off the coast of England, had accepted a limitation both as to time and place. They agreed not to fish "between Autumn and the Calends of January," and only throughout that part of the sea "which is bounded on this side by the Ports of Scarborough and Southampton, and on the other side by the coast of Flanders and the mouth of the river Seine."

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Maine *et al.* Ex. No. 189

Fulton, Thomas Wemyss,
***The Sovereignty of the Sea* (1911)**

* * *

There was good reason for the king's eulogy of Selden's treatise. From the point of view of his policy nothing that the pen can do could have been better done. It is an elaborate and masterly exposition of the case for the sovereignty of the crown of England in the British seas, which throws into the shade all the other numerous works which were written on that side of the question. One of the most eminent lawyers of his time, a scholar, an antiquary, an historian, the author brought to his task a keen

intellect, an immense erudition, and the ability of dispos-
370 ing his material and arguments to the best advantage. In learning at least he far surpassed Grotius, and he was not inferior to his illustrious contemporary in ingenuity of reasoning. It was Selden's misfortune that the cause he championed was moribund, and opposed to the growing spirit of freedom throughout the world. At the same time it must be said that, apart from its extreme doctrines as to the sovereignty of England in the seas, it more correctly represented what are now the admitted principles as to the appropriation of the adjacent sea than did most of the works written on the other side, not excepting even those of Grotius.

* * *

373 The maritime sovereignty claimed by Selden for the kings of England was of the most absolute kind. Speaking particularly of the eastern and southern parts of the English sea, lying between England and the shores of France and Germany, – in which Charles was especially interested, – he declared that the powers exercised by the kings of England from the time of the Norman Conquest were as follows: (1) the custody, government, and admiralty, as if it were a territory or province of the king; (2) leave of passage granted to foreigners at their request; (3) liberty of fishing in them conceded to foreigners, and protection afforded to their fishermen; (4) the prescribing of laws and limits to foreigners in hostility with one another as to the taking of prizes. It is to be noted that Selden in expounding his case expressly rejected the principle of the mid-line, the limits laid down by the Italian writers, and those prescribed by King James in defining the King's Chambers; and he disclaimed the arguments used by the English commissioners at the Bremen Conference in 1602, as to the freedom of the seas, as being

374 contrary to English rights. He concludes his famous book in the following words: "It is certainly true, according to the mass of evidence set forth above, that the very shores or ports of the neighbouring sovereigns on the other side of the sea are the bounds of the maritime dominion of Britain, to the southwards and eastwards; but in the open and vast ocean to the north and west they are to be placed at the farthest extent of the most spacious seas which are possessed by the English, Scots, and Irish."

It may be added that *Mare Clausum* became in a sense a law-book, an authoritative work to which eminent lawyers, as Lord Chief-Justice Hale and Hargrave, appealed as proving the existence and the legality of the rights of the crown of England to the dominion of the British seas. Even as late as the year 1830 this doctrine held its place in certain recognised treatises on the law of England, together with Selden's definition of the extent of those seas.

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Maine *et al.* Ex. No. 190

Galloway, Robert L., *A History of Coal Mining in Great Britain* (London 1882)

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55 An Egyptian wheel was fitted up about or before the year 1600, by Sir George Bruce, to re-open the colliery of Culross, in Perthshire, which had been abandoned for some time. Sir George was famed for his knowledge and great skill in machinery, "such like," it is stated, "as no other man has in these days," and he made his colliery at Culross the wonder of the district, the workings being carried to a distance of a mile underearth, the Firth of Forth. The colliery had two pits, or shafts, one of which

was situated in a little artificial island on the fore-shore near low-water mark. The other pit was on the edge of the shore, and here was placed the engine which drew the
56 water from the mine. It was driven by three horses, and consisted of an endless chain with thirty-six buckets attached to it, of which eighteen were continually descending empty, and eighteen ascending full of water. The buckets filled themselves in the well at the bottom of the pit, and emptied themselves into a trough at the top as they passed over the axle-tree.

Tradition records that King James paid a visit to Sir George Bruce in 1617, and went to see his wonderful colliery. The royal party entered the mine by the shaft on the land, and in returning were brought up the other shaft on the island. The tide happened to be high at the time, and the King, not knowing the peculiar arrangement of the mine, on arriving at the top and seeing himself surrounded by the waves, at once suspected a plot on his life, and shouted "Treason!" His host, however, instantly explained the matter, pointing to a beautiful pinnace waiting to take the party on shore, and the King's equanimity was restored.

* * *

94 Spedding entered upon the management of the pits at Whitehaven about the year 1718.

* * *

. . . Here he proposed to Sir James Lowther to sink a pit and erect a steam-engine which would drain many hundred acres of coal under the land and an unknown extent under the sea.

The sinking at Saltom was the most remarkable colliery
95 enterprise of its day. It was commenced in 1729 within twenty yards of high-water mark.

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Maine *et al.* Ex. No. 196

Hull, Edward, *The Coal Fields of Great Britain* (London 1881)

* * *

34 Sir John Clerk, in a letter to a friend, written in 1739, gives an interesting account of the collieries of Whitehaven. The coal-beds, even at that time, were worked far under the sea, so that, as the writer observes, Sir James's riches in part swim over his head, for ships pass daily above the very ground where his colliers work.

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Maine *et al.* Ex No. 197

Malynes, Gerard, *Lex Mercatoria or the Ancient Law-Merchant* (London 1622)

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186 *Bartolus* doth in his opinion allow for princes and people at the sea-side *Centum milliaria,* which is one hundreth leagues of sea from their coast, if they extend their protection so farre, called by them *Districtus maris et territorium,* which is most plaine in those seas where the Isles of Garnesey and Iarnesey are so sensible and visible to the realme of England, or where there are such rockes or emi-
187 nent marks as the Washes at the West seas thereof; to which purpose *Paulus* a renowned Civilian saieth, That it is not needfull for him who would possesse himselfe of any land,

to go about, and tread over the same; but it is sufficient to enter in upon any part thereof, with a mind to possesse all the rest thereof, even to the due marches, to be made apparant by the instruments of Geometricians. And the like may be designed upon the seas, notwithstanding the soliditie of the one, and the continuall flowing too and fro of the other.

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Maine *et al.* Ex. No. 198

1 Marsden, Reginald, *Documents Relating to Law and Custom of the Sea* (1915-1916)

* * *

88 The King to his well-beloved and trusty Robert de Herle and Robert Belknap, Greeting. Although we appointed you, and certain others of our lieges, to hear and determine according to the law and custom of our realm divers trespasses and felonies committed and perpetrated, as it was said, by certain of our subjects and others, upon the sea, against certain merchants, as well English as foreign, who were in a ship of John Goldbetere and John Saleman, of England, and Jakemart, a Flemyng, merchants, of which ship Christian Roos of Sluys was master, being loaded at Nantes, in Brittany, with divers goods and merchandises, to the value of 20,000*l.*, to be taken from thence to Flanders; Nevertheless because, after further consideration of the matter by us and our council, it appears that, according to the law and custom of our realm, felonies, trespasses, or injuries done upon the sea ought not to be dealt with or determined before our Justices at the common law, but before our Admirals according to the maritime law; Therefore we, desiring to do what is just, have caused our commission so made to you [as

aforesaid] to be recalled; and we command that you wholly abstain from executing in any way our commission so made, or to be made, to you, and that you in no way, and by no means intermeddle therewith. In witness, &c.

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Maine *et al.* Ex. No. 199

2 Marsden, Reginald, *Documents Relating to Law and Custom of the Sea* (1915-1916)

231 *1713.* Hedges to Burchett, as to the limits of the British seas. — *Adm. Sec. In Letters 3668,* f. 146.

My Lords of the Admiralty having been pleased to require my opinion, as soon as conveniently may be, how far the Channel and North Seas are commonly known or reputed to extend, I lay my thoughts before them without delay, with all I can recollect concerning the whole extent of the British seas, as briefly as the matter will admit.

1. I take it, without any doubt, that the four seas, viz. East, South, West, and North are within her Majesty's sea dominions, as queen of Great Britain.

2. That the East and South parts of this dominion extend to the opposite shores; and, if a line be drawn from Berwick to the Naes in Norway, and another from Cape Finisterre to Cape Clear, or the most Southern point in Ireland, I conceive the space within those lines has been always reputed a part of the British seas; but I can't say this is the utmost extent of them outwards, there being some opinions that carry it further.

3. If a line be drawn from the North Foreland to Calis, and another from the islands of Scilly to Ushant, I think the space between those lines and the opposite shores describes that part of the British seas called the Channel; and the other space from the Channel to the Naes is also distinguished by the name of the German Ocean.

4. If the imaginary line from the Naes to Berwick be continued to Carlisle, and thence Westward by the coasts of Scotland and Ireland, in about 56 degrees North, it
232 may be a proper distinguishing boundary of the North Seas on this side, which are extended Northward to the coasts of Norway, taking in the Hebrades, Orchades, and all the islands, even to [Iceland].

5. To the Westward the British seas take in St. George's Channel, and as far beyond Ireland to the West as has been accounted and reputed to belong to the British seas, or according to the extent of possession thereof. Some will have it reach to Newfoundland or North America, but I do not find there is any certain point of boundary fixt by the Trinity House, or any writers of good authority in this particular.

6. All nations pretend to dominion at sea on their own coasts; some extend it to no further than they can reach, some sixty miles, some a hundred or more, with regard to the seas which wash their borders, or opposite shores. But no rule can be drawn from thence, since their seas are narrower, and can't be compared with those of Brittain, which has no opposite shores to the Westward but in the British territories; and if the British dominion may be extended as far from the Irish shores to the Westward in any proportion that the Ocean bears to

the Mediterranean, the Gulf of Venice, the Euxine, Sound, Belt, or White Sea, which are possessed by several princes and states, who retain those respective dominions, the Queen of Britain may take in many more leagues than any of them do miles; or if they claim by virtue of being possessed of opposite shores, her Majesty may, by the same rule, claim the Western Ocean beyond Ireland.

Lastly, if her Majesty may extend her dominion as far Westward as she does North and South from the shoare, it may be reasonably asserted that the ship taken in the
233 latitude of 53 degrees North, and about eighty or a hundred leagues West North West of Greenland was taken in the British Seas.

Which, nevertheless, I submit to the better judgement of those who have a more competent knowledge of the boundaries of sea dominion; though I crave leave to observe that the British sovereignty has in all ages been asserted to the utmost extent of those seas which have been possessed by the Brittains and Irish in the vast oceans of the North and West.[1]

[1] In 1699 Hedges made a long report upon the same subject with reference to a sloop captured by the French 25 leagues S.W. of Ushant. It was claimed that the capture was not made within the British seas, within the meaning of those words in the agreement for cessation of hostilities. The substance of the report is that, according to English authorities, the British seas extend to the coast of Spain, and that Belle Isle, Oleron, and other islands in the Bay of Biscay are within the British seas; that in the second treaty with the Dutch, as to the salute, the same limit was mentioned; and he quotes Solinus, Pliny, and Pomponius Mela, and certain French writers. The claim of England to these seas he traces to the time when the kings of England were Dukes of Normandy and Aquitaine. He suggests a line drawn from the north of Ireland to Finisterre (Ushant), and from thence 'along the coast

of Spain and France in the Bay of Aquitaine, and in the Channel on the coast of France and the Low Countries over against Britain,' as being the boundary. The British seas are not, he says, confined to the King's Chambers, as defined by James' proclamation (vol. I, p. 357), the only purpose of which was to describe the waters in which fighting between the Dutch and Spaniards would not be allowed. He refers to two reports of the Trinity House; one of 1668 (see *Add. MSS.* 30221, f. 19), stating that the English Channel is entered when Scilly is brought N.N.W.; the other of 1671, that the British seas extend to the North Cape (Finisterre or Cape Ortegal). The treaty of peace of 1667 between France and England, he says, assumes that the British seas extend to Cape St. Vincent. . . .

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Maine *et al.* Ex. No. 202

Medows, Sir Philip, *Observations Concerning the Dominion and Sovereignty of the Seas* (London 1689)

* * *

42 And yet 'tis a thing undoubted, and never brought into Question by any; but that every Prince, whose Country adjoyns to the Sea, and whose Shores are indented with Bayes, Creeks, Havens, and Rivers, has some portion of the Sea belonging to him in property, as an accession of the Land, or appendant to it, or rather incorporated
43 with it, like Veins and Arteries, integral Parts of the same Body.

* * *

If there be no certain Standard in Nature, whereby to ascertain the precise Boundaries of that peculiar Marine Territory, I am now speaking to, which belongs to every Prince in Right of his Land; yet, by Treaty and Agreement, they may easily be reduced to certainty. For, as to the Judgment and Opinion of private Persons, we cannot fetch from thence any true measure; for though they

all agree unanimously, that there is something due of Right, yet they vary in the *Quantum*, or How much. *Baldus* reckons One hundred Miles at Sea, as the District of the adjacent Land. *Bodin* affirms it for a received Law amongst Nations, That the Prince, whose Country abuts upon the Sea, should have Sixty Miles Jurisdiction from the Shore, and that it was so adjudged in the Case of the Duke of *Savoy*. Another Doctor will tell us, That so much of the Sea appertains to the Land, as far as a Man can see from Shore in a fair day. But this will not serve our turn: For if a Man may see from *Dover* to *Calais*, I suppose the like may be done from *Calais* to *Dover*, and whose shall the Sea be betwixt? Therefore, the surest way is, to prescribe the Limits of Fishing betwixt Neighbouring Nations by Contract, and not by the less certain measure of Territory. For if no Bounds be fixed, how many Inconveniences, and what a licentious Extravagance, may such a Liberty run into? Why may not the *Dutch*, as formerly they have done, dredge for Oysters upon the Coasts of *Essex*, within the Fisheries of private persons, and within Streams and Waters appertaining to particular Mannors, by Grants from the Crown?. . .

It was anciently Covenanted betwixt the Crown of *Scotland*, and the *Netherlands*, that they should not Fish within Fourscore Miles from the *Scottish* Shoars. . . .

* * *

Maine *et al.* Ex. No. 204

Needham, Marchamont, *Of the Dominion or, Ownership of the Sea* (translation of John Selden, *Mare Clausum*) (London 1652)

* * *

141 Lastly, that which is objected, touching the vast magnitude of the Sea, and its inexhaustible abundance, is of very little weight here. Suppose it bee inexhaustible, so that hee which shall appropriate it to himself, can receiv no dammage by other men's using it, what more prejudice is this to the right of Ownership or Dominion, then it is to the Owner of a Fire or Candle, that another man's should bee lighted by his? Is hee therefore less Master of his own Fire or Candle? But truly wee often see, that the Sea it self, by reason of other men's Fishing, Navigation, and Commerce, becom's the wors for him that own's it, and others that enjoie it in his right; So that less profit ariseth, then might otherwise bee received thereby. Which more evidently appear's in the use of those Seas, which produce Pearls, Coral, and other things of that kinde. Yea, the plentie of such seas is lessned every hour, no otherwise then that of Mines of Metal, Quarries of Stone, or of Gardens, when their Treasures and Fruits are taken away. And it is a custom of the *Mahometans* (who are
142 very great and Potent Nations) to estimate their seas no less upon this accompt, then by the Revenue either of Fishing or Navigation; as wee may see in that their *fals Prophet*, when speaking of the most holy God hee *saith*, *It is hee that hath prepared the Sea for your use, that thence yee may take fresh Food* (and use Fishing) *and also that out of it yee may draw ornaments to adorn you.* *Mahomet Ben Achmed*, the best Expositor of the *Alcoran*,

for the chief Commodity of the Sea. From whence also it is, that a special Licence to search for *Coral*, hath somtimes been granted in Leagues made by the grand Seignieur, it is observed before. Yes, and *Pliny* speaking, especially of the more Eastemly Seas, saith; *It had been counted a small matter, that men swallowed whole Seas into their throats, if both men and women also did not wear them up and down upon their hands, ears, heads, and all parts of the Body.* But it is well known to us, that precious Stones and Pearls, are very often found also in the Western Seas, and hee tell's us, they were frequently found in antient time. Moreover (saith hee) *It is certain that in* Britain *they are produced, though small and ill colored* (as wee all see at this day) *forasmuch as* Julius Caesar *would have it understood, that the breast-plate which hee consecrated to* Venus *in her Temple, was made of British Pearl.* Yea, it is written by many, and testified by *Suetonius*, that *Caesar* went to *Britain* in hope of Pearls. It is obvious therefore to every man, that the gain of such a Voiage into *Britain*, may bee lessned, and that the abundance either of Pearls themselvs, or of those shellfishes, which produce them, may through a promiscuous
143 and common use of the Sea, bee diminished in any Sea whatsoever. Where then is that inexhaustible abundance of Commodities in the sea, which cannot bee impaired? There is truly the same reason also, touching every kinde of Fishing. . . .

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Maine *et al.* Exhibit No. 207

Spelman, Sir Henry, *The English Works of Sir Henry Spelman* (Edmund Getson ed., 1723)

226 OF THE PLACES SUBJECT TO THE ADMIRALTIE.

The Place subject to the Admiraltie is of two sorts, one in respect of Jurisdiction, the other in respect of Coercion only.

The Place of Jurisdiction is the Sea, which is either common or appropriate.

The common Seas are those which lye so remote from . . . . . of every Prince, as none may justly claim them . . . . . unto him, or to have any generall Jurisdiction . . . . . but every of them particularly over his own Subjects . . . . . there.

The appropriate Sea is that which joyneth to the Territories of any Prince, as namely his Majesty of *England* . . . . . the face thereof be free for all Men as touching . . . . . and Navigation; yet the Beddy and Soil belongeth to the particular Lord: so that no Man haply ought to cast a Net or Anchor therein, but by his Favour and License, for which they commonly render Toll and Custome.

By this reason the King of *Spaine* doth not only monopolize the Fishing for Pearle, and the Wealth of the *Indian* Seas, but in jealousy thereof, the very Liberty of Navigation also. And the Kings of *Denmark* in times past have compelled our Countrymen using the *Iseland* Fishing, to pay a Custom or Tribute unto him, as King of those Seas.

* * *

229 But the Customes and Law of *England* seemeth to have broken the generality of these [Roman] Laws; for the Soyle of the Shore and Sea adjoining, is now the King's, and particular Lords, according to their Titles: Insomuch that it is ordinary to take Toll and Custom for Anchorage, Groundage, *Etc.* And some Lords do lett the stony Places near the Sea to Island Merchants to dry their Fish.

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Maine *et al.* Ex. No. 209

Welwood, William, *An Abridgment of all Sea-Lawes* (1613 ed.) (London 1590)

* * *

67 For answere, first concerning the nature of the sea, as supposed impossibly occupable or acquirable; Is this so thought because the sea is not so solid, as is the land, that men may trade thereon, as upon land? or that it is continually flowing to and fro? Surelie, that lack of solidity for man his trading thereon by foote, shall not hinder the solid possession of it, farre lesse the occupation and acquiring, if wee will giue to the sea, that which the Jurisconsults indulgently graunt to the land, which also cannot bee denied. *Paulus* the Jurisconsult saith, . . . that is, it is not needfull for him who would possesse himselfe in any part of the land, to goe about and tread over the same; but it is sufficient to enter-in upon any part thereof, with a mind to possesse all the rest thereof, even to the due marches. And what can stay this to be done on sea, as well as on land? And thus far concerning the solidity.

* * *

68 God hath diversly informed men by the helps of the compasse, counting of courses, sounding, and other waies, to find forth, and to designe *finitum in infinito,* so farre as is expedient for the certain reach and bounds of seas, properly pertaining to any Prince or people. . . .

69 Which bounds *Bartolus* hardily extends and allowes for Princes & people at the sea side, an hundreth miles of sea forth from their coasts, at least; and justly, if they exercise a protection and conservacie so farre: and this reach is called by the Doctors *Districtus maris et territorium.*

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Maine *et al.* Ex. No. 211

2 Wynne, William, *The Life of Sir Leoline Jenkins* (1724)

* * *

698 . . . [T]he King of *England* for the Time being is Lord of those Seas, where he hath the Right of his Flag acknowledged; and that those Seas are, as much as that watery Element is capable of being so in its Nature, no less a Domain of the Crown, than the Honour of *Greenwich,* or Manor of *Eltham.*

. . . [A]s the King in his Domains on Land enjoys all he has by written Law, or else by Custom, so he enjoys what he hath in his *Seigneurie Territoriale* by Sea, partly by Law, and partly by Custom, against his own Subjects; but by Custom principally, which hath a Force no whit inferior to that of a written Law, being duly prescribed and circumstantiated against all Strangers whatsoever.

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Maine *et al.* Ex. No. 212

Zouch, Richard, *The Jurisdiction of the Admiralty of England Asserted* (London 1663)

* * *

17 The Admirall of *England* (as Mr. Selden observes) hath another manner of Right, and Jurisdiction, than the Admirall of *France*, or other ordinary Admiralls, for that the Jurisdiction over the Seas of *England*, and *Ireland*,
18 and the Dominions and Isles of the same as a Province are committed to his Custody and Tuition, as to a President to defend the same, as in the Dominion of the King, by whom he is Authorized, The bounds of which Jurisdiction are limited and determined in those Seas; and besides, as the *French*, and other Admiralls he hath the power over the Navy, and the Government over the Sea-men, and Jurisdiction over the persons and moveable goods which come under his Judicature, . . . which Jurisdiction hath the bounds, but extends to the *Mediterranean*, *African*, and *Indian* Seas, or any other far remote.

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Maine *et al.* Ex. No. 221

755 **PROCLAMATION OF JAMES I. FOR THE RESTRAINT OF FOREIGNERS FISHING ON THE BRITISH COASTS.**

(A Booke of Proclamations, &c. 1609 [1602-1672].)

James by the Grace of God King of Great Britaine, France and Ireland, Defender of the Faith, &c. . . .

Whereas wee have bene contented since our comming to the Crowne, to tolerate an indifferent and promiscuous kinde of libertie to all our friends whatsoever, to fish within our streames, and upon any of our coasts of Great

Britaine, Ireland, and other adjacent Islands, so farre foorth as the permission or use thereof might not redound to the empeachment of our Prerogative Royall, nor to the hurt and damage of our loving Subjects, whose preservation and flourishing estate we hold our selfe principally bound to advance before all worldly respects: So finding that our connivence therein, hath not onely given occasion of over great encrochments upon our Regalities, or rather questioning for our Right, but hath bene a meanes of much dayly wrongs to our owne people that exercise the trade of Fishing as (either by the multitude of Strangers, which doe preoccupy those places, or by the injuries which they receive most comonly at their hands) our Subjects are constrained to abandon their Fishing, or at the least are become so discouraged in the same, as they hold it better for them, to betake themselves to some other course of living, whereby not onely divers of our Coast-townes are much decayed, but the number of Mariners dayly diminished, which is a matter of great consequence to our Estate, considering how
756 much the strength thereof consisteth in the power of Shipping, and use of Navigation: We have thought it now both just and necessary (in respect that wee are now by Gods favour lineally and lawfully possessed, aswell of the Island of Great Britaine, as of Ireland, and the rest of the Isles adjacent) to bethinke our selves of good lawfull meanes to prevent those inconveniences, and many others depending upon the same. In the consideration whereof, as we are desirous that the world may take notice, that we have no intention to deny our neighbors and Allies, those fruits and benefits of Peace and friendship, which may be justly expected at our hands in honour and reason, or are affoorded by other Princes mutually in the point of Commerce, and exchange of those things which may not proove prejudiciall to them: So because some such convenient

order may be taken in this matter, as may sufficiently provide for all these important considerations which doe depend thereupon; Wee have resolved first to give notice to all the world, That our expresse pleasure is, that from the beginning of the Moneth of August next comming no person of what Nation or qualitie soever, being not our naturall borne Subject, be permitted to fish upon any of our Coasts and Seas of Great Britaine, Ireland, and the rest of the Isles adjacent, where most usually heretofore any fishing hath bene, untill they have orderly demanded and obtained licenses from us, or such our Commissioners, as we have authorised in that behalfe, viz. at London for our Realmes of England and Ireland, and at Edenborough for our Realme of Scotland: Which Licenses, our intention is, shall be yeerely demanded, for so many Vessels and ships, and the Tonnage thereof, as shall intend to fish for that whole yeere, or any part thereof, upon any of our Coastes and Seas as aforesaid, upon paine of such chastisement, as shalbe fit to bee inflicted upon such wilfull offendors.

Given at our Palace of Westminster, the 6. day of May, in the 7. Yeere of our Reigne of Great Britaine, &c.

Anno Dom. 1609.

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Maine *et al.* Ex. No. 223

S. P. Dom., Car. 1, CCCXIII (1635-36)

* * *

210 Feb. 5. [1636] 24. Lords of the Admiralty to the King. Report on two points recommended to them by the King for their consideration; vizt. the employing his

fleet for his honour and profit. 1. In wafting merchants that pass through his seas; and 2. For protecting fishermen that exercise that trade by his Majesty's license. After hearing Sir Henry Marten they were all of opinion that the right and royalty of fishing upon his Majesty's coasts belongs to him by inheritance, so that he may justly prohibit or license strangers. The present occasion of his strength at sea is most proper to put in execution his just claim. Are of opinion that it should be intimated to the Minister of the United Provinces residing here that the King is resolved to defend those fishings in the same manner as the hereditary right of any other of his dominions, but that he offers the fishermen of the United Provinces licenses which will entitle them to safety and protection in fishing, for that he will draw the sword for maintenance of his licenses against any. With respect to wafting of merchant strangers' ships, they are of opinion that he ought to have profit by it, to be taken of such as desire waftage, in proportion to the value of the ship and the length of the waftage.

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Maine *et al.* Ex. No. 237
1. Acts of Privy Council (Col.) #65

40 [65.] Whitehall, 18 June [1621]

Whereas there was a petition exhibited unto his Majestie in the name of the Pattentees and Adventurers in the Plantation of New-England concerning some difference betweene the Southerne and Northerne Colonies, the which petition was by his Majestie referred to the consideration of the Lords. Their Lordshipps upon the hearing and debating of the matter att large and by the consent of both Colonies did establish and confirme two former orders, the one

bearing date the 16th of March 1619 agreed upon by the Duke of Lenox and the Earle of Arundell (to whom the busines was referred by the Board) the other of the 21th of July 1620 ordered by the Board, whereby it was thought
42 fitt, that the said Colonies should fish att Sea within the limitts and bounds of each other reciprocally, with this limitation that it bee onely for the sustentation of the people of the Colonies there and for the transportation of people into either Colonie (as by the said order more att large appeareth) And further it was ordered att this present by their Lordshipps, That they should have freedome of the Shore for drying of their nettes, and taking and saving of their fish, and to have wood for their necessary uses, by the assignement of the Governors att reasonable rates. Lastly that the Patent of the northerne plantation shalbe renewed, according the premises, And those of the Southerne plantation to have a sight thereof before it be ingrossed, And the former Patent to be delivered into the handes of the Pattentees.

* * *

Maine *et al.* Ex. No. 270

CSP, Col., 1700, **Nos. 368, 641**

418 Address of the Governor, Council and Assembly of Massachusetts Bay to the King. About 18 months since we represented to your Sacred Majesty the insults of our neighbours the French, and the interruptions by them given to your Majesty's good subjects in their Fishery, as also their ungrounded claim to a considerable part of your Majesty's dominion, namely, to extend their boundary as far W. as the River of Kennebeck. A copy of this Address and of the proof of the matters therein set forth we presume to lay before your Majesty, humbly praying that your Majesty

may cause effectual order to be taken for the speedy and vigorous assertion of the antient acknowledged extent of
419 your Majesty's territory within that Eastern Country reaching to the River Ste. Croix next adjoining to New Scotland in America, as appears by the grant of King Charles II. to James, Duke of York, March 12, 1664; and of the undoubted right and privilege of your Majesty's subjects to fish in the seas on the whole Eastern Coast, conformable to your Majesty's right of Sovereignty over the seas. . . .

* * *

Maine *et al.* Ex. No. 276

An Act to Entitle Garret De Graeuw and his Assigns to the Fishery of Porpoises during the Term of seven Years. 1 *Colonial Laws of New York* (1894).

839 An Act to Entitle Garret De Graeuw and his Assigns to the Fishery of Porpoises during the Term of seven Years.

[Passed, September 4, 1714.]

Whereas the Fishery of Porpoises and other Fishes of that Nature will tend to the benefit of Trade in this Colony, and add to the facilitating the returns of the same; And Whereas Garret De Graeuw in his Petition presented to the General Assembly has set forth, That by certain New Inventions by him found out he has perfectly enabled himself and is actually ready to the sure and successfull carrying on the said Fishery, humbly praying, That, in regard of his peculiar Industry and great Charge, It may be Enacted in his Favour and for his Encouragement That none but the said Garret De Graeuw his Executors Administrators and Assigns shall be permitted to carry on the said Fishery by the same Inventions for a certain Term of Years.

Be it enacted by his Excellency the Governour, the Council and General Assembly, and by the Authority of the same, That no person or persons whatsoever, from and after the Publication of this Act, shall undertake or presume to carry on the Fishery of Porpoises and other Fishes of that Nature by the said Inventions in the seas, Harbours, Rivers and other Waters within this Colony, for and during the Term of seven Years, but the said Garret De Graeuw his Executors Administrators and Assigns, to whom only the sole benefit, profit and Advantage arising from the said Fishery by the said Inventions shall belong and appertain. Saveing nevertheless the Right of her Majesty her heirs and Successors.

And be it further Enacted by the said Authority, That if any person or persons, from and after the Publication of this Act, shall undertake or carry on the said Fishery, by the Inventions of the said Garret De Graeuw contrary to and Frustrating the true intent and meaning of this Act, he or They shall forfeit and pay the sum of one hundred Pounds Current Money of this Colony of New York to be recovered in any Court of Justice within this Colony by Action of Debt, one half thereof to her Majesty her Heirs and Successors, and the other half to the said Garret De Graeuw his Executors Administrators or Assigns who shall sue for and recover the same.

And be it further Enacted by the Authority aforesaid, That in Case the said Garret De Graeuw, his Executors Administrators or Assigns, do not within the time of Twelve Months from the publication hereof putt his said Inventions in Effectual Practice and execution then it shall and may be lawful for any other person or person to undertake and carry on the said Fishery, without incurring the penalty mentioned in this Act, any thing contained in this Act to the contrary hereof in any wise Notwithstanding.

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Maine *et al.* Ex. No. 277

An Act for Preserving of Oysters.
1 *Colonial Laws of New York* (1894)

An Act for Preserving of Oysters.
[Passed, May 19, 1715.]

845 Be it Enacted by the Governour Council & General Assembly & by the Authority of the same, That from & after the Publication of this Act, it shall not be Lawfull for any Person or Persons Whatsoever (Native free Indians only excepted) from & after the first day of May, until the first day of September Annually to gather, Rake, take up, or bring to the Market, any Oysters whatsoever, under the penalty of Twenty shillings for every Offence, to be recovered before any of His Mat'ys Justices of the Peace, who are hereby Authorized & required to hear & finally Determine the same, one half thereof to him, her or them, that shall prosecute the same to Effect. & the other half to the Poor of the place where the Offence shall be Comitted.

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Maine *et al.* Ex. No. 280

An Act for the Preservation of Oysters at and near Richmond County in this Colony.
2 *Colonial Laws of New York* (1894)

1067 An Act for the Preservation of Oysters at & near Richmond County in this Colony.

[Passed, December 16, 1737.]

WHEREAS it is found by daily Experience that the Oyster Beds Lying at & near Richmond County within this Colony are wasted & destroyed by Strangers. The preventing of which will tend to the great benefit of the Poor People & others Inhabiting the aforesaid Colony.

BE it therefore Enacted by his Honour the Lieutenant Governour the Council & the General Assembly, and it is hereby Enacted by the Authority of the Same, that no Person or Persons whatsoever not Residing within this Colony from & after the Publication of this Act, do presume Directly or Indirectly to Rake or Gather up any Oysters within this Colony and put them on board any Canow
1068 Periauger Flat Scow Boat or other Vessel whatsoever not wholly belonging to & owned by Persons who live within the aforesaid Colony under the Penalty of Seizing and Forfeiting of all Such Canoes Periaugers Flats Scows Boats or other Vessells as Shall be found doing the Same together with all the oyster shells oyster Rakes Tongs & all furniture & Apparel thereto belonging.

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Maine *et al.* Ex. No. 283

Charter, Free Society of Traders. *Annals of Pennsylvania* (Hazard, Samuel, ed. 1850)

* * *

541 On the 22d and 23d March, William Penn granted to N. Moore and others, deeds of lease and release for a large body of land, and by the following charter, dated March 25th, erects it into a manor, and incorporates them into a company, with most extraordinary powers and privileges, by the name of the Free Society of Traders. This is the Pennsylvania company heretofore alluded to.

* * *

549 "And I do, for myself, and my heirs and assigns, grant unto the said Free Society of Traders, free fishing of whales, sturgeon, and all royal and other fishes in the main sea and bays of the said province, and in the inlets, waters, and rivers within or adjoining to the said twenty thousand acres, or any part thereof, the said Free Society

of Traders, and their successors, yielding and paying unto me, William Penn, my heirs and assigns, the sum of one shilling yearly, ..."

* * *

Maine *et al.* Ex. No. 326

An Act for the Preserving of Oysters in the Province of New-Jersey. *The Acts of the General Assembly of the Province of New-Jersey, From the Time of the Surrender of the Governments of the said Province, and the Fourth Year of the Reign of King George the Second.* **(1732)**

103 Whereas it is found by daily Experience, that the Oyster-beds within this Province are wasted and destroyed by Strangers, and others at unseasonable Times of the Year, the Preservation of which will tend to the great Benefit of the poor People, and others inhabiting this Province,

Be it therefore Enacted by the Governor, Council and General Assembly of this Province, and it is hereby Enacted by the Authority of the same, That no Person or Persons whatsoever shall Rake or Gather up any Oysters or Shells from and off any Beds within the said Province, from the Tenth Day of *May* to the First Day of *September,* yearly and every Year, after the Publication hereof.

104 *And Be it further Enacted by the Authority aforesaid,* That no Person or Persons whatsoever, not residing within this Province, from and after the Publication hereof, shall not, directly or indirectly, Rake or Gather up any Oysters or Shells within this Province, and put them on board any Canow, Periauger, Flat, Scow, Boat, or other Vessel whatsoever, not wholly belonging to and owned by Persons who live within the said Province, under the Penalty of Seizing and Forfeiting of all such Canows, Periaugers, Flats, Scows, Boats, or other Vessels, as shall be found

doing the same, together with all the Oysters, Shells, Oyster-Rakes, Tongs, Tackle, Furniture and Apparel thereto belonging.

* * *

Maine *et al.* Ex. No. 336

12 Reports from Committees, Session 8 February – 15 August 1876.

REPORT

iii THE SELECT COMMITTEE appointed to inquire what are the Reasons for the present Scarcity of OYSTERS, and what has been the effect of the Measures relating to OYSTER FISHERIES adopted by PARLIAMENT subsequently to the REPORT of the ROYAL COMMISSION on SEA FISHERIES in 1866, and to report what further Legislative Measures may, in the opinion of the Committee, be desirable; – HAVE considered the matter to them referred, and have agreed to the following REPORT:–

THAT your Committee having examined witnesses and taken evidence relating to the questions referred to them, have come to the conclusion that the supply of Oysters round the British coast has for some years steadily decreased, and that though, to some extent, cold seasons have contributed to cause this diminution, the principal cause is to be found in the continual and constantly increasing practice of over-dredging for them in open waters without allowing any sufficient close time. Your Committee have also obtained evidence from France, in which country regulations for close seasons for some years have been more or less rigidly insisted on, and it appears to them that in proportion to the stringency with which these regulations have been enforced, the supply of Oysters has increased. Your Committee have therefore come to the conclusion that it is desirable to make provisions for a general close time for Oyster Fisheries, and that it should

extend from the 1st of May to the 1st of September in each year. There are, however, portions of the sea, especially the Estuary of the Thames, where it is doubtful whether any close season for dredging would be required; and a power should therefore, in the opinion of your Committee, be entrusted to the Board of Trade, after inquiry, to shorten, vary, or determine this close season in any particular case.

Your Committee also recommend that the Board of Trade, on the application of local authorities or for other sufficient reasons, may set apart districts within which, for limited periods, no dredging whatever should be allowed. They also think that where orders are applied for by local authorities, every facility should be given to them, and that no charge should be made for the expense of the Department in connection with such schemes.

Your Committee would recommend, with regard to the Oyster Fisheries of private individuals, that subject to the restrictions for the sale of Oysters in the close season, the regulations as to dredging should not apply.

As regards the Deep Sea Fisheries, your Committee are of opinion that the close season enacted by the Convention Act of 1868, viz., from the 15th of June to the end of August, is sufficient; and they recommend that no Oyster should be sold from the Deep Sea Fisheries under 2½ or 3 inches in diameter.

Your Committee recommend that a penalty should be inflicted for buying or selling Oysters during the close season for the purposes of consumption.

Your Committee are of opinion that the close season, and other regulations which may be enacted, should be enforced under the superintendence of Inspectors, and that the services of the Coastguard men should be employed.

iv Your Committee approve the practice of granting portions of foreshore to private individuals and companies for the purpose of breeding and feeding Oysters.

They are further of opinion that the policy of making grants of portions of the bottom of the sea, or the foreshore, for the cultivation of Oysters, should be continued, subject to this, that the grants should be limited in extent, and liable to forfeiture, if not usefully employed for the object of oyster cultivation.

Your Committee are of opinion that such amendments of the law as would give effect to these recommendations should be made with the least possible delay. Pending such legislation, your Committee are of opinion that every fishery, formed under the orders of the Board of Trade, should be inspected at the earliest possible opportunity. The reports of the Inspectors should be laid before Parliament at the commencement of each Session.

7 July 1876.

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Maine *et al.* Ex. No. 445

Joseph Chitty, Jr., *A Treatise on the Game Laws and on Fisheries* (London, 1812)

239 OF PUBLIC FISHERIES.

FISHERIES are *public* or *private*. Public are either fisheries in distant seas in which all nations have a right to fish, and some of which are encouraged by act of parliament, or they are fisheries within the four seas, or within public navigable rivers in which all British subjects have a right to fish, in exclusion of other nations, subject in some particular instances to modifications by acts of parliament,

or the prescriptive rights of individuals. *Private* fisheries are those in which some particular persons are entitled to an exclusive right of fishing.

* * *

241 The general immunity, by virtue of which all nations may fish in the sea, is confined to those seas which have not been appropriated by a particular state, or are not within a certain distance from its shores: for although, by the law of nature, the sea is in general open to all mankind, the right of fishing in ports and rivers, or even on the coasts of an independent state, could never have
242 been considered or intended to be admitted as an universal right, nor could a foreign power send vessels to navigate within the limits of such maritime districts, or take fresh running water on the shore, without permission expressed or implied; neither can the interests of maritime states admit a promiscuous liberty to strangers to fish or navigate within their seas, since it might affect both their personal security and personal sustentation. Their personal security would be endangered by the facility afforded to foreign powers to make inimical incursions upon them; and their food might be lessened by the exhaustion of their fisheries; for, though fishing is abundant in the sea, it is manifest that it may in part be exhausted, especially if all nations should desire such a right and liberty near the coasts of any particular country; and as it is very usual that some particular kind of fish, or perhaps some more precious commodity, as pearls, coral, amber, or the like, are to be found only in one part of the seas, and that of no considerable extent, the congregation of many people to that part must necessarily prejudice the people of the neighbouring shore. In this case, then, there is no reason why the borderers should not rather challenge to

themselves this happiness of a wealthy shore, or sea, than those who are seated at a distance from it. And, according to Bodinus, by a kind of common right enjoyed by
243 all princes of maritime countries, the particular sovereign may command and controul those who approach within sixty miles of his shore. And most of the modern writers upon the law of nations agree that each state is mistress of the sea on all sides within cannon shot of her coasts, which is explained to mean three leagues; and for that reason, a vessel taken within cannon shot of a neutral fortress, is not a lawful prize. Those parts of the open waters which encompass the four sides of the British islands, and are therefore known by the name of the British Seas, have long been acknowledged by most nations as her lawful possession, and exempt from the intrusion of other nations.

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Maine *et al.* Ex. No. 449

Robert G. Hall, *Essays on the Rights of the Crown* (1875 ed.)

1 *Of the King's Title to the British Seas.*

THE British Seas, sometimes called the Four Seas, are those which encompass the coasts of England, Scotland, and Ireland. To the west they not only include the sea between Great Britain and Ireland, but extend over the Atlantic Ocean, which washes the western coasts of Ireland: this western part of our sea is subdivided; for, so much as runs between England and Ireland is called St. George's Channel, or the Irish Sea; and the sea on the west coast of Scotland is sometimes named the Caledonian, Deucaledonian, or Scottish Sea, and sometimes the

North Sea. To the east we have the German Ocean, which is bounded principally by the opposite coasts of Germany, and the United Provinces (now Belgium); lastly, to the south there is the British Channel, or Sea, which runs along
2 the French coast, and, comprehending the Bay of Biscay, ends with the northern coast of Spain.

Over the British seas, the King of England claims an absolute dominion and ownership, as Lord Paramount, against all the world. Whatever opinions foreign nations may entertain in regard to the validity of such claim, yet the subjects of the King of England do, by the common law of the realm, acknowledge and declare it to be his ancient and indisputable right.

This dominion and ownership over the British seas, vested by our law in the King, is not confined to the mere usufruct of the water, and the maritime jurisdiction, but it includes the very *fundum* or soil at the bottom of the sea. "The sea is the King's proper inheritance," and he is "Lord of the Great Waste," both land and water; "*tam aquae quam soli.*" Selden, in his celebrated treatise on the Dominion of the Seas, would seem to contemplate this ownership of the King, as combining both jurisdiction and ownership; the one, indeed, would seem to involve the other, if Selden's doctrine to its full extent be admitted.

There are eminent writers upon natural and upon national law, who have controverted Selden's doctrines, and have denied the King of England's exclusive dominion and consequently his ownership over the British seas; but however this may be, and probably will ever continue *vexata quaestio* between such writers, we know that the writers on the common and municipal law of England, as
3 well as the decisions of our judicial courts, all speak the

same language, and appropriate the dominion of the British seas *tam aquae quam soli,* to the King.

This dominion not only extends over the open seas, but also over all *creeks, arms of the sea, havens, ports,* and *tide-rivers,* as far as the reach of the tide, around the coasts of the kingdom. All waters, in short, which communicate with the sea, and are within the *flux* and *reflux* of its tides, are part and parcel of the sea itself, and subject, in all respects, to the like ownership. This is abundantly proved by the cases hereinafter referred to, where the public *right of fishing* in the creeks, arms of the sea, havens, ports, tide-rivers, &c., of the kingdom has been, in many instances, established upon the principle that they are *part of the sea,* and of the King's dominion, and as such, liable to the common law of right of the subject to fish therein; of which right we shall, in a future page, take notice.

Lord Hale, in the treatise ascribed to him, aptly compares the King's property in the sea and tide-rivers, creeks, &c., to the ownership of lords of manors in the common or waste lands of the manor. The soil and freehold of the waste belong to the lord, but subject to certain rights of the manorial tenants; such as common of pasture, piscary, turbary, ways, &c., claimed and enjoyed by them, by the custom of the manor, in and out of such waste lands. So the king is lord of the great waste of the sea, subject to certain beneficial rights and privileges of fishing, navigation, &c., immemorially enjoyed by his subjects therein, by the custom of the realm, which is the common law.

The title of the King of England to the land or soil *aqua maris cooperta,* is similar to his ancient title to all the *terra firma* in his dominions, as the first and original

proprietor and lord paramount. It is a fundamental principle of our laws of property in land, that all the lands in the realm belonged originally to the King; and, according to the feudal principles of our ancient laws of tenure, the landowners of England are, to this day, *tenants* to the King, holding their lands of him, as their lord paramount.

That part of the land which the King and his ancestors have never granted out to the subject, remains to the King, as his *demesnes*, in absolute ownership. The *terra firma* of England has become, almost entirely, the property (by grant and tenure) of the subject; but the *terra aqua maris cooperta* still remains to the King in wide and barren ownership.

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Maine *et al.* Ex. No. 451

Henry Schultes, *An Essay On Aquatic Rights*
(London 1811)

* * *

8 The sea surrounding the British empire is considered as part of the realm, and within the jurisdiction of the government; and the sovereign of England, since the Saxon times, has been constantly acknowledged to be the lord and sovereign of the sea, and his jurisdiction and interest
9 is said to extend between Britain and France, and to the middle of the sea between Britain and Spain.

* * *

Maine *et al.* Ex. No. 458

2 Reginald Marsden, ed., *Documents Relating to Law and Custom of the Sea* (1915-1916)

* * *

256 1721. Penrice to Burchett (?), as to the limits of the British Seas. – *Adm. Sec. In Letters 3670.*

The Lords of the Admiralty having asked, Whether by the 'British seas' mentioned in the convention with Spain of Feb. 1719 for cessation of arms the said seas ought to be allowed to extend as far as Finisterre? Penrice, after referring to the authorities cited by Hedges in his report of 1699 (*supra*, p. 231), and setting out the words of the convention, continues as follows:

By the treaty of cessation with France in August 1712 ships are to be restored that are taken in the Channel and in the North Seas after twelve days, and after six weeks taken beyond the Channel, the British seas, and the North seas, as far as Cape St. Vincent. This second limitation, though it fixes no certain bounds to the British seas, does not confine them to the Channell, but allows the British seas to comprehend seas different and contradistinguished from the Channel, which is taken only as a part of the British seas. The treaty of cessation with France in 1712 is confirmed by the treaty of peace with Spain at Utrecht in July 1713, by the 16 Article of which it is agreed to
257 be well and truly executed, according to the tenor thereof, in all things relating to captures made in the British or Northern seas or Elsewhere. So it is very plain by this treaty with Spain that the British seas must be extended beyond the chops of the Channel, though the boundaries are not expressed in the treaty. Since, therefore, it is allowed by the King of Spaine's advocate that the British

seas to the Southward are bounded by the coasts of Spain; since, by the treaty with Holland in 1673 the Dutch have agreed to strike their flag in any seas as far as Finisterre, which must be taken to be in acknowledgment of the British sovereignty in those seas; since, by their Lordships' Instructions to the captains of his Majestie's men of war, his Majestie's seas are declared to extend to Cape Finisterre; and, since it does not appear by any treaty between Great Britain and Spain, either written or printed, that the extent of the British seas is otherwise specified or agreed between the two Crowns, these are reasons to induce me to think that the British seas mentioned in the first limitation of the convention for cessation with Spain may be taken to extend as far as Finisterre.

But this is humbly submitted to their Lordships' consideration, whose long experience and compleat knowledge in marine affairs will enable them to form a right judgment in this point, which has not yet been settled by any treaty that I know of.

[*Dated June 16, 1721.*]

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Maine *et al.* Ex. No. 461

"The Advantages of the Fishery to Great Britain Demonstrated" (1719) (Fearing Collection, Harvard University)

* * *

19 Not to mention our Rich *New-England Fishery*, our *Western* Ports are incomparably scituated for the *Newfound-Land Fishery*, and the Country itself belonging to the Crown of *England*, you [the Dutch] can have no footing there.

* * *

Maine *et al.* Ex. No. 469

Pitman Potter, *The Freedom of the Seas in History, Law and Politics* (1924)

* * *

The kings of Spain included the phrase *del mar Oceano* (of the ocean) in the list of regions subject to their rule. The kings of Portugal put forward a claim to control the "navigation of (to?)" African and Asiatic regions rich in colonial trade. Not only were unlicensed traders – alien or native – excluded from landing and trading in the regions of Ethiopia, Guinea, Arabia, Persia, and India so controlled by the Portuguese, but from sailing in the adjacent seas.

The states of northern Europe likewise entered this race for maritime dominion. The French kings claimed to be supreme lords of all the seas which touched their coasts. The Danes claimed dominion in the Baltic – a claim never extinguished explicitly in principle to this day. Polish sovereignty of the sea was a matter of solicitude to her French allies, and both Danish and Polish pretensions were matters of great concern to the intervening Hanse towns.

Culminating in the British claims to sea dominion, this long and extensive body of state practice found here its most vigorous expression. A document of Alfred extended the King's power to the middle of the surrounding seas, and Edgar styled himself "king . . . of the ocean lying round about Britain." After the Conquest this claim was maintained and considerably extended. John required (1200) the striking of sails to all British ships at sea. Edward I (1272-1307) instructed his naval officers to maintain firmly "the sovereignty which his ancestors the kings of England

were wont to have in the sea so far as concerns the amendment, declaration, and interpretation of the laws by them made to govern all manner of nations passing through the said sea."[22] Henry IV (1399-1413) granted leave to a certain Spaniard to sail "freely from the port of London through our dominions to the town of Rochelle,"[23] and Elizabeth (1588-1603) was besought by the king of Sweden to grant permission to one Wormacus to sail to Spain "through the sea-dominions of the Queen," as the king wrote.[24]

In *Regina v. Constable* it was held that "the Queen hath the whole jurisdiction of the sea between England and France."[25]

22 Tower, MS., quoted in Selden, Bk. II, Chap. 20; see also document of Edward in Coke, *Institutes*, Chaps. 22 and 44, holding that the King of England is in possession of the sovereignty of the sea of England, and that "within the four seas" means within English jurisdiction.

23 *Rot. Franc.*, 5 Hy. 4, quoted in same; the same king later gave a permit to French ambassadors to pass "through all places under our power, our territories, our seignories, by sea and land" (same).

24 Selden, Bk. II, Chap. 20, quoting from MS. letter in the library of Thomas Cotton.

25 Leonard, *Reports*, Vol. III, 72. Such writers as Meadows and Buroughs and Clavel affirmed English rights to exclude "all foreign ships of war from passing upon any of the seas of England without special license for that purpose first obtained," and that the sovereignty of the British seas was the most precious jewell in His Majesty's crown, and that "the King of Great Britain is Lord of the sea flowing about, as an inseparable propriety and perpetual appendant of the British Empire." Meadows, 7; Buroughs, 56; Clavel, 1.

Much more evidence of the same type might be exhibited here. Admirals' commissions were based on the proposition that the British kings were "lords of the English sea on every side."[26] Parliamentary records contain similar allusion to the "sovereigns of the sea," "lords of the sea," and so on.[27] Charles I, in levying ship money in 1634 declared that the British kings had ever been lords of the English sea, and this confirmed his current actions.[28] In the *Ship Money Case (Rex v. Hampden)* it was held that the King was sovereign of the sea and that therefore his subjects were bound to fight and be taxed to defend that sovereignty.[29] In a famous charge Sir Leoline Jenkins, sitting in admiralty at the Old Bailey, described "the sovereignty of our King in the British ocean," and asserted British power in the Four Seas, "to keep the public peace on these seas," "to maintain the freedom and security of navigation the world over so that not the utmost bound of the Atlantic Ocean nor any corner of the Mediterranean nor any part of the South or other seas but that if the peace of God and the King be violated upon any of his subjects or upon his allies or their subjects, and the offender be afterwards brought up or laid hold of in any of his Majesty's ports, such breach of the peace is to be inquired of and tried in virtue of a commission of oyer and

[26] Commission quoted in Selden, Bk. II, Chap. 23, from *Rot. Scot.*, 10 Edw, 3. Further on exercise of the right of vail, and capture for failure to observe same, see Raleigh, Vol. VIII, 327; Ogilvie, 77-79.

[27] Quotations from *Rot. Parl.*, 46 Edw. 3 and 8 Hy. 5, in same.

[28] Proclamation of 20 October, 1634, quoted in same; for various documents illustrative of the British claims in the early seventeenth century see Fulton, 749-774.

[29] 1637; Broom, 303-367.

41 terminer, as this is, in such country, liberty, or place, as His Majesty shall please to direct; so long an arm has God by the laws given to his viceregent the King."[30]

It will be observed that there are two elements present here. There is a great body of state practice, and there is some considerable comment upon it by observers.

The activities of maritime states as just reviewed were quite clear and definite in intention. Attempts were being made to secure control over various bodies of water for the sake of the practical advantages to be gained thereby. But in addition to this we observe a new tendency, a tendency to specifically claim, as a matter of right, the dominion sought by force of arms, a thing not so clearly observable in past times. The appearance of proud and pretentious personal rulers and of pushing mercantile states led to the assertion of claims sometimes exorbitant, sometimes unsupported, but always unabashed and frank.

The implication is that such claims could, as a general matter, be made and vindicated whenever the appropriate circumstances justified such action. In other words, it is implied that an institution of national maritime dominion was recognized and accepted as part of the principles of interstate relations or even international law and custom.

The language of the historians and private scholars seems to bear out this implication. "Princes have a right to impose tolls," says one writer.[31] Feudal legal terms – seignory, royalty, and so on – were commonly employed to

30 Quoted in *Queen v. Keyn*, 1876, L. R. 2 Exch. Div., 63; also in Wynne, *Life*, Vol. I, xc-xcv.

31 Bonius, Art. 16, §40, quoted in Selden, Bk. I, Chap. 16; see Nau, §88.

42 describe the situation. There is common talk of the "empire of the sea (*imperium maris*)" and "sea kings (*maritimos reges*)." The language and the thought of these writers is substantially a duplication of that of the Greek historians in their day, with added emphasis upon the element of right and legal authority.

* * *

44 It is necessary, however, to recognize from this time on a regular allignment of authorities and evidence on one side and the other of the principal issue: whether it is possible, by the law of nations, to acquire a dominion over the sea; and whether such a dominion may be exercised to exclude persons from the use of the sea, to charge tolls therefor, and so on.

State practice, we have seen, all tended to indicate an affirmative answer to this question. Likewise, the newly developing bodies of national law tended to produce the same result. The traditional rules of the Roman law providing for public use of the sea and shores were repeated as the Civil Law was worked out in Spain and France and elsewhere, but they did not prevent the assertion of claims on the part of the Crown to control the sea and to grant to individuals exclusive privileges therein. Indeed, the public use of the sea and shores came to be placed mainly on the basis of a national title thereto, subject only to special
45 grants or special claims open to all men in like circumstances.[45]

In England this situation became very involved. Bracton (1260) repeated the principle that the sea is "common" by natural law, as stated in the Institutes, and set forth

[45] Documents quoted in Selden, Bk. I, Chap. 17.

the rights of public building and fishing on shores and in seas and harbors and rivers. Then, quite without any apparent feeling of contradiction, he declares the king's right to levy tolls on fishermen in the public waters, treats of pourprestures made upon the sea and of the four seas around England as parts of the realm.[46] The Fleta followed Bracton.[47] The net result was a clear claim to some degree of national territorial jurisdiction over the sea.[48]

The establishment of admiralty jurisdiction in England is a subject all by itself but it sheds much light upon the view of the English law regarding the freedom of the sea at the time.[49] Ever since the thirteenth century Britain had been troubled by claims of French and Flemish victims of British sea-robbers or pirates.[50] Failing to settle matters satisfactorily by negotiation, and feeling compelled to conciliate Flemish commercial opinion, the British Crown decided, in the middle of the fourteenth century (1340-
46 1357) to establish certain special courts to deal with cases of piracy.[51] Heretofore prize matters had been dealt with

[46] Bracton, I, 12, 5, 6; II, 24, 2 and 5; III, 1, 3; III, 2, 1 and 116 and 118; V, 30.

[47] *Fleta*, I, 20, 18; III, 1, 4.

[48] See also Dooms of Ipswich (13th century) on the "iiij sces of Ingleland" as part of the realm for certain purposes; Belknap (1390) and Littleton (1475) followed the same doctrine. Twiss, Vol. II, 45. So Rolle (1668), Vol. I, 170, ¶18, following Selden.

[49] In general: Marsden, *Pleas*, Vol. I, Introduction, xiv.

[50] And by claims of Venetian and Genoese merchants to the same effect; Britain also had claims against Flemish and Breton pirates: Marsden, *Pleas*, Vol. I, Introduction, xxxv.

[51] Marsden, as cited, xiv, xxxviii; Twiss, as cited, Vol. I, 29, n. 3.

by the courts of common law.[52] Edward III (1327-1377) now claimed again a special guardianship or jurisdiction over the sea, and since, after the battle of Sluys (1340), he was in point of physical fact master of the channel, he was able to vindicate his claim. The new courts of admiralty were to maintain "peace and justice among the people passing through the sea of England."[53]

To a large extent, of course, we have here merely a national pretension, not by itself conclusive upon the point whether maritime dominion was legally possible for any one and whether the British had secured such a dominion. And for the acquiescence of other states, the evidence is not uniform. There is an old recognition of British maritime sovereignty by a Congress of the Empire in 1299.[54] And another in the time of Edward I.[55] Edward II (1307-1327) had, apparently, secured in 1320 an admission from certain Flemish negotiators that he was "lord of the sea" and that a certain robbery "was committed on the sea within his power."[56] But this was not universal, and both the French and Spanish protested against the idea of British maritime dominion put forward by Edward III, so that in the end the jurisdiction was founded on personal grounds, through the captors of the vessel in question.

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[52] Holdsworthy, Vol. I, 304-313.

[53] Selden, Bk. II, Chap. 24; Marsden, Vol. I, xv. The Admiralty office had dealt heretofore only with naval administration and discipline.

[54] Vattel, Vol. I, Chap. 23, §289, citing Selden, Bk. II, Chap. 28.

[55] Molloy, Vol. I, Chap. 5.

[56] Marsden, as cited, xxii, xxxiii, xxxiv. Edward I had defended his claim to maritime sovereignty against the Flemings in 1207; Marsden, xxxiv.

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Maine *et al.* Ex. No. 473

Order by Governor of New York Establishing Cod Fishing Company, 24 *New York Colonial Manuscripts* (1675)

* * *

1 The Governor desiring and resolving by all Ffitting means in his Power, to Promote and Encourage a Codfish Ffishery in this Government, And finding Upon enquiry, and the best informacon and Advice, That the Most Probable meanes to effect it, is by a Company and Joynt Stock, doth by the advice of his Councell, allow and Authorize the Same, in the manner after Exprest, To witt.

* * *

That upon the 9th of February, every Member of the Said Company, or his Sufficient, Deputy, Shall meet together at New Yorcke to consult, and by the Plurality of votes make all orders, Rules and officers, and So from time to time, and take all Accounts for The mannageing, improving and ordering all things relating to the said Company, and Joynt Stock as above, for the Said Ffishery, and then appoint or give Direccons for another generall meeting or Meetings as Shall bee thought necessary.

* * *

2 THAT this Company bee not understood any wayes to debarre or hinder any other Person or Persons from Ffishing by themselves, or in Companyes, as they Shall like Best.

By order of the Governor

Matthias Nicoss, Sec.

* * *

Maine *et al.* Ex. No. 476

An Act to entitle Lovis Hector Piot De Langloiserie to the Sole Fishery of Porpoises in the Province of New York during the Term of Ten Years, 2 *The Colonial Laws of New York* (1894)

* * *

311

An Act to entitle Lovis Hector Piot De Langloiserie to the Sole Fishery of Porpoises in the Province of New York during the Term of Ten Years.

[Passed, June 17, 1726.]

WHEREAS the Fishery of Porpoises will tend to the Benefit of Trade in this Colony and enable the Inhabitants thereof to make Considerable returns for great Britain by their own Industry. AND WHEREAS the said Lovis Hector Piot De Langloiserie by his Petition to the General Assembly of this Colony, has Set forth that by an Exact observation of the Methods Used and Practiced in other Countrys, he has obtained a perfect knowledge of Catching and Taking Porpoises in an Effectual manner. AND for his Encouragement humbly prayed that noe but he the Said Lovis Hector Piot De Langloiserie his Executors, Administrators and Assigns be permitted to carry on the Said Fishery in the Same Manner and Method as Shall be Used by the Petitioner for Such a Term of Years as the Said Assembly Should think meet. And it being Just and Reasonable that the Projector or Undertaker of Such a Fishery should be Encouraged therein, because the Success thereof will undoubtedly tend to the Benefit of the Province in General, and to the Undertaker in particular. BE it therefore Enacted by his Excellency the Governour Council and General Assembly of this Colony, and it is

hereby Enacted by the Authority of the Same, That no Person or Persons whatsoever from and after the Publication of this Act, shall Undertake or presume to Carry on the fishery of Porpoises in the Same manner and Methods as the said Petitioner shall make Use of, in the Seas Harbours, Rivers and other Waters within this Colony for and during the Term of Ten Years, but he the said Lovis Hector Piot De Langloiserie his Executors Administrators and Assigns to whom only the Sole Benefit Proffit and
312 Advantage Ariseing from the said Fishery of Porpoises in the Manner & Methods aforesaid Shall belong & Appertain SAVEING Nevertheless the Rights of His Majesty His Heires and Successors. . . .

* * *

Maine *et al.* Ex. No. 481

Act relating to Fishing, *Record Containing the Agreements Acts and Lawes of the General free Assembly of the Province of West New Jersey in America and Confirmed by the Governour thereof from the first Session att Burlington begun the 21th day of the nyenth month called Novembber in the yeare 1681* (1693)

Whereas the Whalery in Delaware Bay has been in soo great a measure invaded by strangers and foreigners that the greatest part of oyle and Bone reserved and gott by that imploy hath been exported out of the Province to the great detriment thereof, to obviate which mischiefe, Be it Enacted by the Governor Councill and Representatives in this Assembly mett and assembled and by the Authority of the same, that all Persons not resyddiing within the Premiss of this Provinse or the Provinse of Pennsilvania who shall kill or bring on shore any whale

or whales within Delaware Bay or elsewhere within the Boundaries of this Government shall pay one full and entyre tenth of all the oyle and Bone made out of the said Whale or Whales unto the present Governor of this Provinse for the time being.

* * *

Maine *et al.* Ex. No. 491

An Act for the preserving of Oysters in the Province of New-Jersey (March 27, 1719), *Acts of the General Assembly of the Province of New Jersey* (1776)

* * *

57 Passed March 27, 1719.

WHEREAS it is found by daily Experience, that the Oysterbeds within this Province are wasted and destroyed by Strangers, and others, at unseasonable Times of the Year, the Preservation of which will tend to the great Benefit of the poor People and others inhabiting this Province;

Sect. I. BE IT THEREFORE ENACTED *by the Governor, Council, and General Assembly of this Province, and it is hereby Enacted by the Authority of the same.* That no Person or Persons whatsoever shall rake or gather up any Oysters or Shells from and off any Beds within the said Province,
58 from the tenth Day of *May* to the first Day of *September*, yearly and every Year, after the Publication hereof.

2. AND BE IT FURTHER ENACTED *by the Authority aforesaid,* That no Person or Persons whatsoever, not residing within this Province, from and after Publication hereof, shall not, directly or indirectly, rake or gather up any Oysters or Shells within this Province, and them put on board

any Canoe, Periauger, Flat, Scow, Boat or other Vessel whatsoever, not wholly belonging to and owned by Persons who live within the said Province, under the Penalty of seizing and forfeiting of all such Canoe, Periauger, Flat, Scow, Boat or other Vessel, as shall be found doing the same, together with all the Oysters, Shells, Oyster-rakes, Tongs, Tackle, Furniture and Apparel thereunto belonging.

* * *

Maine *et al.* Ex. No. 499

Acts Relating to Fish and Fishermen, Colony Laws (1646, 1652, 1668), ***The Charters and General Laws of The Colony and Province of Massachusetts Bay***

* * *

113 SECT. 1. WHEREAS it hath been a custom for foreign fishermen to make use of such harbours and grounds in this country, as have not been inhabited by Englishmen, and to take timber and wood at their pleasure for all their occasions, yet in these parts which are now possessed, and the lands disposed in proprieties, unto several towns and persons, by the king's grant, under the great seal of England:

It is declared, that it is not lawful for any person, either fisherman or other, either foreigner or of this country, to enter upon the lands so appropriate to any town or person, or to take wood or timber in any such place, without the license of such town or proprietor; and if any person shall trespass herein, the town or proprietor so injured may take their remedy by action at law, or may preserve their goods or other interest, by opposing lawful force against such unjust violence; provided that it shall be lawful for such fishermen as shall be employed by any inhabitants of this jurisdiction, in the

several seasons of the year, to make use of any of our harbours, and such lands as are near adjoining for the drying of their fish or other needful occasions, as also to have such timber and fire wood, as they shall have necessary use of for their fishing seasons where it may be spared, so as they make due satisfaction for the same
114 to such town or proprietor. [1646.]

SECT. 2. Whereas much damage hath arisen to merchants trading hence, by bad making of fish, and the credit of our trade therein hath much suffered:

It is therefore ordered, that at every fishing place within this jurisdiction, some discreet and honest person be appointed by the country court, unto which such fishing place doth belong, and those persons so nominated and appointed are by this court empowered to give oath unto such persons as shall be chosen by the deliverers and receivers of any fish, who have liberty hereby, either of them, to choose one or more sufficient knowing men in such cases, to view what fish is delivered and received; which viewers shall be sworn as aforesaid, and what they approve of as merchantable, the receiver shall accept, and what is refuse fish shall be cast by, and the said viewers, for their labour and pains aforesaid, shall be allowed one penny per quintal for so much merchantable fish as he or they shall view, to be paid one half by the deliverer, and the other half by the receiver:

And for further direction to the viewers in trial of fish:

It is hereby ordered, that all sun burnt, salt burnt and dry fish, that hath been first pickled, shall be judged unmerchantable. [1652.]

SECT. 3. For the explanation of an order bearing date, 1646, and the repealing of the same, 1667, for giving a liberty to fishermen, according to a reservation in the patent, to cut down wood for flakes or stage and other uses about their fishing employ, that it is intended only in that order to give liberty to such as are strangers, and come only to make fishing voyages, and not to fishermen that are inhabitants, who are not to trespass upon any person in their propriety, but are liable to make satisfaction with damages as in any other action of trespass, no way restraining fishermen in common lands, any law, custom or usage to the contrary notwithstanding. [April, 1668.]

SECT. 4. It is ordered by this court and the authority thereof, that no man shall henceforth kill any codfish, hake, haddock, or pollock, to be dried for sale in the month of December of January, because of their spawning time, nor any mackerel to barrel up in the month of May or June, under penalty of paying five shillings for each quintal of fish, and five shillings for each barrel of mackerel; nor shall any fisherman cast the garbage of the fish they catch overboard at or near the ledges or grounds where they take the fish; nor shall any of the boats' crew refuse or neglect to obey the order of the master of the vessel to which they belong, for the times and seasons of fishing; nor shall they take or drink any more strong liquors than the master thinks meet to permit them: the
115 breach of these three last being under the penalty of twenty shillings for the first offence; for the second forty shillings; for the third three months imprisonment, one third part of the aforesaid fines to the informer proving the same. [1668.]

SECT. 5. This court being informed, that the taking of mackerel at unseasonable times do greatly diminish their increase, and will in the issue tend to the spoil of the trade thereof:

Do order and enact, that henceforth no mackerel shall be caught, except for spending whilst fresh, before the first of July annually, on penalty of the loss of the same; the one half to the informer, and the other half to the use of the country. And any magistrate or county court is empowered to act herein to all intents and purposes, for the execution of this law.

Maine *et al.* Ex. No. 503

An Act For The Regulating And Encouragement Of Fishery (Nov. 26, 1692), Acts of 1692/93, *The Acts And Resolves, Public and Private, Of The Province Of The Massachusetts Bay* 71

71 Upon consideration of great damage and scandal, that hath happened upon the account of pickled fish, although afterwards dried and hardly discoverable, to the great loss of many, and also an ill reputation on this province, and the fishery of it, –

Be it therefore enacted by the Governour, Council and Representatives, convened in General Court or Assembly, and it is enacted by the authority of the same,

[SECT. 1.] That no person or persons whatsoever, after the publication hereof, shall save or salt any sort of fish (that is intended to be dried) in cask or fattes, or any other way then what hath formerly and honestly been

practised for the making of dry fish, on penalty of forfeiting all such fish so salted and pickled, whether it be green or drye; the one moiety thereof to the use of the poor of the town where the offence is committed, and the other moiety to the person that shall sue for the same.

And it is further enacted by the authority aforesaid,

[SECT. 2.] That henceforth no mackrel shall be caught (except for spending whilst fresh) before the first of July annually; and no person or persons whatsoever, after the publication hereof, shall at any time or place within this province take, kill, or hale ashore any mackrel, with any sort[s] of nets or sa'ens whatsoever, on penalty of forfeiting all such mackrel so taken or haled ashore, and also all such nets and sa'ens which were so imployed; the one-half thereof to their majesties towards the support of this their government, and the other half to him or them that shall inform and sue for the same. And all justices are hereby impowred, and required to grant their warrants for the seizing of the same and the aforesaid forfeitures, or the receiving of the like value in currant money of this province. [*Passed November* 26.]

Maine *et al.* Ex. No. 554

Indian deed of Southhampton, Dec. 13, 1640, *The First Book of Records of the Town of Southampton with Other Ancient Documents of Historic Value* (1874)

* * *

12 **Indian Deed.**

This indenture, made the 13th day of December, Anno Dom. 1640, betweene Pomatuck, Mandush, . . .

the native Inhabitants & true owners of the eastern pt. of the Long Island, on the one part, and Mr. John Gosmer, Edward Howell, . . .

13 on the other part, witnesseth that the sayed Indians for due consideration of sixteene coats already received, and alsoe three score bushells of indian corne to bee payed upon lawfull demand the last of September, which shall bee in the yeare 1641, . . . doe absolutely & for ever give & grant & by these presents doe acknowledge ourselves, to have given & granted to the partyes above mentioned. . . . all the lands, woods, waters, water corses, easements, proffits & emolumeents thence arisinge what soever, from the place comonly knowne by the place where the Indians hayle over their cannooes out of the North bay to the south side of the Island, from thence to possess all the lands lying eastward between the forsaid bounds by water, to wit, all the lands lying eastward between the foresaid bounds by water, to wit, all the land pertaining to the parteyes aforesaid, as alsoe all the old ground formerly planted lying eastward from the first creek at the westemore end of Shinecock plaine, . . . with all emolumonts & profits thereto appertaining or any wise belonging from sea or land within our limitts above specified without all guile wee have set to our hands the day and yeare above sayd.

* * *

Maine *et al.* Ex. No. 565

"The Reasons of the Strangers answered . . . fishing in His Majesties Seas . . . ." [circa 1605-1615] Papers of Sir Julius Caesar, Admiralty, British Museum.

* * *

1 *Title:* The reasons of the straungers answered touching their contynewance of fishing in his Majesties seas; with a furder declaration what profitt, and commodity the taking of the same into his Majesties owne handes, And renting it forth for the tenth fish maye bring forth to his Highness and his Realmes.

TOUCHING HIS MAJESTIES TITLE

Wee answere thus, that King Edgar did write himself Lord and King of the Four great Seas, and surveyed the same, twice every yeare; Which was long tyme, before there were any Inhabitants in Holland of any reckoning, or accompt. Furthermore it is to be prouved, that King Philipp the Second, King of Spayne, had a lease graunted him, from Queene Mary, for XXI years, to lysence his subjects to fish uppon the Irish Coasts (under whose obedience the Hollanders lyved) and payed 1000£ per annum, into the Treasury of Ireland to Sir Edward Fitton, then beeing Treasurer there, who had the receipt thereof for his tyme. And his son Sir Edward Fitton, who nowe lyveth, hath seene, and read the same lease, which hee will testifie uppon his oath, if neede requyre. Besydes Mr. Camden in his discourse of Yorkshire sayeth, no straunger, nor hollander durst let fall a net into the Seas, till they have obtained leave of Scarborough castill; All which sheweth the kings right.

2 PRECEDENTS GIVEN BY OTHER KINGS AND PRYNCES TO OTHER FISHERMEN FISHING IN THEIR SEAS

Fishing in Russia many leagues from the Mayne, they are compelled to paye a greate tribute to the Emperor. In the Shotland Islands, and other Islands there adjoyning under the King of Swethen, they are compelled to paye great taxes in like case. Under the King of Denmark, our English fishers are compelled to paye greate tribute, both at Wardhowse and Sound. Likewise the Duke of Medina Sydonia in Spayne hath his greatest Revenues in taxing his fishermen, for their fishing of Tuny, As also all the prynces of Italy bordring uppon the seas, make the like benefit. Also our fishers in the west parts of England, taking pilchards [?] there doe paye the tenth fish to the lord of the manor next a adjoyning, And likwise dyvers chief Lords inhabiting upon the sea costs, have Tribute payed unto them in like manner in many other places in England.

FOR MOVING OR WARRE, WEE ANSWERE THUS

That there is not found in any Records, that a Tribute, Tith, or Tax demanded in kynd, did ever move warre, for that many tymes, fishers bee dryven to throw into the seas, for want of Salt or Cask, well neare as many fish as would answere this demand, beeing in so myld a manner as it is meant it shall bee.

Agayne (under most humble reformation) there is small likelihood of moving contention, or warre, beeing a thing of comon examplared, and well known to bee payed to other kings and Prynces in their severall kyngdomes and dominoins, as aforesaid; And therefore, the only waye to contynue peace and amitye, is the paying his Majestie his due. Besydes, no contrye is in generall chardged therewith, but only such, as are fishermen fishing within his

Magesties seas, principalities and Royaltys, which no sovereyne king or prynce can denye; which beeing graunted, no cause then of moving warre, the demaund beeing so reasonable, as to bee satisfied with the tenth fish. Furthermore, these fishers, taking all or most parte of the fish they have within his Majesties Seas; who notwithstanding doe pay Taxes to their owne Prynce or Sovereyne [?] after a certeyne Date for every kynd of fish they take, If so (as certayne it is) then Reason, the foundation of Law and Justice, sayth they should paye to the king or Prynce, in whose seas they take the same, and by which they lyve; And therefore in reason no cause of moving contention by any such inposition, or tax.

* * *

Maine *et al.* Ex. No. 566

"The Case Between Browne the Scottish Man and the Dutch Captaine" and "The . . . Case between His Majesty and the States of the United Provinces . . ." [1617]

* * *

1 [An opinion of Julius Caesar, Admiralty Judge, and Counsel in 1617.]

Endorsements:

1) 28 Nov. 1617. The Case betweene Browne the Scottish Man and the Dutch Capttaine (399 verso)

2) The State of the Case between his Majesty and the States of the United Province, touching the remanding to his Majesty of 2 Delinquents. 19 Nov. 1617. (401 verso)

The Case.

In August 1617 (blank) Browne His Majesties Subject of the Kingdome of Scotland, was by authority from that State sent in a Pinnace of the king, to the subjects of the United Provinces who weare then fishing for herrings upon the coastes of Scotland, to demand a certeine acknowledgement claimed by his Majesty, as due unto him in the right of that Crowne.

Browne comminge amongst them, and having delivered his errand, was forthwith arrested, and carryed prisoner into Holland, by a Dutch commander in that ffleete: pretending his warrant and commission from the Lords the States so to doe. His Majestie (havinge represented this indignitie, by his Ambassador there, to the Lords the States, and beinge thence advertized that the States disavowed the fact of that Captaine) requireth the offender there, to be remannded unto himself heare, to receive as to Justice shall appertaine.

The Question. Whether this Offender ought to be sent herein to his Majestie as is required.

Answeare. There are good authorities, that if a subject of one State comitte a haynous crime, within the territory of an other state (though against a private person) the subject so offendinge, ought to be remitted to the place where the cryme was committed, if it be required.

* * *

Maine *et al.* Ex. No. 570

State Papers Domestic, Charles I.
[Draft of a proclamation, circa 1635.]

1 Whereas Our Father of blessed memory, King James, did in ye 7th year of his Reigne of Great Brittaine, set forth a Proclamation touching Fishing, whereby for the many Important Reasons, therein expressed all Persons of what Nation or quality soever (being not His Natural-Born-Subjects) were restrained from Fishing upon any ye Coasts and Seas of Great Brittaine, Ireland and ye rest of ye Isles adjacent, where most usually heretofore Fishing had been, until they had orderly Demanded and Obteined Lycenses from Our said Father or his Commissioners in that behalf, upon pain of such chastisement as should be fit to be inflicted upon such willfull Offenders. Since which time albeit neither Our said Father nor Our Selfe have made any considerable Execution of the said Proclamation, but have with much patience expected a voluntary conformity of Our Neighbours and Allies, to so just and reasonable a prohibition and directions as are contained in ye same. And now finding by experience, that all ye inconveniences which occasioned that Proclamation, are rather encreased than abated, besides that Our Right and Regalities in those Seas & Fishing places, are more confidently questioned then heretofore. We being very sensi-
2 ble of ye Premises, and well knowing how far We are obliged in Honor *and Conscience* to maintain ye Rights of Our Crown, especially of so great consequence, have thought it necessary by ye Advice of Our Privy Councell, to renew ye foresaid Restraint of Fishing upon Our foresaid Coasts, without Lycense first obtained from Us. And by theis Presents to make publick Declaration, That Our

Resolution is, at all times convenient, to keep such a competent strength of Shipping upon Our Seas, as may (by Gods Grace) be sufficient, both to hinder such further encroachments upon Our Regalities, and assist and protect those Our good Friends and Allies, who shall henceforth by vertue of Our Lycenses, to be first obtained, endeavour to take ye benefit of Fishing upon Our Coasts and Seas, in ye Places accustomed.

Copy upon ye Bronillon found
in ye Paper office.

Proclamation
June, 1635

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Maine *et al.* Ex. No. 604

[Admiralty judges' opinion, February 25, 1635.]

It may please your Majesty.

1 According to your Majestyes commandment wee your Commissioners for your Admiralty, have mett & consulted of those two pointes which you were pleased to recomend unto our consideration, touching ye employing of your Fleete for your Honor & proffit. The one for the Wafting and Securing of Merchants that passe through your Majestyes Seas, the other, for protecting all Such Fishermen in generall, as shall exercise that Trade, by your Majestyes licence upon your Seas, & coastes.

The first of these that fell into debate was that concerning ye fishing & by Sir Henry Martin it was made evident unto us that your Majestyes Father of blessed memory in [blank] yeare of his Raigne was upon long & mature consideracion satisfied & resolved that the fishing in his Seas, & upon ye Coasts of his dominions did justly appertain unto him, as a right incident to his Crownes, & that in
2 pursuance thereof he did then sett out His Royall Proclamation, thereby declaring his title as allso his pleasure that noe stranger of what qualitie soever should presume to fish there with out his expresse licence, & so was graciously pleased in ye said Proclamation to appoint that for ye Coastes of England & Ireland licences should be given in London, & for that of Scotland in Edembourg.

And howsoever Sir Henry Martin did alsoe make it appeare unto Us that the states of the United Provinces did at that time send Commissioners into England, representing to His Majesty a Paper contayning allegations, by which they did intend to prove a continued custome, & a present possession of that fishing, mentioning with all some Treaties that had beene heretofore between the Kings of England, & the Dukes of Burgundy in favor of that their fishing, yet upon ye whole matter, & after due deliberation, wee were all of opinion & are so still that the Right & Royalty of that fishing upon your Majestyes Coastes, doeth undoubtedly belong unto you by inheritance so as you may justly prohibit or licence all strangers as your Royall will & Pleasure.

3 In this wee were much guided by that which your Majesty your selfe was pleased to declare unto us touching ye protecting of all such Fishers as should take your licence: for it is most certain that the Hollanders will by noe meanes be so much induced (be the right what it will)

as by considerations of their owne proffit, & safety. Wee therefore thought fitting, (& do humbly offer it to your Majesty as our opinions) that unto ye Minister or Ministers of ye states residing heere it may be intimated, & declared that your Majesty doth noe way relinquish that just right & clayme which you selfe have & your Predecessors ever have had these Royall fishings so divolved unto you from your Royall Predecessors, but are resolved to defend it as the inheritance & possession of any other your Dominions, yet least they should think you did now challenge it in tyme when they have most neede of your favor & grace, it may be told them that it is farre otherwise: for whereas your Majestyes Father did barely offer them licences you do now offer them safety & protection with all, & that which further move's you to doe it in this season, is, that by a third Prince, who pretendes no interest at all, they are of late interrupted & beaten from that fishing, even in light of your Majestyes harbors: wherein your Majesty is prejudiced in honor & interest, & they in profit.

That it is not unknowne by ye states how much their Enemies are resolved to interrupt that their fishing, as holding it a most certain way & meanes, both to weaken & impoverish them.

That be takeing licences from your Majesty you may justify the drawing your sword in theire defence, & for the maynteynance of the said licenses against any not with standing any League, or Treaty whatsoever, which with out that obligation may seeme a breache of that neutrality which hetherto your M.[ajesty]hath preserved in your selfe.

And lastly wee tooke into consideration that in case the Hollanders shall willfully refuse to take these licences upon so gracious & favorable conditions from your Majesty then so wee weere all cleere of opinion that your Majesty should renew & publish the like proclamation to that of the King your ffather, & prosecute the settling of that your right as a thing so highly concerning you in honor, Dominions, & proffit. And se wee do humbly conclude this point, with advise that all such licences as shall be granted be rated according to ye tunne or burden of the vessells so to be licensed.

Touching that of the wafting of Merchants strangers Shipps that shall passe through your Majestyes Seas, wee are cleere of opinion that your Majesty ought to have proffit by it, seeing they are thereby preserved from oppression & ruine but wee are not of opinion that this proffit should arise by way of a generall imposition upon all that passe, for that would doubtlesse draw a just complaint & clamor from your neighbour Princes, & their subjects, but that it should be taken of such as shall desire waftage, which your Majesty may direct not to be denyed to any of what Christian Nation soever that shall demand it *not being men of warre.*

5 And because it will be a difficult matter to expresse in any commission, or Instruction a certain somme or duty to be taken of every ship so wafted, for that som shipps are rich, outhers of lesse value, some will require a short waftage, others a longer. Therefore wee are of opinion that for ye value much is to be left to the discretion of your Generall & Commanders, & that some honest and able man may be employed to Keepe bookes, and to receave the moneys of all these waftings which shall occur, and be accomptable, and answerable for ye same.

Maine *et al.* Ex. No. 609

[Letter from Secretary Windebank to Sir Balthasar Gerbier, Dec. 29, 1637.]

[Sir Balthazar Gerbier was the King of England's Agent at Brussels. The "Conde d' Oñate" was Conde de Oniate et de Villa Medina, Ambassador Extraordinary from Spain to the English crown.]

Mr. Secretary Windebank to Sir Balthasar Gerbier.

Westminister
29 Dec: 1637

The Ambassador (Conde d' Onate) [sic] opposes not His Majesties Sovraiginety in his Seas, nor his Power to grant Lycenses, nor shall the Subjects of the King of Spayne interrupt such as shall take his Majesties Lycenses while they are fishing in his Majesties Seas.

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Maine *et al.* Ex. No. 621

HCA 1/10/Part I/No. 23. Admiralty Records. [Indictment of Bartlet, Heritson and Marshall for Failure to Salute the English Flag. December 30, 1674.]

The jurors for our sovereign Lord the King do upon their oath present, that since the British Seas are, and from the time beyond the memory of man have been, within the sovereignty and of the dominion of the Kings of England for the time being as a parcel of the Kingdom of England; and since the said British seas are, and from the beginning of the reign of our Sovereign Lord Charles

the Second, by the grace of God now king of England, Scotland, France, and Ireland, Defender of the Faith, etc. have been within the sovereignty and of the dominion of our said Lord the King in right of his crown of England; and since also by an ancient and lawful custom and prescription used from time to time beyond the memory of man, the commanders, masters and sailors of all and singular ships and vessels of whatever nations and foreign countries sailing in and upon the said British seas or any part thereof which shall meet or be near any ship or vessel then belonging to the King of England for the time being, and then carrying the flag or ornaments [literally:
2 the curved stern of a ship with its ornaments of flags, streamers, etc.] of the said King have been accustomed to, and ought to, and are bound immediately to withdraw their flag from the top of the mast and lower their topsail respectively in due acknowledgment of the supreme dominion of the King of England for the time being in and upon the aforesaid British Seas. Yet nevertheless, Christian Bartlet, recently from Ostende in Flanders, a gentleman in the land beyond the seas, pilot of a certain foreign ship drawn up for war generally called in English (?) the Young King of Spain, near the aforesaid port of Ostende, and a certain Derrick Heritson from the aforementioned Ostende, who was a sailor, and Cornelius Marshall or Mareshall also from the aforementioned Ostende, who was a sailor knowing ____(?)____ in this same foreign ship from Ostende were with many mariners, unknown to the said jurors, confederating and conspiring together, on the _(?)_ day of August in the ____(?)____ year of the reign of our said Lord Charles the Second by the grace of God King of England, Scotland, France, and Ireland, Defender of the Faith etc. about the third hour after noon on the certain day on the high sea in a certain place within

the said British Seas about 18 leagues from the harbour of Rye in the county(?) of Sussex in the distance; and within the jurisdiction of the Admiralty of England, and
3 sailing with the flag or ornaments of the said foreign vessel from Ostende flying openly aloft and also with the topsail of the said ship hoisted up and spread out on the top of the mast, there met with and was near a certain ship or vessel called the Woolwich, being a ship or vessel of war belonging to our said Lord the King under the government and command of Captain Henry Carverth then and there carrying the ensign, flag, ornaments, and pendant called the Ensign Jack of our said Lord the King, openly and plainly flying. But the aforementioned Christian Bartlet, Derrick Heritson, and Cornelius Marshall or Mareshall and the aforesaid mariners then and there being in the aforesaid foreign vessel from Ostende, nor any one of them, did not withdraw the said sail from the said top of the foreign ship from Ostende and then, in the execution of the aforesaid confederacy and conspiracy, they did not lower, nor did any one of them lower, the aforesaid top sail of the foreign ship of Ostende then and there. And the aforesaid Henry Carverth being the captain of the said ship of war called the Woolwich, as aforesaid, and seeing that the said Christian Bartlet, Derrick Heritson, and Cornelius Marshall or Mareshall and the aforesaid mariners, or any one of them, had not removed the flag, nor was removing the flag then and there from the top of the mast of the aforesaid ship of Ostende, nor had lowered nor were lowering the topsail of the said foreign vessel from Ostende which was then and there raised and spread out, which they ought to and were bound to do, did then and there, attending to the duty of his office in that behalf, and as the custom is when and so often as such acknowledgement due and payable by the aforesaid custom to the King of England for the time being

is not so much ___(?)___, and according to the aforesaid custom paid, fire and discharge various great guns from the aforementioned ship or vessel of the said Lord King called the Woolwich then and there against the said foreign ship of Ostende called the Young King of Spain, to the end and intent that the said Christian Bartlet, Derrick Hertison, and Cornelius Marshall or Mareshall and the aforesaid mariners in the said foreign vessel of Ostende being warned by the discharging of the said guns, should, according to the said custom, withdraw the flag from the top of the mast and lower the topsail of the said foreign ship of Ostende then being upon the high sea within the aforesaid British Seas and place aforesaid. Nevertheless, the aforesaid Christian Bartlet, Derrick Hertison, and Cornelius Marshall or Mareshall and the aforesaid mariners, then being, as aforesaid, in the said foreign vessel upon the high sea within the said British seas in the place aforesaid, or any one of them did not withdraw the said flag and ornaments of the said foreign vessel flying aloft as aforesaid, nor lower her topsail being hoisted up as aforesaid, but they and every one of them did unlawfully, insolently, and in a hostile manner refuse to do so. And the and every one of them did by force and arms unlawfully, insolently, and in a hostile manner, keep and continue the said flag and ornaments of the said foreign ship aloft flying and her said topsail raised and fixed at the top of the mast, in contempt of our said sovereign Lord the King, and in manifest violation of the aforesaid custom and against the peace of our said Lord the King, his crown and dignity, etc.

* * *

Maine *et al.* Ex. No. 622

HCA 1/10/Part I/No. 32. Admiralty Records.
[Petition of Bartlet, Heritson and Marshall for release from Newgate. January 1674/75.]

To the honourable Sir Lionell Jenkins Judge of his Majesty Court of Admiralty and to the rest of the honorable Bench sitting at the Marshallseas.

The humble petition of Captaine Christopher Bartelor, Dierieth Herretson and Cornelius Marishall, commonly called Offenders now prisoners in Newgate.

Humbly showeth your good Honnours that your Petitioners hath ever since your honnours Sentence against them, laine and still doeth in the place abovesaid uppon greate Charges; for so sadd and sorrowfull accomodation: that they are ready to bow downe, and perish under that afliction: their owne miscarriages have plunged them into: haveing very little left to purchis the fruites of the feild to support nature but onely theire praiers to the never Erring hand of providence in heaven and to your good Honnors heart upon earth our Judges to consider our sad and sorrowfull condition and to end our woes uppon whose Clemency and mercy wee Anchorr all our hopes.

And ffurther humbley beseech your good Honnours to consider that as wee are Aliens and Strangers to this nation so wee are farr from freinds which togeather by our long and tedious suffering wee are brought to the very bottom of poverty: and consequently not able to pay the [unclear] or fine, as is layd uppon us: and in mercy and compassion to our dayly and howerly sufferings: we humbly beseech your honnours speedy order to remove us into som other more Christian place or prison.

And your Honnours poore petitioners for ever shall be bound to pray to the God of recompenses for your [unclear] and especiall Honnour and happines.

* * *

Maine *et al.* Ex. No. 623

HAC 1/11/No. 17. High Court of Admiralty. Oyer and Terminer Records. Public Record Office, London. (Hereinafter "Admiralty Records.") [Indictment of Peter Giraudeau, for failure to salute the English flag, December/January 1676/77.]

1 HCA 1/11/No. 17. High Court of Admiralty. Oyer and Terminer Records.

[Translation from French by D. H. Flaherty]

[Text of Giraudeau's indictment.]

In spite of the fact that the British Seas have for all time belonged to the Kings of England for the time being, and that all masters and mariners of foreign ships sailing on the said seas, by very ancient customs are bound, when they approach or meet any vessel belonging to the king of England and carrying his flag, to strike their flag and lower their topsail, in due acknowledgment of the supreme dominion and sovereignty of the king of England on the said British seas;

You are accused of having failed in your duty, in that on the 16th day of July last [English style,], at approximately six o'clock in the evening, and about 56 leagues off Cape Finisterre, on the said British seas, and within the jurisdiction of the English Admiralty, you being then in a French vessel called L'esprit de Sabledolon and belonging to the port of Nantes (of which you were master),

flying your flags and with your sails hoisted and approaching a man of war belonging to the king of England, called the Bristol, of which the knight Bery was then captain,
2 and carrying the flag of the present king of England, neither you nor any of your crew lowered or caused to be lowered your flags or sails in accordance with the said ancient customs [although(?)] you were warned by several cannon shots fired by the said man of war of His Majesty of England, but on the contrary you refused unjustly, insolently, and unlawfully to do so.

* * *

Maine *et al.* Ex. No. 624

HCA 1/10/Part II/No. 141. Admiralty Records.
[Trial of Peter Giraudeau, January 1676/77.]

* * *

1 [English text]: Peter Giraudeau. Who has been indicted under a charge brought against him by the aforementioned jurors, for not lowering the flag from the top of the mast of a certain foreign ship of war called the Esprit de Sabledolon whose captain or pilot was the same Peter Giraudeau, being within sight of the harbour of Nantes, and for not lowering the topmost sail of a certain ship on the high seas within British waters, at the approach of a certain ship or vessel of war called the Bristoll, a ship of war which is the property of our king and under the command and direction of the master Sir John Berry and of our lord king; and having been questioned through an interpretion by Thomas Bedford (and bound by the oath of John James Benard for a faithful interpretation) whether he was guilty and worthy of blame in method and type as he stood charged, he replied by means of an interpretation that he was not guilty and placed himself on his country as his evidence.

* * *

Maine *et al.* Ex. No. 625

HCA 1/11/Part I/No. 3. Admiralty Records. [Original information against Selingue and De Ville for failure to Salute the English Flag. March 1676/77.]

1 HCA 1/11/part 1/no. 3: High Court of Admiralty, Oyer and Terminer Records.

Endorsement: "The Originall Information of Captain Carverth and his Officers against two frenche Captaines namely Anthony Selingue Commander of the ffrigat le fidele of Dunkirk and John de Ville Commander of a Snow or Sleep called la pouppone for not striking to his Majesties ship the ffrancis."

March the 17th. 1676/77.

This afternoone betweene Three and fouer A Clock about Three Leagues S:S:E: from Callis came up Three Vessells before the Winde from the Westward, the Winde being at West S, West: And when they came neare, wee judged they were three of the French Kings Vessells, which soe proved: Whereof of (sic) which was one small ffriggat of about Eight or 10 Gunns, as we judge: The Two Sloopes of about ffower Gunns d(unclear). When theise Vessels came about Cannon Shott of us, the two Sloopes lowered their Topsailes, but whether itt was in obedience to his Majesties Soveraignety, or to keepe Asterne of the ffrigate, we cannot tell: But we doe judge itt was to keepe by the ffriggate, because the ffriggte came within quiusqueh(?) Shott of us with his Pendant, and Top Gallant
2 sayle A Tripp: Upon which wee fired a Gunn with Shott thwart his fforefrott(?) of which he tooke noe notice of:

But [text unclear]

and gott his Starrboard———aboard, whereby to keepe the Weather ____(?)____ of us, which we could by noe means prevent (although endeavoured). wee Pursued(?) the same tacks about (?) and Luftt (?) as neare him as we could: And fired another shott, and Another to hitt him: upon which he returned a shott towards us, and halled upp his Mainsaille, and the divers (?) Sloopes A sterne of him, all in A Line; and Intending as as (sic) we thought to Inguadge us: We still fireing severall Shott to hitt him, which we thinke some might. Whereupon he findeing our Posotition (?) fired (?) another Gunn with shott directly att us which went betwixt our mast and allsoe A Vallat (?) of small Shott; But did noe damage, and immediately withall gott his ___(?)___ ___(?)___ on board againe, and made all the Saile he could, and likewise the Sloopes: We still keptt fireing att them untill they were out of Shott, and allsoe we gave Chase neare upon Two howers afterwards in hopes it might blow hard, and thereby we might fetch them up: But findeing they did much wrong us both in Saileing and desparing A better winde, we desisted the Chase, being very fforose (?) and night Coming on us soe that there was noe hopes of fetching them up. To the truth of which We have hereunto Set our hands, and are Ready to make Oath.

Signed on Board his Majesties Shipp the Francis in Lenox Road the 17 of March: 1677

Henry Carverth Commander
William Pinkman Mate
Bernard Bligh Midshipman
Hugh Full
John Ffatnis Gent.
John Busboe
William Grissop QuarterMaster
Anthony Scolloy

Maine *et al.* Ex. No. 626

HCA 1/11/Part I/No. 4. Admiralty Records. [Warrant from the Lords of the Admiralty to the Marshall of the Court for taking Selingue and De Ville into custody, June, 1677.]

HCA 1/11/part 1/no. 4. High Court of Admiralty, Oyer and Terminer Records.

[Warrant from the Lords of the Admiralty to the Marshall of the Court]

By the Lords Commissioners for Executing the Office of Lord High Admirall of England.

These are to Authorize and require you forthwith to make your repair on board his Majestys Shipp the Suadadoe now lying at Sheerness Captain James Jenifer Comander, and receive from him unto your Custody, the Person of Captaine Slingue Comander of a fforreigne Shipp of Warr going under the Name of the Fidelle, and of Captain De Ville Comander of a like Forreigne Shipp of Warr commonly called the Pouponne lately seized on upon the Coast of France, and brought in by his Majesties Shippe the Newcastle, and the said Shipp the Suadadoes, in pursuance of his Majesties Comand on that behalfe, in order to their the said Captain Slingue, and Captain De Ville's being brought to a tryal according to Law, for their late refusall to pay the respect due to his Majestys fflagg born by his Shipp the ffrancis within his Majesties Seas; Wherefore you are to keep them the said Captain Slingue, and Captain De Ville in safe Custody untill you shall receive order for their discharge.

And for soe doing this shall be your Warrant. Dated att Derby House the 22nd day of June 1677.

To William Joynes Gentleman Marshall of the High Court of Admiralty

Lauderdale
Hlevenson

By Comand of the Lords.
Pepys.

Maine *et al.* Ex. No. 627

HCA 1/11/Part I/No. 14. Admiralty Records. [Indictment against Selingue and De Ville, 1677.]

HCA 1/11/part 1/no. 14. An indictment against Anthony Selingue and John De Ville in the High Court of Admiralty, 1677:

The Jurors for our Sovereigne Lord the King doe upon their Oath present, That whereas the British Seas are and from time beyond The memory of Man have bin within the Sovereigntie and of the Dominion of the Kings of England for the time being and parcell of the Kingdome of England And that the said British Seas are and from the beginning of the Raigne of our Sovereigne Lord Charles the Second by the grace of God now King of England Scotland ffrance and Ireland Defender of the faith etc. have been within the Soveraignity and of the Dominion of our said Lord the King in right of his Crowne of England. And whereas alsoe by an Anntient and Lawfull Custome and prescription used from time to time beyond the memory of Man the Comanders Masters and Marriners of all and singuler Ships and Vessells of what fforreigne Nation and Country soever Sayling in and upon the said British

Seas or any part thereof which shall meet or be neer any Shipp or Vessell then belonging to the King of England for the time being and then carryeing the fflagg or fack(?) of the said King have used and ought and are bound immediately to strike their fflagg and lower their Topsaile respectively in due acknowledgment of the Supreme Do-
2 minion of the King of England for the time being in and upon the British Seas aforesaid. Yet notwithstanding one: [1] John de Vill: of Villerscostnept in Picardia [2] Anthony Selingue late of Boloigne in the Kingdome of ffrance in the parts beyond the Seas Gent: Comander or Master of a certaine fferraigne vessell called the Fidelle [2] the Pouponne belonging to the port of Dunkirke: Knowing the ____(?)____ being in the said fforreigne Ship with many Marriners (unknowne to the said jurors) confederateing and conspiring together, on the 17th day of March in the Nine and twentieth yeare of the Raigne of our said Lord Charles the second by the grace of God King of England Scotland, ffrance: and Ireland Defender of the faith etc. about five of the Clocke in the Evening of the said day on the high Sea in a certaine place within the British Seas about three Leagues from Callice: And within the jurisdiction of the Admiralty of England and Sayling with the flagg of the said fforreigne Vessel aloft flying and alsoe with [their?] Top sayle a trip (or being hoysted up) met with and was near a certaine Shipp of Warr titlled the Francis being a Shipp of Warr belonging to our Said Lord the King under the Government and Command of Captaine Henry Carverth then and there carrying the Ensigne, I ank(?), and pendant of our said Lord the King, openly and apparently fflying. but the aforesaid John de Ville Anthony Selingue and Narriners
3 aforesaid then and there: being in the aforesaid fforreigne vessell or any of them (in execution of the foresaid confederacy and conspiracy) did not strike the flagg

nor did they or any of them lower the Top sayle of the said fforreigne vessell. And that the aforesaid Henry Carveth being then and there Captaine of the said Shipp of Warr called the Francis as aforesaid, And seing that you the said John de Ville Anthony Selingue and Marriners aforesaid or any of them did not strike the fflagg then and there Flying aloft nor lower the Topsayle of the said fforreigne Vessell then and there a Trip (which you ought and were bound to doe) did then and there (attending to the duty of his Office in that behalfe: and as the Custome was and is when and so often as such acknowledgment due and payable by the aforesaid Custome to the King of England for the time being is not presently and according to the aforesaid Custome paid) fire severall great Guns from the said Shipp of Warr of our said Lord the King called the ffrancis against the said fforreigne Vessell called Le Fidelle Le Pouponne of Dunkirke to the end and intent that you the said John de Ville Anthony Selingne (and the Marriners aforesaid yet unknowne to the said Jurors) in the said fforreigne vessell being warned by the dischargeing of the said Gunns, should (according to the said Custome) Strike the fflag and Lower the Topsayle of the said fforreigne vessell then being upon the high Sea within the British Seas and place aforesaid (.) Neverthe-
4 lesse you the said John de Villa Anthony Selingue (and the aforesaid Marriners Yet unknowne to the said jurors) then being (as aforesaid) in the said fforreigne Vessell upon the high Sea within the said British Seas in the place aforesaid or any of them you did not strike the said fflagg of the said fforreigne Vessell soe flying aloft as aforesaid nor Lower her Topsayle: being hoysted up as aforesaid, but they you and every of them you did unlawfully, insolently, and in a hostile manner refuse soe to doe. And they (you) every one (?) of them did by force and Armes

unlawfully insolently and in a Hostile Manner, keep and continue the said fflag of the said fforreigne Ship aloft flying and her said Topsayle a Trip in contempt of our said Sovereigne Lord the King, and in Manifest Violation of the foresaid Custome and against the peace of our said Lord the King, his Crowne and dignity etc.

Notation: "The like against John de Ville of Villerscoshost (sic) in the Kingdome of ffrance in the parts beyond the seas gent. Comander or master of a certaine fforreigne vessell called La pouppone of Dunkirk"

[In the above text the name of De Ville and of his ship appear as inserts above the corresponding information about Selingue.]

* * *

Maine *et al.* Ex. No. 628

HCA 1/11/Part I/No. 18. Admiralty Records.
[Latin minutes of trial of Selingue and De Ville, August 27, 1677.]

1 HCA 1/11/part I/no. 18. High Court of Admiralty, Oyer and Terminer Records.

[Minutes of Jury Trial including trial of Selingue and De Ville. First mention of them occurs on fourth page of Latin document. We have transcribed and translated only those parts which concern Selingue and De Ville.]

[English text]: Antonius Selingue of Boloigne in the Kingdom of France.

Who has been indicted on a charge brought against him by the aforementioned jurors for not removing the sail from the top of the mast of a foreign ship called the Fidelle,

whose captain or director was Antonius Selingue who was in view of the port of Dunkirke, and for not lowering the top sail of this ship on the high seas in British waters about three leagues from the port of Calice on the approach of a certain ship of war called the Francis, the property of our king and under the command and direction of Henry Carverth and of our king and having been questioned through a translation whether he was guilty and worthy of blame in method and means as was charged, he replied (?) that he was not guilty through the aforementioned translation and for his own justification he placed himself on his country [*i.e.*, he swore in the name of his country.]

[Indictment of De Ville now begins.]

[English text]: Johannem de Villo from Villerscostnept in Picardia in the Kingdom of France.

Who has been indicted under a charge brought against him by the aforementioned jurors of not lowering the flag from the top of the mast of a certain foreign ship called the Pouponne (of which the divine (?) Johannes de Villo was captain or pilot) within sight of the harbour of Dunkirke, and for not lowering the top flag of a certain ship on the high seas within British waters at the approach of a certain man of war called the Francis, a ship of war which is the property of our king and under the direction and command of _____ Henry Carverth; and having been questioned through the aforementioned translation whether he was guilty and worthy of blame in method and type as he stood charged, he replied that he was not guilty by means of the aforementioned translation, and for his evidence he placed himself on his country.

* * *

4 [Some irrelevant material concerning another case before the court is now omitted, and then the case of De Ville is presented to the jury.]

[English text]: To be determined on their oath whether the aforementioned Johannes de Ville is guilty and worthy of blame or not of the abovementioned misdeeds, contempt and conspiring (?) in method and type as he stands accused, and after the depositions of witnesses had been made against him aloud (or: in person), they gathered together to decide (?) and shortly after returning to ____ they gave their verdict and announced it as follows: The aforementioned Antonius Selingue is submitted to be guilty and blameworthy of the aforementioned misdeeds of contempt and conspiring (?) in method and type as charged above.

* * *

5 [English text]: And it was decided previously that Johann de Ville was not guilty or blameworthy in the aforementioned transgressions, contempts, and conspiring with which he was charged, and that he alleged in excuse in his petition concerning this that he never withdrew or fled on this occasion. Then the aforementioned Antony Selingue was summoned to court from his home and was questioned whether he might have it in his power or might have anything to say on his behalf why the aforementioned judgment previously sworn against him was not, and he said nothing further. And likewise it was considered by the
6 court that he be fined and restrained, and the ame Antonius Selingue was fined and restrained, and the court ordained a total of four hundred pounds for the transgressions, contempt, and conspiracy with which he stands convicted. And the aforementioned Lord Justices decided and brought it about that the same Antony Selingue should

be entrusted to the care and custody of this Marshall in [text unclear] until they [sic] pay the sum of 400 pounds.

It was also considered by the court that the previously mentioned Johann de Ville who as it is stated was acquitted of Transgressions etc., with which he stands charged and arrested (?) go undisturbed from this place, and likewise (?) the Lord Justices decreed that this same Johann de Ville be released from arrest in this place as far as the aforementioned transgressions are concerned, and be removed from prison, and be set free.

Maine *et al.* Ex. No. 629

HCA 1/11/Part I/No. 20. Admiralty Records.
[Crown warrant for pardon of Selingue, August, 1677.]

* * *

HCA 1/11/part I/No. 20 High Court of Admiralty. Oyer and Terminer Records.

Endorsement: "Pardon to Anthony Selingue"

CHARLES R

Whereas Anthony Selingue of Boloigne in France late Master or Commander of a Forraine Vessell called Le Fidelle belonging to the Port of Dunkirk in the afternoone of the 17th day of March last past within Our British Seas about Three Leagues from Calais upon meeting with Our Ship of Warre called the Francis (Captaine Henry Carverth Command'r) then carrying Our Ensigne Jack and Pendant flying, did unlawfully, insolently, and in a hostile manner refuse to Strike to Our Flag although he was required so to do by the fireing severall Guns from Our

said Ship of Warre; For which insolency and Contempt he was Tryed at Our Sessions of the Admiralty held in Southwarke, on Monday the Sixth of this instant August and found Guilty by the Jury, and fined by the Court in Foure Hundred pounds, and committed to Prison to be kept in execution till he payd the sayd summe; But upon the humble and submissive request of the said Anthony
2 Selingue We have graciously condescended to forgive the sayd Fine of Foure Hundred pounds, and to lett the said Anthony Selingue at liberty. Our Will and pleasure therefore is, and Wee do hereby direct and require you to prepare a Bill for Our Royall Signature to passe Our Great Seale containing Our gracious Pardon to the said Anthony Selingue for the said Insolency and Contempt done by him to our Flag, with a clause for not paying Fees for the said Pardon under Our Great Seale, and with such other fitting and apt clauses as are requisite and usuall in like cases. And for so doing this shall be your Warrant. Given at Our Court at Whitehall the 27th day of August 1677 in the Nine and Twentieth yeare of Our Reigne.

To our Truely and Welveloved
Sr. Leoline Jenkins Knight
Judge of Our High Court of
Admiralty. Or to the Justices
of Oyer and Terminer
of Our Said Admiralty, or any foure of them.

By his Majesties Command
Henry Coventry

* * *

Maine *et al.* Ex. No. 635

Admiralty 7; Vol. 729, fols. 126-127.
[Letter from Trinity House concerning the extent of the British seas, 1671.]

Miscellaneous Admiralty 7. "Compilation of miscellaneous documents relating to the history of the Navy, the Dominion and Sovereignty of the seas, salutes, etc." Vol. 729, "A Collection of Papers and Notes upon the Subject of the Dominion and Sovereignty of the British Seas, the Right of the Flag and all Matters relating to Salutes and Colours," fol. 126-127. [Trinity House was a guild or association of English mariners first chartered under Henry VIII in 1514. Their duties included examination of pilots and control over the erection of beacons and other markers along the seacoasts of England.]

126. Letter from Trinity House, That the British Seas extend to Cape Finisterr or the North Cape, And that the Sea, which washes the Coasts of the Low Countries and France, has been allways reputed part of the British Seas; with reference to their Papers of Instances etc.

Trinity House, Nov. 30th 1671.

Sir

In answer to yours of the 8th Instant We having consulted upon the same do return this following Account.

* * *

As to the Extent of the British Seas, It has been commonly received by Us from our Predecessors, that it does extend to Cape Finisterr or the North Cape; and that the Sea which washes the Coasts of the Coasts [sic] of the Low Countries and France, has been allways reputed part of the British Seas. To know how far it does extend Northward, We desire you will please to consult those Authors who have treated on that Subject, it not being known of a certain by Us.

Though the Custom of striking the Flag by our Neighbours to any of His Majesty's Ships as an Acknowledgement of his Sovereignty of the Seas has been ever practised and needs not be disputed; yet since you require something of Proof as to the matter of fact, in the inclosed Paper you will see some of the most Material Instances of their Striking Sail to our Ships, or a single Ship, and that upon their own Coasts.

3 Which being all at present, We remain

Sir

Your humble Servants

Je. Smyth
Th: Middleton
Simon Nicholls
Tho. Allin
In. Swanley
In. Kempthorne
Joseph Dobyns

* * *

Maine *et al.* Ex. No. 637

CO 388/90, fols. 29-31. Board of Trade.
[A copy of Sir Henry Penrice's Report on the extent of the British Seas, 1721.]

* * *

Copy

Sr. Henry Penrice's Report to the Lords Commissioners of the Admiralty as to the Extent of the British Seas, Dated Doctors-Commons, 16th June 1721.

Sir,

In Obedience to the Commands of my Lords Commissioners of ye Admiralty Signify'd to me by Your Lettr of ye 9th of this Instant, I have perused & considered the Several papers inclosed to me, & being directed to report my Opinion as soon as conveniently may be;

Whether by ye British Seas mention'd in ye first limitation of ye Cessation with Spain, ye sd. Seas ought not to be allow'd to extend as far as Cape Finester.

I have consider'd the Matter, & do find that the four Seas, vizt. The Southern The Eastern, Western & Northern Seas, are within His Majesty's Dominions as King of Great Britain, and this fully appears by Publick Records & the Opinions of many Eminent Lawyers taken Notice of at large in Admr. Selden's Mare Clausum; And the English Writers particularly assert, That the British Seas extend Southwards to the Coasts of Spain.

* * *

3 Albeneus Gentilis, the King of Spain's Advocate, who resided in England in the time of King James the first, as Agent for the Spanish Nation, owns in plain Terms, that the British Seas to the Southward, were bound by ye Coasts of Spain, His words are Hibernid Meridionalia Termitiantur ad Hispaniam, this out of ye mouth of a Spanish Lawyer residing here, with a Character from the Crown of Spain, confirms the common & ancient receiv'd Opinion of the English, that the British Seas extend from Cape Clare Southward to Cape Finisterre.

And accordingly His Majesties Sovereignty in these Seas which are called the British Seas, or his Majesty's Seas, has been always asserted, & his Honour Maintain'd therein, by the Respect show'd to his Flag; and it is given in Instructions by their Lordships to every Captain of his Majesties Ships of War, that they should take care to have his Majesties Flag respected in His Majestie's Seas, which by those Instructions are Declared to extend to Cape Finisterre.

By Treaty's made with Holland, it appears, that whereas the first Treaty which mention the Striking of the Flag, took Notice of Striking in the British Seas, as in former times, the last Treaty Ano 1673 has explained it, & expressed it to be done as far as Cape Finisterre and tho' the British British [sic] Seas be not mentioned in that Treaty, yet it must be taken as intended, because there is no pretence for that Respect, but upon Account of it's being within the British Seas, for otherwise it might as well be required in all Places whatsoever at Sea.

4 But I do not find that by any Treaty or Special Convention with Spain, the extent of ye British Seas is Settled, the present Convention for a Cessation of Arms with Spain made in Febr. 1719, has four Several Limitation;

1 . . . . After Twelve days, taken in the British & North Seas.

2 . . . . After Six Weeks, taken beyond the British & North Seas, as far as Cape St. Vincent.

3 . . . . After Ten Weeks, beyond the Cape of St. Vincent, as far as ye Equinoctial Line.

4 . . . . After Six Months, taken beyond the Said Equinoctial.

It is observable that in the first Limitation there is the Terminus a quo, the British & North Seas, but no Terminus ad quem, no place or Boundary towards Spain where the Said Limitation ends, whereas in the other three Limitations, there are distinct Spaces both of time & place.

By the Treaty of Cessation with France in Augt. 1712, Ships are to be Restored that are taken in the Channel, & in the North Seas, after Twelve days, & after Six Weeks taken beyond the Channel, the British Seas and the North Seas as far as Cape St. Vincent.

This second Limitation tho' it fixes no certain Bounds to the British Seas, does not confine them to the Channel, but allows the British Seas to comprehend Seas different & contradistinguish'd from the Channel, which is taken only as part of the British Seas.

This Treaty of Cessation with France in 1712, is confirmed by the Treaty of Peace with Spain at Utrecht in July 1713, by ye 16th Article, of which, It is agreed to be well & truly executed according to the Tenor thereof, in all things relating to Captures made in the British or Northern Seas, or elsewhere.

So that it is very plain by this Treaty with Spain that ye British Seas must be extended beyond the Chops of the Channel, tho' ye Boundaries are not expressed in the Treaty.

Since therefore it is allow'd by the King of Spain's Advocate, that the British Seas to ye Southward are bound by the Coasts of Spain.

Since the Treaty with Holland in 1673, the Dutch have agreed to Strike their Flag in any Seas as far as Cape Finisterre, which must be taken to be in acknowledgment of ye British Sovereignty in these Seas.

Since by their Lordships Instructions to the Captains of His Majesties Men of War, His Majesty's Seas are Declared to Extend to Cape Finistre.

And Since it do's not appear by any Treaty between Great Britain & Spain either written or printed, that the extent of the British Seas is otherwise Specify'd or Agreed between the two Crowns;

These are Reasons to induce me to think that y British Seas mentioned in the first Limitation of Convention of Cessation with Spain, may be taken to extend as far as Cape Finisterre.

6 But this is humbly Submitted to their Lordships Consideration Whose Long Experience & Compleat Knowledge in Marine Affairs, wich enable them to form a Right Judgment in this point, which has not yet been Settled by any Treaty that I kno' of.

I am,

Sr.

Your most humble Servt.

H. Penrice

Drs. Comons

June ye 16th 1721.

* * *

Maine *et al.* Ex. No. 657

C 66/3339, No. 22 Patent Rolls.
[Patent to Neale for wrecks, etc. within 20 leagues of Bermuda, 1690.]

* * *

Grant to Thomas Neale of Wrecks jetsam flotsam lagan goods derelict riches gallion plate gold silver coyne barrs and piggs of silver ingotts of gold merchandise and other goods and chattels whatsoever which at any time before 25 June 1688 have been cast away wrecked or lost in or upon any of the rocks shelves shoals seas or banks within 20 leagues of our Isle of Bermuda in America and which at any time before 26 June 1694 shall be taken up gotten or recovered by Thomas Neale his agents substitutes or assigns reserving to the King and Queen one full tenth of all such wrecks jetsam flotsam lagan goods derelict riches gallion plate gold silver coyne barrs and piggs of silver ingotts of gold merchandise and other goods and chattels whatsoever . . . . they to sail to the parts mentioned and search for take receive and possess themselves of the same . . . . Thomas Neale forthwith or as soon as conveniently may be cause a voyage for the parts aforementioned at his own costs, the goods recovered to be brought to the port of London, Governors and officers of the Islands to assist them. Dated 25 November [1690].

* * *

Maine *et al.* Ex. No. 667

Benedict, Erastus C., 4 *The Law of American Admiralty: Its Jurisdiction and Practice,* pp. 360-62, 367-70 (1940).

* * *

367 § 683. Inquisition at Quinborough. II.

"Heads of the Articles of the Inquisition, taken at Quinnborow in the year 1376, in the 49th of King Edward the Third, by eighteen expert seamen, before William Nevil, Admiral of the North, Philip Courtney, Admiral of the West, and the Lord Latimer, Warden of the Cinque Ports.

"I. OFFENCES AGAINST THE KING AND KINGDOM.

"1. Of such as did furnish the enemy with victuals and ammunition, and of such as did traffic with the enemies without special licence.

"2. Of Traytors goods detained in ships and concealed from the King.

"3. Of Pirates, their receivers, maintainers and consorters.

"4. Of murthers, manslaughters, maimes and petty felonies, committed in ships.

"5. Of ships arrested for King's service; breaking the arrest; and of sergeants of the admiralty, who for money discharge ships arrested for the King's service; and of mariners who having taken pay run away from the King's service.

"II. OFFENCES AGAINST THE PUBLIC GOOD OF THE KINGDOM.

"1. Of ships transporting gold and silver.

"2. Of carrying corn over sea without special licence.

368 "3. Of such as turn away merchandises or victuals from the King's ports.

"4. Of forestallers, regrators, and of such as use false measures, balances, weights, within the jurisdiction of the admiralty.

"5. Of such as make spoil of wrecks, so that the owners, coming within a year and a day, cannot have their goods.

"6. Of such as claim wrecks, having neither charter nor prescription.

"7. Of wears, riddles, blindstakes, water mills, etc., whereby ships and men have been lost or endangered.

"8. Of removing anchors, and cutting of buoy-ropes.

"9. Of such as take salmons at unreasonable times.

"10. Of such as spoil the breed of oysters, or drag for oysters and mussels at unreasonable times.

"11. Of such as fish with unlawful nets.

"12. Of taking royal fishes, *viz.*, whales, sturgeons, porpoises, etc., and detaining one half from the King.

"OFFENCES AGAINST THE ADMIRAL, THE NAVY, AND DISCIPLINE OF THE SEA.

"1. Of judges entertaining pleas of causes belonging to the Admiral, and of such as in admiralty causes sue in the courts of common law, and of such as hinder the execution of the Admiral's process.

"2. Of masters and mariners contemptuous to the Admiral.

"3. Of the Admiral's shares of waifs or derelicts, and of deodands belonging to the Admiral.

"4. Of *Flotsom*, *Jetson* and *Lagon*, belonging to the Admiral.

"5. Of such as freight strangers' bottoms, where ships of the land may be had at reasonable rates.

* * *

369 **§ 685. Statute of 1389. 13 Richard II, Cap. 5.**

So strengthened, the Admiralty encroached upon other jurisdictions and usurped that which did not belong to it. Complaints were made to the King, not of the Admirals exercising their ancient jurisdiction in all maritime matters, but that within the bodies of the counties of the nation they took jurisdiction of trespasses, house-breaking,

carrying away goods on land, of the King's deodands and wrecks; of regulating the prices of provisions, the wages of labor, and other things of this sort, interfering with the every-day business of the common people on land. This produced, in the year 1389, the statute 13 Richard II, cap. 5, re-enacting the proper maritime law, and the usage of the time of Edward III., as follows:

> "*Item.*—Forasmuch as a great and common clamor and complaint hath been oftentimes made before this time,
> 370 and yet is, for that the Admirals and their deputies hold their sessions in divers places within the realm, as well within franchise as without, accroaching to them greater authority then belongeth to their office, in prejudice of our Lord the King, and the common law of the realm, and in diminishing of divers franchises, and in destruction and impoverishing of the common people, it is accorded and assented, that the Admirals and their deputies shall not meddle from henceforth of anything done within the realm, *but only* of a thing done upon the sea, as it hath been used in the time of the noble prince, King Edward, grandfather of our Lord the King, that now is."

"*But only,*" is another phrase for *unless* or *except,* and if either of those words had been used (the realm of England including all the British seas), there would hardly have been any dispute about the meaning of this Act. The Admiral "shall not meddle of anything done within the realm, except of a thing done upon the sea, as it hath been used in the time of King Edward III," was evidently intended only to enforce the ancient maritime jurisdiction, and to cut off the new usurpations of the Admirals on the land, and not on the water, to the prejudice of the King's perquisites, in diminishing the franchises of the lords, and

impoverishing the common people, who were thus subject to double exactions.

* * *

Maine *et al.* Ex. No. 668

Bingham, Joseph Walter, etc., *Joint Memorandum in Support of Rehearing in United States v. Texas*, 3 Baylor L. Rev. 319-35 (1951).

* * *

319 JOINT MEMORANDUM
IN SUPPORT OF REHEARING IN
UNITED STATES v. TEXAS

By

Joseph Walter Bingham
C. John Colombos
Gilbert Gidel
Manley O. Hudson
Charles Cheney Hyde
Hans Kelsen
William E. Masterson
Roscoe Pound
Stefan A. Riesenfeld
Felipe Sanchez Roman

320 JOSEPH WALTER BINGHAM: Chairman, The International Law Association Committee on Rights in the Sea Bed and its Subsoil, American Branch; Professor of International Law, Stanford University, 1907-1944; author, *Report on the International Law of Pacific Coastal Fisheries* and numerous articles on international law.

WILLIAM W. BISHOP, JR.: Assistant to Legal Adviser Department of State, 1939-1947; Legal Adviser United States Delegation Council of Foreign Ministers and Paris Peace

Conference, 1946; author: *The Exercise of Jurisdiction for Special Purposes in High Sea Areas Beyond the Outer Limit of Territorial Waters,* 1949.

C. JOHN COLOMBOS: King's Counsel; Rapporteur, International Law Association's Committee on Neutrality, 1924, 1926, 1928, and 1932; author, *International Law of the Sea* (1943), *A Treatise on the Law of Prize* (3rd ed. 1949), and other works on international law.

GILBERT GIDEL: Member of the Institute of International Law; President of the Curatorium of the Academy of International Law at The Hague; French delegate, 1930 Hague Conference for Codification of the Law of Territorial Waters; author, *Le droit international public de la mer (The Public International Law of the Sea)* (1932-1934), 3 vols. (4th volume in preparation).

MANLEY O. HUDSON: Member and first chairman, United Nations International Law Commission; Judge Permanent Court of International Justice, 1936-1946; American adviser, 1930 Hague Conference for the Codification of International Law; Bemis Professor of International Law, Harvard University, 1923 to present; author of over 300 articles and publications on international law.

CHARLES CHENEY HYDE: Former Solicitor of the Department of State under Secretaries Hughes and Kellogg; Professor of International Law and Diplomacy, Columbia University, 1925-1945; author, *International Law, Chiefly as Interpreted and Applied by the United States* (2nd rev. ed. 1945), 3 vols., and other works on international law; President of the American Society of International Law, 1946-1949.

HANS KELSEN: Legal adviser to the Austrian Government and draftsman of the Federal Constitution of Austria, 1919-1922; Member of the Constitutional Court of

Austria, 1921-1929; author, *General Theory of International Law* (1934), *General Theory of Law and the State* (1944), and other works on international law and jurisprudence.

WILLIAM E. MASTERSON: Department of State consultant, 1944-1947; adviser on research in international law, Harvard Law School; author, *Jurisdiction in Marginal Seas* (1929); co-author, *The International Law of the Future* (1944), and author of numerous articles on international law, constitutional law, and jurisprudence.

ROSCOE POUND: Professor of Jurisprudence and Dean of Harvard Law School, 1910-1936; Director of National Conference of Judicial Councils, 1938 to date; author of more than 850 books, articles, and addresses on jurisprudence, international law, constitutional law, etc.

STEFAN A. RIESENFELD: Professor of Law, University of Minnesota, 1938 to date; Special Consultant, Board of Economic Warfare, 1942-1943; author, *Protection of Coastal Fisheries Under International Law* (1942), and of numerous articles on international and comparative law in German and American legal periodicals.

FELIPE SANCHEZ ROMAN: Former member of the Permanent Court of Arbitration at the Hague; member of the Spanish National Academy of Jurisprudence and Legislation; Legal Adviser to Spanish and Mexican Governments; Professor of Civil Law at the Contral University of Madrid, 1916-1936.

JOINT MEMORANDUM

Based upon our individual research and consideration of the pleadings, briefs, and evidentiary materials, each of us has prepared a separate memorandum opinion on the title to the lands and minerals underlying the Gulf of Mexico within the original boundaries of the

State of Texas and the rules of international law applicable thereto. These memoranda were written at the request of the Attorney General of Texas prior to the Court's decision of June 5, 1950.

321 Without collaboration, each of us concluded:

1. The Republic of Texas, as an independent nation, had full sovereignty over and ownership of the lands and minerals underlying that portion of the Gulf of Mexico within its original boundaries three leagues from shore.[1] Under international law and under the domestic law adopted by the Republic of Texas, the ownership *(dominium)* of the subjacent soil and minerals was severable from the paramount governmental powers (*imperium*) employed in the original acquisition and in the regulation and control of commerce, navigation, defense, and international relations.

2. The transfer of national sovereignty and governmental powers relating to interstate and foreign commerce, navigation, defense, and international relations from the Republic of Texas to the United States in 1845 did not effect a transfer or relinquishment of the ownership of the
322 lands and minerals above described. International law, as it existed in 1845, did not imply or require a cession of these proprietary rights with a transfer of national sovereignty.

3. The Republic of Texas, upon annexation, did not cede to the United States the ownership of the controverted 2,608,774 acres of lands and minerals within its original boundaries, but specifically retained this ownerhip

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[1] The First Congress of the Republic of Texas, on December 19, 1836, fixed the boundaries as follows: ". . . beginning at the mouth of the Sabine River, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande." 1 Laws, Republic of Texas, p. 133; 1 Gammel's Laws of Texas 1193-1194.

under the terms of the agreement between the Republic of Texas and the United States.

322 4. A contrary position, first asserted by the United States 103 years after the international agreement of annexation, creates a dispute as to the meaning of the controlling documents. Under such circumstances either litigant should be entitled to present evidence bearing upon the intention of the contracting parties.

5. Available evidence of the status of international law, reflected by the customs, usages, and practices of nations in 1845 and since that date, will support the foregoing conclusions of fact and law.

After studying the majority and dissenting opinions of June 5, 1950, each of us has written a separate memorandum directed to issues raised by the majority opinion which we respectfully submit require a rehearing and judgment for Texas or at least a trial on the evidence. In the interest of brevity, this joint memorandum is submitted as a summary of our individual opinions and of the evidence of relevant customs, usages, and practices of nations which we will develop fully if given the opportunity at a trial of the case on its merits.

323 *JOINT MEMORANDUM*

I.

In the first instance, the majority opinion in its concept of the nature of a nation's sovereignty over and ownership of marginal belt lands and minerals is not in harmony with international law as it existed in 1845 and as it continues to exist at the present time.

The majority has written:

> ". . . once low-water mark is passed the international domain is reached. Property rights must

> then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign. . . ."[2]

323 There is no accepted authority in international law for this notion of "international domain." To the contrary, it may be said that customs, usages, and practices of nations in and since 1845 indicate complete agreement that the territorial marginal sea and its subjacent soil and resources within its boundaries are under the full sovereignty of the littoral nation, subject only to the accepted rules of "innocent passage" through the overlying waters.

Under international law as it existed in and since 1845, the "international domain" did not, and does not now, begin at the low-water mark of a littoral state. *Vis-a-vis* other nations, the area of a littoral state between low-water mark and the seaward limit of its marginal belt was and is in the same category as its inland waters, uplands, and other ter-
324 ritory within its boundaries.[3] As said by Wheaton in 1836,

> "Within these limits, its rights of property and territorial jurisdiction are absolute and exclude those of every other nation." Wheaton, *Elements of International Law* (Philadelphia, 1836) 142-143.

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[2] 70 S. Ct. at 924.

[3] The only limitation or exception is that by mutual consent and established practice there exists a right of "innocent passage" for ships of other nations. But as said by the Italian publicist, Scipione Gemma: "The limitations implied by the right of innocent passage of foreign vessels and by certain exemptions applicable to them in matters of civil and criminal local jurisdictions exercised by the coastal nations are not enough to consider the littoral sea as something different from the national territory." Gemma, *Appunti di diritto internazionale* (Bologna, 1923) 187.

Sala wrote in 1845 that customs and usages of nations have "converted the sea as to this portion thereof into property no different than the lands occupied by them."[4] Hautefeuille described territorial seas as under littoral state dominion "in the same manner and by the same title as the land."[5] Many writers term it a continuation of the continental territory. Olivart says "the jurisdiction of the state over its territorial sea is exclusive as it is over its land territory."[6] Among the jurists and publicists there
325 is almost complete unanimity of opinion on this point.[7]

It is respectfully urged that no matter what the United States may gain in this case by a holding that the Texas marginal sea is "international domain," such gain could be far outweighed by the consequent gratuity to other nations. Implicit in the denomination of the area as "international domain" is the possibility of other nations having rights

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[4] Sala, *Sala Mexicana, o sea La Ilustracion al Derecho Real de España* (Mexico, 1845), vol. 2, p. 11.

[5] Hautefeuille, *Des droits et des devoirs des nations neutres en temps de guerre maritime,* (Paris, 1848) 231. He continued: "There is continuous, complete, and absolute possession, as there might be of a river, a lake, or a piece of land territory." (p. 232.)

[6] 1 Olivart, *Tratado de Derecho Internacional Público* (Madrid, 1903) 204.

[7] See "Summary of Available Opinions of Jurists and Publicists – 1670-1950," pp. 18-50 of the Appendix to Brief for the State of Texas in Opposition to Motion for Judgment. See especially quotations from Molloy and Pufendorf (p. 18), Vattel (p. 19), Lampredi (p. 20), Rayneval (p. 21), Azuni and Schmalz (p. 22), Wheaton (p. 24), Cussy and Gardner (p. 27), Casanova (p. 29), Field (p. 30), Fiore and Martens (p. 31), Pradier-Fodére (p. 33), Hershey (p. 38), Fenwick and Möller (p. 43), Bustamante (p. 45), Gidel and Baldoni (p. 46).

therein other than innocent passage through the waters. Spain, Mexico, France, England, Russia, and other nations can make no reasonable assertion of an interest in the oil and other minerals within the three-league Gulfward boundary of Texas so long as this Court recognizes that the area was removed from international domain when it became a part of the Republic of Texas. This was accomplished by the Republic of Texas in accordance with international law as recognized at the time by the countries named and by all other civilized nations. A contrary conclusion by the United States Supreme Court could well be used by other nations as an opening for claims not now asserted.

The Court's holding in this regard is contrary to the official position of the United States as expressed by the De-
326 partment of State and by Presidential Proclamations. The official view of the United States at the League of Nations Conference at The Hague in 1930 was declared as follows:

> "... the sea-bottom and subsoil covered by the territorial waters, including fish and minerals, are the property of the United States or the individual states where they border." [8]

The Continental Shelf Proclamations and Executive Orders of the President of the United States on September 28, 1945, do not regard the bed of the continental shelf as "international domain." On the contrary, the Proclamation regards the land and resources below low tide "as an extension of the landmass of the coastal nation and thus naturally appurtenant to it" and wholly unaffected by "the character as high seas of the waters above the

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[8] Reply of the United States to the Bases of Discussion, March 16, 1929, League of Nations Conference for the Codification of International Law, Bases of Discussion, C. 74. M. 39. 1929. V. p. 128.

continental shelf and the right to their free and unimpeded navigation."[9] The Executive Order recognizes that ownership of the subsoil and sea-bed is possible either in the States or the United States.[10]

There is no authority in international law for the doctrine that property rights in the marginal sea must "be so subordinated to political rights as in substance to coalesce and unite in the national sovereign." On the contrary, in-
327 ternational law in and since 1845, and all domestic law with which we are acquainted, recognizes that political rights (*imperium*) are separate and severable from property rights *(dominium)* in the subsoil and minerals of the marginal belt the same as in any other soil and minerals within a nation's territory.[11] The use of the soil may be more limited by governmental restrictions and regulations designed to protect public use, innocent passage, and navigation of the waters generally, but restrictions and regulations on property use have not been understood to vest ownership of the property in the governmental power which imposes the restrictions and regulations.

There is no obligation or responsibility of a nation to other nations which requires it, rather than one of its political subdivisions, to own the soil and minerals within its territorial marginal belt, so long as it has governmental

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[9] 3 C.F.R., 1945, Supp., Proc. 2667, 13 Dept. State Bull. 484, 485 (1945).

[10] 3 C.F.R., 1945, Supp., E.O. 9633.

[11] It is believed that evidence of the practice of nations in 1845 will show that they treated original ownership of the subsoil and minerals of the marginal belt as within the same legal regime and property law as was applicable to other unsold and unappropriated lands within their boundaries.

powers which guarantee innocent passage for ships of other states. The exercise of this responsibility and all other responsibilities connected with foreign and interstate commerce, defense, and international relations, is wholly separate from and does not depend upon the economic use and profits connected with the proprietorship of this subsoil and minerals any more than it does the subsoil and minerals beneath uplands, inland waters, and all areas of the nation's territory.

328 Such was the status of international law when the Republic of Texas and the United States entered into their agreement for the annexation of Texas. A transfer of marginal sea lands and minerals was not then implied in a transfer of national sovereignty. An express cession or other clear terms indicating a transfer of these proprietary rights was as necessary then as it would be now to effect such a result. As recently said by one of the co-authors of this memorandum:

> "In this day when world governments are being planned it is important that *dominium* is not confused with or inextricably tied to *imperium*. . . .
>
> "Assume that all of this nation's powers of external sovereignty, international relations, and defense were transferred to a United Nations of the World. This transfer of external sovereignty should not be held to carry with it any proprietary rights theretofore acquired by the United States in the marginal belt of the original States and California in the absence of a cession of the property.
>
> "Such is the situation which existed between Texas and the United States in 1845.

> Texas transferred its external sovereignty and certain enumerated properties which then pertained to its national defense. It ceded no other property. This is confirmed by a specific reservation of all 'vacant and unappropriated lands lying within its limits.' The subsoil and minerals remained in the State just as the subsoil and minerals of the California belt would remain in the United States if it should transfer external sovereignty to a larger federation of States without ceding its rights of a proprietary nature beneath
329 the marginal sea of California."[12]

II.

Even if the Court believes that the lands and minerals in question would ordinarily pass to the United States with national political rights, this would not be true if the parties made an agreement to the contrary at the time of annexation.

In this case there is an international agreement which contains a specific retention of lands lying within the limits of the Republic of Texas.[13] It is of the same nature and has the same effect as a treaty or contract between independent nations. Therefore, rules of interpretation applicable to treaties, conventions, and other international agreements apply. The object of the interpretation of an agreement of this nature is to discover the understanding and intention of the parties at the time the contract or agreement was entered into.

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12 Roscoe Pound, "Rights Involved in United States v. Texas," pp. 10-11, Memoranda and Appendix, Brief for the State of Texas in Opposition to Motion for Judgment.

13 5 Stat. 797; 2 Gammel's Laws of Texas 1225, 1228.

Texas has a specific allegation at page 15 of its First Amended Answer that:

> "By these acts on the part of the United States and the Republic of Texas, when construed, as they must be, in the light of the intention of the contracting parties, there was a binding agreement between the two independent sovereigns that upon annexation Texas would not cede to the United States any, but that the newly created State would retain all, of the lands, minerals, and other things lying beneath that part of the Gulf of Mexico within the original boundaries of the Republic, as well as the right to take, use, and develop the lands and minerals, subject only to the dominion and paramount powers of the United States as recognized in section 2, paragraph II above."

If it be found, as alleged by Texas, that the parties intended by the terms of the agreement that the lands and minerals beneath the marginal belt were to be retained by Texas the same as other lands and minerals within its limits, no other provision of the agreement should be permitted to defeat this intention. Thus, a controlling issue in this case is the fact question of whether the parties intended the retention clause to be effective to the extent of the "limits" of Texas, as the terms imply, or only as far as low-water mark.

The applicable rule in such cases is stated in the majority opinion as follows:

> ". . . If there were a dispute as to the meaning of documents and the answer was

> to be found in diplomatic correspondence, contemporary construction, usage, international law and the like, introduction of evidence and a full hearing would be essential."[14]

If this case is not determined in favor of Texas on the law and terms of the documents alone, it should not be determined against Texas without allowing it the opportunity for introduction of evidence and a full hearing. It is our
331 opinion that the answer to the dispute will be found in diplomatic correspondence, contemporary and subsequent construction, usage, and international law under which the parties were dealing in 1845.

In so far as international law is concerned, it was possible in 1845 for one nation to join another and retain the lands and minerals underlying the marginal sea within its boundaries.

This was and is possible also in so far as the domestic law of the United States is concerned. Counsel for the United States itself have not contended that ownership of the marginal belt lands and minerals is an inseparable attribute of national sovereignty.[15] In the Government's brief in *United States v. California,* 332 U.S. 19 (1947), it was said:

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[14] 70 S. Ct. at 922.

[15] Solicitor General Perlman, in answer to a question by Mr. Justice Reed during the argument on the Motion for Leave to File the Complaint herein, said that if the United States owns the property, it could convey it to the States. His words:

> "Oh yes, Congress could give whatever title it has, whatever rights it has, to the States." Argument, *United States v. Texas,* May 9, 1949, Reporter's Transcript, p. 6.

> "We do not argue that the effective exercise of the foregoing powers (national defense, commerce, international relations) granted to the Federal Government by the Constitution would be impossible without ownership of the marginal sea." (p. 89.)

The Court, in that case, also recognized that ownership of this property is not a necessary incident of national sovereignty or essential to the exercise of federal constitutional powers over the area, when it said that the power of Con-
332 gress to deal with such property "is without limitation."[16]

Implicit in the powers of the United States Congress to convey these lands and minerals to the states and good faith claimants and to admit new states is the power to admit Texas to the Union under an agreement that Texas retain the lands and minerals in the first instance.

The Texas Annexation Agreement of March 1, 1845, whether classed as a treaty, act, or joint resolution, was passed by Congress and carried into effect by the President, who is charged with the conduct of international affairs. This agreement provides that:

> ". . . said state, when admitted into the Union . . . shall also retain all the vacant and unappropriated lands lying within its limits . . . ."

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16 *United States v. California*, 332 U.S. 19, 27. Also in stating that valuable improvements made in good faith under State titles are not ground for a different judgment, the Court added: "But beyond all this we cannot and do not assume that Congress, which has constitutional control over Government property, will execute its powers in such way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission. See *United States v. Texas*, 162 U.S. 1, 89, 90; *Lee Wilson & Co. v. United States*, 245 U.S. 24, 32." *Id.* at 40.

Thus as to Texas, Congress has acted with regard to the specific question before this Court. The Congress of Texas, and the people in convention assembled, agreed to annexation with this as one of the "conditions" and "guarantees."[17] There is no evidence in the terms of the agreement that
333 the parties meant to retain only those lands lying above low tide on the coast. The retention clause says "*lands lying within its limits.*" Neither is there any evidence in the terms that the parties intended the lands and minerals of the three-league marginal belt to "coalesce and unite" with the political powers of national sovereignty transferred to the United States. Under the domestic law of the Republic of Texas, these lands and minerals involved rights of property, severable from sovereignty, but orignally held by the sovereign in trust for the people.

The constitution of the new State, adopted in accordance with the terms of the annexation agreement and as a part of the annexation procedure, indicates that these property rights were to remain as they were under the laws of the Republic of Texas. It included this provision:

> "The rights of property . . . which have been acquired under the Constitution and laws of the Republic of Texas . . . shall remain precisely in the situation which they were before the adoption of this Constitution."[18]

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[17] 5 Stat. 797; 2 Gammel's Laws of Texas 1225, 1228. The Annexation Resolutions of the two nations are set out at length on pages 58-62 of the Appendix to Brief for the State of Texas in Opposition to Motion for Judgment.

[18] Art. VII, Sec. 20, Constitution of 1845; 2 Gammel's Laws of Texas 1293-94.

This Constitution was laid before the United States Congress and was approved by that body in the final Act of Admission as being "in conformity to the provisions" of the annexation resolution. 9 Stat. 108.

On the basis of these documents it would appear that Texas retained the lands and minerals in question by the specific agreement and approval of the United States Congress. The only doubt cast on the meaning of the documents is the contention by the United States that the "retention clause" was not intended to include lands and minerals below low tide and the statement in the majority opinion that an "equal footing" clause in the annexation resolution of March 1, 1845, effected a relinquishment of the property to the United States.

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The "equal footing" clause in the March 1 resolution for annexation of Texas was contained in Section 3, which was an alternative proposal never submitted to, or considered or accepted by, Texas. Sections 1 and 2 contained the "proposals, conditions, and guarantees" submitted by the President of the United States and accepted by the Congress and the people of Texas. These sections provided that Texas retain its lands and pay its own debts. It is significant that they contained no "equal footing" clause. Only the unilateral final act of admission referred to "equal footing," but it also recited that admission was granted in accordance with the "proposals, conditions, and guarantees contained in the first and second sections" of the March 1, 1845, annexation resolution. It could not have the effect of taking from Texas lands and minerals which had been specifically retained by the "proposals, conditions, and guarantees" theretofore agreed upon. Texas pleads that it has evidence which will show that no such meaning or effect was intended by the contracting parties.

If, upon rehearing, judgment is not rendered in favor of the State of Texas on the basis of the terms contained in Sections 1 and 2 of the annexation agreement and its failure to cede the lands and minerals, it would indicate that some doubt still exists in the minds of the majority as to the meaning of the annexation agreement and the in-
335 tention of the parties. In that event, Texas should be entitled to an opportunity to present its evidence. This was requested by Texas in its motion for the appointment of a Master and in its brief in opposition to the motion of plaintiff for judgment on the pleadings. We submit that the Court should reconsider its ruling denying Texas this opportunity to develop evidence as to the intention of the parties to this international agreement.

Evidence which can and will be submitted as to the customs, usages, and practices of nations in and since 1845, the nature of the sovereignty over and ownership of marginal belt lands and minerals in international law, and all other relative interpretative matters, will support the contentions of the State of Texas as to the law and facts applicable to this case.

Respectfully submitted,

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FELIPE SANCHEZ ROMAN

July 14, 1950

CONCURRENCE

Time has not permitted me to assist in the preparation of this memorandum, but I am fully in accord with the position taken by the State of Texas in its brief and argument in this case. I wholeheartedly concur in the opinion that there should be a rehearing, and a judgment for Texas or at least a trial on the evidence.

WILLIAM W. BISHOP, JR.

July 15, 1950

Maine *et al.* Ex. No. 673

Bollan, William, *The Ancient Right of the English Nation to the American Fishery*, pp. 1-4, 8-13, 20-25, 34-50, 55, 82-100, 103-05 (1764).

* * *

1 ALL things are small in their beginnings, *Amsterdam*, says the *Dutch* proverb, stands upon herring bones, and the *American* fishery from *Sebastian Cabots* taking up the first cod with *European* hands having long since so far encreased as to raise a very large number of able seamen, I purpose to set forth the original right of the *English* nation to this fishery, with the various diminutions thereof by royal grants, encroachments and cessions, in order to illustrate this matter, wherein the *British* naval power is so nearly concerned.

King *Henry* the Seventh made the following grant, to wit,

* * *

"The king to all to whom, &c. Greeting.

"Be it known and manifest that we have given and granted,
2 and by these presents do give and grant, for Us and our heirs, unto our beloved *John Cabot*, citizen of *Venice*, and to *Lewis*, *Sebastian* and *Sanctus*, sons of the said *John*, and to the heirs and deputies of them and each of them, full and free authority, leave and power of sailing to all parts, regions and bays of the east, west, and north sea, under our banners, standards and ensigns, with five ships or vessels, of whatever burthen and quality they be, and with as many and such sailors and men, as they shall be willing to take with them in the said ships, at their own proper charges and expences.

"*To find out, discover and investigate whatsoever islands, countries, regions or provinces of gentiles and infidels, in whatever part of the world situated, which were unknown to all Christians before these times.*

"We have also granted to them, and to every of them, and
3 to the heirs and deputies of them and every of them, and have given licence, to affix our aforesaid banners and ensigns in whatever village, town, castle, island, or firm land by them newly found.

"And that the beforenamed *John* and his sons, or the heirs and deputies of them, may subdue, occupy and possess all such villages, castles, towns and islands by them found, as can be subdued, occupied and possessed as our vassals and governors, lieutenants and deputies of the same, acquiring to us the dominion, title and jurisdiction of the said villages, castles, towns, islands and firm land so found."

Before the *Spaniards* had discovered that there was any continent in the western part of the world *Sebastian Cabot*, proceeding under this authority, discovered the island of *Newfoundland*, together with the continent, from the 56th
4 or 58th to the 28th degree of north latitude.

* * *

[8] *NEWFOUNDLAND*, with the adjacent countries, islands, and fisheries, was in a manner the most notorious by Sir *Humphrey Gilbert* more clearly annexed and fully brought under subjection to the crown of *England*, of which we have a particular relation given by Mr. *Edward Hayes*, whereby it appears that on the 11th of *June* Sir *Humphrey* sailed with five ships manned with about 260 men, from *Causet* bay, near *Plymouth*. The largest, burthen 200 tons, named the *Rawley*, was vice admiral, and fitted out by the illustrious person whose name she bore, who was half brother to Sir *Humphrey*. Mr. *Hayes* was captain and owner of the ship *Golden Hinde*, the rear admiral. On the 3d of *August* having entered and come to an anchor in the harbour of *St. John*, the captains and masters repaired on board their admiral, "whither," to proceed in the authors words, "also came immediately the masters and owners of the fishing fleet of *Englishmen*, to understand the general's intent, and cause of our arrival there. They were all satisfied when the general had shewed his commission, and purpose to take possession of those lands to the behalf of the crown of *England*, and the advancement of *Christian* religion in those *Paganish* regions, requiring but their lawful aid for repairing of his fleet, and supply of some necessaries, so far as conveniently might be afforded him, both out of that and other harbours

9 adjoining. In lieu whereof he made offer to gratify them with any favour and privilege which upon their better advice they should demand, the like being not to be obtained hereafter for greater price. So craving expedition of his demand, minding to proceed further South without long detention in those parts, he dismissed them, after promise given of their best endeavour to satisfy speedily his so reasonable request. The merchants with their masters departed, they caused forthwith to be discharged all the great ordnance of their fleet in token of our welcome."

"It was further determined that every ship of our fleet should deliver unto the merchants and masters of that harbour a note of all their wants; which done the ships, as well *English* as strangers, were taxed at an easy rate to make supply. And besides, commissioners were appointed, part of our own company, and part of theirs, to go into other harbours adjoining (*for our* English *merchants command all there*) to levy our provision; whereunto the *Portugals* (above other nations) did most willingly and liberally contribute; insomuch as we were presented (above our allowance) with wines, marmalads, most fine ruske or bisket, sweet oils, and sundry delicacies." After mentioning what is at present immaterial, the author says that, on monday following, the general had his tent set up, who being accompanied with his own followers, summoned the merchants and masters, both *English* and strangers, to be present at his taking possession of those countries. Before whom openly was read, and interpreted unto the strangers, his commission; by virtue whereof he took possession in the same harbour of St. *John*, and 200 leagues every way, invested the queens majesty with the title and dignity thereof, had delivered unto him (after the custom of *England*) a rod and a turf of the same soil, entering possession also for him, his heirs and assigns for ever: and signified unto

all men, that from that time forward they should take the same land as a territory appertaining to the queen of *England;* and himself authorized under her majesty to possess and enjoy it, and to ordain laws for the government thereof, agreeable (so near as conveniently might be) unto the laws of *England,* under which all people coming thither hereafter, either to inhabit or by way of traffick, should be subjected and governed.

* * *

"These contents published obedience was promised by general voice and consent of the multitude as well of *English* men as strangers, praying for continuance of this possession and government begun. After this the assembly was dismissed; and afterward were erected not far from that place the arms of *England,* ingraven in lead, and infixed upon a pillar of wood. Yet further and actually to establish this possession taken in the right of her majesty, and to the behoof of Sir *Humphrey Gilbert* knight, his heirs and assigns for ever, the general granted in fee farm divers parcels of land lying by the water side, both in this harbour of St. *John,* and elsewhere, which was to the owners a great commodity, being thereby assured (by their proper inheritance) of grounds convenient to dress and to dry their fish, whereof many times before they did fail, being prevented by them that came first into the harbour. For which grounds they did convenant to pay a certain rent and service unto Sir *Humphrey Gilbert,* his heirs or assigns for ever, and yearly to maintain possession of the same, by themselves or their assigns.

* * *

12 The grant and authority in virtue whereof Sir *Humphrey Gilbert* proceeded were made and given to him by letters patent issued under the great seal of the kingdom; and it is to be remembered that the territorial jurisdiction which was thus established in the crown of *England* comprises all those portions of the main land which in part surround and form the great bay or gulph, as well as the gulph, together with the island of *Newfoundland*, and all the adjacent islands seas and fishing-banks; and moreover extends so far as to comprise the country of *Nova Scotia*, according to its limits
13 given by the grant to Sir *William Alexander*. And it is to be noted that at the time of this proceeding, or at any other time during the reign of queen *Elizabeth*, no other *Christian* prince had possession of any part of the land thus comprised. It may be observed that in consequence of *Sebastian Cabots* discovering the country of *Baccalaos*, and his return with the tidings to *Europe*, the *Portuguese*, *Spanish* and *French*, as well as *English* fishermen resorted early to the new found land, of which descriptive words an appellative was in time formed by the *English*, and appropriated to the great island which was the chief seat of this fishery, and *Stephen Parmenius* says that when Sir *Humphrey Gilbert* entered *St. Johns* harbour they found about twenty *Portugal* and *Spanish* ships there, besides the ships of the *English*.

* * *

Maine *et al.* Ex. No. 675

Burchett, Josiah, *A Complete History of the Most Remarkable Transactions at Sea*, preface, pp. 21-22, 26-28, 34-37 (1729).

* * *

[26] . . . Sovereignty upon better reason may be claimed by absolute Kings and Princes in their several Seas, than by the Emperors of *Rome* over the *whole Ocean*, as well in respect to the Protection they afford to those who pass within the Limits of their Command, as of their many Years Prescription, whereby their Claims by length of time are settled and confirmed. And therefore now, when several Parts of that Empire are devolved to proprietary Lords by just and lawful Titles, to give notwithstanding all Men a common Interest in every Part of the Sea, and to put the Reins of Power over the same equally into the Hands of all Men, were not only injuriously to take away that which of right appertaineth to Princes, but also to dissolve the Bands of Order and Justice, which when once growing uncertain by whom or on whom to be exercised, forsakes the World, and gives place to all Violence and Confusion.

In Consideration whereof, later Civilians, of greatest Note and Learning, have been forced to acknowlege, that Seas, as well as the Land, have their peculiar Lords and Owners, and this even by the Law of Nations . . . (faith *Baldus*) . . .; that is, We see that by the Law of Nations there are distinct Dominions on the Sea, as well as on the dry Land. Nor is thus much confessed in general only, but some of them descend to more Particulars: As first for the Proportion of Extent, *Bartholus* assigns an hundred Miles of Sea (if the Breadth will carry it) to every Territory from the Main. Next, over this Proportion they not only give proprietary Lords Power, but in mannerly Terms tie them to undergo the Care of Protection. . . . All Princes and States have belonging to them the Protection of such Portion of the Sea as lies next to their Dominions. And lastly, they enforce a Right of Jurisdiction upon Princes in the Sea, which they cannot put off without renouncing those their

Territories upon which the Sea coasteth. For first, . . . that is, The nearest adjacent Islands, and the Sea itself, as far as a hundred Miles, are assigned for a Territory and District to that Country to which they lie nearest. And then . . . . Jurisdiction does as necessarily and tenaciously cohere with Territory, as Accident with Matter. So that if in the Sea there be distinct Dominions, and this Distinction express'd in a demonstrative Certainty, and in this Certainty Power given to Princes, both of Protection and Jurisdiction, what can be in effect more said, or more desired, for that Claim of Jurisdiction which Princes make in these our Days, to those Seas which wash the Coasts of their Kingdoms?. . . .

27 Insomuch as within this large Extent of Sovereignty, even the particular Power (so stiffly by some controverted) of restraining the Passage and Fishing within some Parts of the Sea, upon just occasion, is necessarily comprized and included: For since the Sea bordering upon any County is in the Nature of a Territory (as hath been before shewn) and that therein Princes by the Civil Law have a Right to impose and establish Laws, not only Enemies offering open Violence, but all others who shall refuse Obedience to such Orders and Conditions as by the rightful Owners are reasonably prescrib'd, may, by warrant of the Civil Law and Reason, be prohibited from passing within the same, until they shall regularly conform themselves. And as for the point of Fishing; whereas some object that therein not any one can have more Property than another, for that Fishes in the Sea are as the Birds in the Air, which cannot be appatronated, by reason of the Uncertainty of their Possession, being, as the Law saith, . . . yet it hath been allow'd to be warranted by the same Law, that. . . . The Owner of any Ground may prohibit the Entry of any Person who would go upon it, in order to fish or fowl. And therefore, by the same reason, he who is a proprietary Lord of

any bounded Part of the Sea, as annexed to his Crown, may lawfully prohibit Strangers from entering within the Limits of his Command, to take such Fish as are therein, the Maxim of the Law being, that . . . where the Reason is the same, so likewise is the Disposition of the Law. And this they may the rather do, for that Fishing, by the express Words of the Law, is acknowledged to be among the Regalties.

* * *

34 HAVING thus set before the Reader the most considerable of the Arguments, by which the Title of the Kings of *Britain* to the Sovereignty and Dominion of the *British* Seas may be made good from Prescription; it will be proper in the next Place to give some Account of the Extent
35 of those Seas. Their Boundaries on the East are the Shores of those Countries opposite to *Great Britain* on that side, *viz. Norway, Denmark, Germany,* and the *Netherlands,* by these Limits including that Part of the *British* Seas called the *German* Ocean, or North Sea. On the South they extend the opposite Shores of *France,* to those of *Spain* as far as Cape *Finisterre,* and to a Line drawn from that Cape, in the same Parallel of Latitude, to their Boundary on the West hereafter mention'd; thus taking in that Part of the *British* Seas which consists of the Chanel, the Bay of *Biscay,* and part of the *Atlantick* Ocean. For the West and North, if from the before-mention'd imaginary Line extending from Cape *Finisterre,* a Line be drawn, in the Longitude of twenty three Degrees West from *London,* to the Latitude of sixty three Degrees, and thence be drawn another, in that Parallel of Latitude, to the middle Point of the Land *Van Staten* in *Norway,* we may esteem these to be proper Boundaries of the *British* Seas on those Quarters, thereby taking in, to the West, that Part

of them which consists of part of the *Atlantick* Ocean, and the *Irish* Sea, or St. *George's* Chanel; and, to the North that called the *Caledonian* Ocean, or *Scotish* Sea: And tho' the same Boundaries on the East and South, *viz.* the Shores of the opposite Countries, are also the Limits of the Sea Dominion of the Kings of *Great Britain* that way; yet, to the West and North, does that Dominion extend very much farther than the fore-mention'd Boundaries of the *British* Seas on those Quarters. For tho' (as Mr. *Selden* says) (the vast Western and Northern Ocean (stretching out to so great a Latitude as to reach, on the one hand, the Shores of *America;* and, on the other, those of *Greenland,* and Parts utterly unknown) cannot all be called the *British* Seas, yet hath the King of *Great Britain* most ample Rights on both those Seas, beyond the Bounds of the *British* Name: As he most certainly has, even as far to the West, as *Newfoundland* and the adjacent Parts of North *America,* by virtue of first Invention and Occupancy thereof by *Sebastian Cabot* for *Henry* the VII, and of a more full Possession and Occupancy by Sir *Henry Gilbert* for Queen *Elizabeth:* And, to the North, as far as the Shores of *Greenland,* by virtue of the same Title of first Invention by Sir *Hugh Willoughby* for *Edward* the VI, and of the full Occupancy thereof, and the Discovery of the Use and Profit of those Seas in the Whale-Fishery, by the *English Muscovy*-Company, for Queen *Mary* and Queen *Elizabeth.* However within the Limits before laid down, ought ever to be required (and forced in case of Refusal) from all Ships or Vessels that the *British* Ships of War meet with on those Seas, the striking their Flag and lowering their Topsail; or, where they have no Flag, the lowering their Topsail only, in Acknowledgment of his Majesty's Sovereignty therein.

* * *

Maine *et al.* Ex. No. 676

Bruce, John (ed.), *Calendar of State Papers, Domestic Series, of the Reign of Charles I*, 1635-1636, pp. 31, 393, 416, 560-61 (1866).

* * *

31 48. Draft or copy of a proposed Proclamation, that the late King having in the 7th year of his reign set forth a proclamation, whereby all persons not natural born subjects were restrained from fishing on the English coasts without licence, his Majesty declares that his resolution is to keep such a strength of shipping upon the English seas as may hinder further encroachments upon his regalities, and protect such as shall have obtained licences.

* * *

416 May 10. 62. Proclamation for restraint of fishing without licence. Recites proclamation of King James set forth in the seventh year of his reign, whereby all persons were restrained from fishing on the coasts and seas of Great Britain until they had obtained licences from the said King, or his commissioners, in that behalf. Finding that the inconveniences which occasioned that proclamation are rather increased than abated, the King knowing how far he is obliged in honour and conscience to maintain the rights of his crown, thinks it necessary to renew the said restraint, and to make known his resolution to keep such a strength of shipping as may be sufficient to hinder encroachments upon his regalities, and protect those who shall thenceforth by virtue of licences first obtained endeavour to take the benefit of fishing on the King's coasts and seas.

* * *

Maine, *et al.*, Ex. No. 679

Bruce, John (ed.), *Calendar of State Papers, Domestic Series, of the Reign of Charles I*, 1631-1633, pp. 51-52, 230, 237-38, 243-46, 303, 384, 398-99, 479 (1862).

* * *

98 *Capt. John Pennington to Capt. Henry Stradling, of the Tenth Lion's Whelp. On return of the Second Whelp he is to take her along with his own ship, and range the sea to the westward as high as the Land's End or the Lizard, to free the same from pirates. He is to preserve the*

99 *King's regality in the Narrow Seas, to assist the customers, and give notice of his proceedings to the Lords of the Admiralty or to Nicholas. The Convertive, in the Downs, 1632, July 28.*

* * *

Maine, *et al.*, Ex. No. 680

Callis, Robert, *The Statute of Sewers*, pp. 39-55 (1685 ed.).

The Sea within the Realm of England.

FIRST, touching our *Mare Anglicum*, in whom the interest therein is, and by what Law the Government thereof is, is a fit question, and worth the handling. And in my Argument therein, I hope to make it manifest by many proofs and precedents of great worth and esteem, and the King hath therein these powers and properties, *videlicet.*

1. *Imperium Regale.*
2. *Potestatem legalem.*
3. *Proprietatem tam soli quam aquae.*
4. *Possessionem & Proficuum tam Reale quam Personale.*

And all these he hath by the Common Laws of *England:* in the 6th of *Richard* the Second, *Fitz. Prot. 46.* it is said, *That the Sea is within the Legiance of the King, as of his Crown of* England; This proves that on the Seas the King hath *Dominationem & Imperium ut Rex Angliae,* and this by the Common-law of *England.*

* * *

Imprimis, This Charter is under the great Seal of *England, quod est Lex Angliae.*

40 The King grants to the Admiral thereby power in Maritime Causes, which proves the King's legal power and jurisdiction on the Seas.

He grants to him *bona in mare deperdita super mare emergentia & extra mare projecta,* which be profits arising on the Sea.

And all these are said to be *per totum Regnum Angliae; Ergo,* the Seas be *infra Regnum Angliae.*

In the Eleventh Chapter *de Prerogativa Regis,* it is declared, *Quod Rex habebit wreccum Maris per totum Regnum & Balenas & Sturgiones captos in Mari vel alibi infra Regnum Angliae:* and this was by the Common Laws before ever this Statute was made; for as the King was and is the most Excellent Creature within his Realm, so the most Excellent things which Land and Sea afford are appropriate unto him. And this Statute also proves the Sea to be *infra Regnum Angliae,* and that the profits therein, and thereon arising belong to the King by the temporal Laws of *England.*

In the Case of Sir *Henry Constable* in the Fifth *Report* of Sir *E. Cook,* it is said, That *Flotsan, Jetsan and Lagan are goods on or in the Sea, and that they belong to the King, and the King by his Charter granted them to the Admiral.*

The Statute of the 18th of *Edward* the Third; *Let the Sea be open to all Strangers:* and the Statute of 28 H. 8. Chap. 15. *If any Treason, Murther, or other Felony be done on the Sea-coast, the Offenders shall be tried in such County as the King shall appoint by Commission to be directed to the Admiral and others, to try the same* per Sacramentum duodecim, which is by Jury.

And the Statute 31 *H. 6.* Chap. 4. there is a Restraint, That no Subject do attach any Stranger in amity within this Realm on the Sea.

Here the Statute-laws are in force on the Seas, as appears by the examples; but these seem to tie the Person onely.

41 And in the *Irish Reports* of Sir *John Davies,* in the Case of the Royal Piscary of the *Banne,* it is said, *That the Sea is the King's proper Inheritance.*

And Mr. *Bradson, lib. 2. cap.* 12. in his Title *de acquirendo rerum dominio,* setteth forth a prescription in these words, *Quod F.S. & antecessores sui fuerunt quiet de Theolonio & aliis consuetudinibus dandis per totum Regnum Angliae sam per terram quam per mare:* and many times in that Chapter he reiterates the same words; which is a strong proof that the Sea is *infra Regnum Angliae,* and that the King governs there by his Common Laws of *England;* for that prescription is a main and material point of the Common Law: And the like is alleg'd in Sir *Henry Constable's* Case by way of Custome in the Citizens, as of *Bristol,* to have *Flotsan* on the Seas between the high-water and the low-water Marks.

FOR THE PREROGATIVE AND INTEREST THAT THE KING OF *ENGLAND* HATH IN THE SEAS OF *ENGLAND,* AND THE ANTIQUITY OF THE COURT OF ADMIRALTY; SEE THE RECORD IN *CO.* 4 INST. 142.

So I take it I have proved the King full Lord and Owner of the Seas, and that the Seas be within the Realm of *England;* and that I have also proved it by Ancient Books and Authorities of the Laws, and by Charters, Statutes, Customs and Prescriptions, that the Government therein is by the Common Laws of this Realm.

One Case and one Statute seem to sway to the contrary, and that is *Lacy's* Case, where one was stricken on the Seas, and died on the Land, that the Common Law could not try this Murther: It is true, because that Trial was to be by Jury, which must come out of a proper County, which could not in this Case, because the Sea was not within County-ground, and so no Jury could be summoned there.

42 | And I acknowledge that the King ruleth on the Sea by the Laws Imperial, as by the Roll of *Oleron* and other; but that is onely in the particular Case of Shipping, and for Merchants and Mariners: But the King hath neither the property of the Sea, nor the real and personal profits there arising, but by the Common Laws of *England,* and in proof thereof the Book 15 and 16 *Eliz. in Dyer,* where the Grounds gained from the Sea pertained to the Queen;

AND IN SIR *JOHN DAVIS* HIS REPORTS, *PISCAR. DE BAN. 56.* THAT THE KING SHALL HAVE THE LAND GAINED OUT OF THE SEA.

Which must needs be by the Common Law of *England;* for no Law gives the King any Soil, but onely the Common Laws of *England;* so this is sufficient proof for the real profits, and for the personal profit the Charter of the Admiralty and other Cases aforesaid make it manifest.

And there is a Statute made in 13 *R.* 2, *cap. 5.* which restrains the Admiral that he do not meddle with any thing done within the Realm, but on the Seas; by which

it may be collected, that the Seas be not within the Realm of *England:* But in my opinion the intent of that Statute did rather limit the Admiral how far he should extend his Jurisdiction, than any way to set forth the bounds of this Realm: wherein my conclusion herein is, That my Statute hath his extent within all the Realm of *England;* and that English Seas being within the Realm, be within the bounds of my said Statute of Sewers, and that Statute-law is in full power on the Seas, as by the Cases and Statutes mentioned formerly doth appear.

* * *

44 But I do take the Isle of *Wight* originally to be parcel of *England,* and is a part of the County of *Hampshire,* and was as it were divorced from the Continent as was *Sicily* from *Italy;* the one, as Poets feign, was parted from the Continent or main Land by an Earthquake; the other, as is imagined, by the rage and violence of the Sea: *Insula Vectis inquit Cambdenus in suis insultis Britannicis, fol. 707, est pars Comitatus Hamtonie et àContinente Britanniae avulsa est ut cohaesisse videbatur,* for many do imagine that it was torn from the main Land by the violence of Waters, as of late years parcel of the *Spurnhead* in *Yorkshire,* which before did adhere to the Continent, was torn therefrom by the Sea, and is now in the nature of an Island: Yet the same is within the Realm of *England,* and remains parcel of *Yorkshire;* and the like is said of the Island call'd *Silly.* Many other ancient Islands there be, which being in the English Seas be parcel of this Realm, which I will pass over to avoid prolixity.

But in our Case a new Island is risen up in the English Seas, to whom the same in point of property and ownership shall belong, and what Laws the same shall be governed by, comes now justly to be disputed of. *Justinian* in his *Institutes, De rerum Divisione,* saith, *Quod insula in*

mari nata (ut Delos) est primi occupantis. And *Britton*, one of our ancient Writers in his Book *Titulo Purchase, fol. 86.* saith, That if a new Island rise up in the Sea, *datur primo occupanti*, and agreeth fully with *Justinian* therein; but saith he, if it be taken or divorced from the Continent, then it continueth to the former Owner; but clearly our Law of *England* doth not agree with either of those Authours in the point of ownership. For, if, as I have formerly delivered it, the Sea in property, possession and profit, *tam in aqua quam in solo*, belongs to the King in the right of His Crown of *England*, as I take the Law clearly to be, then it followeth as a consequent, That the Ground which was the King's when it was covered with waters, is His also when the waters have left it; For our Law admits not any thing, either real or personal to go *primo occupanti;* but when an Owner cannot be found, the Common Law gives it *Domino Regi*, as Waifs, Strays, Wreck of the Sea, Treasure found, Escheated-lands, and such like; so that my opinion is conceived in this, that in point of ownership and property, the said new Island is the King's.

But yet I am likewise of opinion, That a new Island risen from the bottom of the Sea, although it be within the Realm, yet it is neither within County, Parish nor Town of this Realm till the King by his Edict or Proclamation have so declared it.

* * *

[47] Now occasion and time gives me fit opportunity to treat of Grounds which be newly gained from the Seas. If, as I have formerly declared, the Grounds be the King's when they be covered with Waters, it must needs be held an infallible ground, that they be also the King's when the Waters have left them dry: and when the Waters had their

being on the same, the whole Profit there arising did appertain to the King;

53 *My Tenets therefore be these:*

First, that the Subject may have the grounds of the Sea to the low-water mark, and that no Custome can extend the ownership of a Subject farther.

That a Subject cannot have the grounds to the low-water mark, but by custome and prescription, and I take it that it is very disputable whether grounds before they be relinquished by the Sea, may be gained by Charter and grant from the Crown; I suppose they may.

That the words *incrementum & decrementum maris* are fully described by the said Record of 43 *E. 3.* of the *Abbat* of *Ramsey:* that is, That if the decrease of the Sea be by little and unperceiveable means, and grown onely in long tract of time, whereby some addition is made to the Frontagers grounds, these by these words may appertain to the Subject; and herein the said words have no other operation, but Lands left to the shore by great quantities, and by a sudden occasion and perceiveable means, accrew wholly to the King.

54 That the increase to the said County Palatine, for the causes aforesaid, doth appertain to the Prince as Earl of *Chester.*

Maine *et al.* **Ex. No. 683.**

Crump, Helen J., *Colonial Admiralty Jurisdiction in the Seventeenth Century,* **pp. 24-35, 58-59 (1931).**

* * *

. . . in the seventeenth century vice-admiralty courts are mentioned in connection with the colonies. Sir Richard Whitbourne refers to one in Newfoundland in 1615; Gorges speaks of a vice-admiral on the North American coast in 1622, and men like Captain John Smith, Argall and Captain Mason are spoken of as admirals. The explanation of this contradiction is to be found chiefly in the history of that group of men of whom Sir Ferdinando Gorges was one of the most important.

The expansion of England was largely due to the efforts of this group which was composed of men drawn from the landed classes, of merchants and of sea-captains who had gained experience in the expeditions of Elizabeth's reign. Either as individuals or as members of a company these men had received charters granting them land and sea within certain limits, the power to organise a government and exercise jurisdiction within these limits, and the right to control the trade and fisheries of the planation. It was the period of the great struggle between the Stuart kings and the United Provinces over the North Sea fisheries, and everyone was familiar with the attempts of the British government to compel the Dutch to buy licences to fish for herring in the North Sea; they knew of the expedition under the command of Captain John Mason to collect the white penny from the fishermen of the west coast of Scotland; they were acquainted with the arguments of Selden, who in *Mare Clausum*, argued that the sovereignty of the British king extended from the shores of the British Isles uninterruptedly to the coasts ruled by other sovereigns. Though Selden did not discuss the question of British sovereignty over the North Atlantic, by making grants of these waters the crown tacitly assumed sovereignty there. The colonial patentees then received grants of jurisdiction and territory which had to be turned into a source of

profit. In an age when fisheries were a favourite speculation and the North Atlantic was already frequented by ships of several nations, considerable interest was taken in the grants of sole fishing rights and jurisdiction by sea as well as by land.

Out of these grants grew the attempts to establish vice-admiralty courts in the colonies, for a court which administered sea-law was most capable of enforcing fishing rights and of protecting a trade monopoly. It was natural that those who were interested in colonial projects should desire to enforce their rights by establishing such courts, for in all
26 probability they had personal knowledge of the work of the vice-admirals of the coast. Many of the vice-admirals were drawn from the nobility and gentry, while the merchants and sailors had professional experience of the usefulness of admiralty courts. It may even be suggested that a few of these men had special experience on these points. Sir Ferdinando Gorges, for instance, must have worked with the vice-admirals of South Devon and Cornwall, and may himself have exercised vice-admiralty powers. He had been interested in the colonisation of North America ever since 1605, when Waymouth gave him two Red Indians, and was the moving spirit in the renaissance of the North Virginia Company as the Company of New England, helping to obtain the charter of 1619, which contained a grant of admiralty jurisdiction. For some years Gorges was commander of Plymouth, where he must have come into contact with the officers of the admiralty court, for he had a considerable knowledge of the damage done to English merchant and fishing vessels by pirates, and in 1611 himself forwarded to Salisbury the report of examinations of merchants, who had been set on by pirates. This certainly looks as if he had exercised vice-admiralty powers as commander of Plymouth. In 1617,

Gorges was very active in trying to get the Western Ports to join with London in raising a fund to equip a fleet to sail against the pirates, but the Western Ports hung back, and their reluctance sprang in part from their dislike of Gorges. John Mason also had some knowledge of maritime administration; he had worked for some years in a commercial house in London and had been sent in 1610 in command of a small expedition to the Hebrides, where James VI was trying to regulate the fisheries. In 1615 he was appointed to succeed Guy as governor of Newfoundland. As a merchant, as a commander of the expedition of 1610, and as governor of Newfoundland, the centre of the North Atlantic fisheries, Mason must have needed and acquired a working knowledge of admiralty law and procedure. Two others of the councillors of the reconstructed company of New England were acting as vice-admirals
27 at this time, the Earl of Warwick who had been made vice-admiral of Essex in January 1619, and the Earl of Pembroke, who was appointed to South Wales a few months later. It is therefore not surprising to find that such men were engaged in trying to set up vice-admiralty courts in their plantations with a view to enforcing their monopolies over trade and fishing.

* * *

29 The British fisheries were, . . ., a matter of national importance, and a subject of national interest. The struggle with the Dutch over the North Sea fisheries, the numerous schemes that were in the air for extending the fisheries, and the importance of the fishing population to the royal navy, all combined to arouse great interest in anything which touched the fisheries, and the western ports were able to carry their attack further.

The cause of the renewed attack in 1621 was the revival of the North Virginia Company as the Company of New England. This was largely due to the efforts of Sir Ferdinando Gorges, who succeeded in obtaining a charter granting exclusive fishing rights on the coast of North America between the 40th and 48th degrees of latitude and admiralty jurisdiction to enforce these rights. It was the practice of the day to appoint an admiral to look after such matters. The duties of an admiral of a colony were neither those of a fishing nor of a naval admiral. He was responsible for the company's ships which conducted the trade between England and the plantation; it was his duty to
30 prevent interlopers in trade or fishing; he had to protect the colony from pirates; and in some cases he was responsible for collecting licences from the fishermen frequenting the private waters under his control. Here lay the trouble. Patents often gave a monopoly of fishing in territorial waters, sometimes, as in the case of the New England Company, as far out as a hundred miles from shore. The fishermen who had frequented the coasts of North America long before the days of colonisation resented this, and the business men at their back were ready to fight. In 1548-9, as a result of an earlier struggle between fishermen and vice-admirals, a statute had been passed forbidding admiralty officials to take dues in money or fish from those fishing in Iceland, Newfoundland, or Ireland under penalty of heavy fine. This gave a decided advantage to the western ports in the renewed struggle with the colonial promoters.

Alarmed by the grant of the charter to the Company of New England, the western ports used their influence to get a bill for free fishing brought before the House of Commons. This is not the place to recount the details of the struggle over the fishing rights of the New England Company,

but it is impossible to avoid telling some part of the story, for Mr. Neale who spoke for the bill, complained bitterly of Whitbourne's court, while Secretary Calvert who was himself a patentee in Newfoundland put the settler's point of view. Neale objected to the vice-admiralty court on practical as well as legal grounds. He maintained of course that it was contrary to the statute of 1548-9 to collect any dues from fishermen, but he further said that it was impossible for captains to spare any time out of the short fishing season of seven weeks to attend a vice-admiralty court. Since they were fined for non-attendance, Neale declared that the real purpose of Whitbourne's court was to extort money from the fishermen. Calvert did not mention the vice-admiralty court, but he spoke of the habits of the fishermen of burning the woods and unloading ballast into the havens, against which Whitbourne had proceeded. Before the bill could reach its final stages James I prorogued parliament.

31 During the prorogation the Council of New England was very active in trying to enforce its rights. The records of the company are fragmentary; they only exist for the periods 31 May, 1622-29 June, 1623, and 4 November, 1632-22 March, 1637. The glimpses of the activity of the group of men who ran the company are tantalizing, but luckily they throw a good deal of light on the interval between the struggles in Parliament of 1621 and 1625-26. On 5 July, 1622, the Council of New England was discussing a proposal to "sollicite ye Lords for procureing from his Majestie a proclamation concerning ye fishermen of ye Westerne parts. Likewise to procure some course for punishing their contempt of authority. And that Mr. Attorney bee moved herein." A week later the same subject came up for discussion. The fishing season was of course in full swing in July and it was too late to do anything that year, but in the autumn the Council was busy

making plans for the regulation of the ships that would set sail at the end of the winter. On 28 October, 1622, it was decided to levy a toll of five fishes out of every hundred from English ships, and to prevent foreigners from making dry fish. On 2 November there is the first hint of the steps that the council meant to take to enforce their rules; "it is ordered that a Commission bee engrossed for Capt. Francis West and afterwards sealed." What this commission was becomes clear from the minutes for the meeting of 8 November. Captain West is to sail in command of the "Plantation" to New England "to be Admiral for that coast during the voyage." Captain Thomas Squibb was appointed to assist him, and Sir Ferdinando Gorges was to draw up his instructions. The Council on 11 November drew up orders for regulating commerce which the admiral was to have fixed to the mainmast of all ships. The Council was careful to explain their actions; they did not mean to hinder anyone from going to fish in their waters provided they obtained a proper licence from the treasurer at Exeter.

32 But West was only to have admiralty power on the coast of New England, and there was work to be done in England before the fleet set sail. Gorges always considered that an admiral was an indispensable officer. He makes this clear in both the *Discovery and Plantations of New England* and in the *Brief Narration.* The proposal, then, which was made in January, 1622-3, that Sir Samuel Argall should be admiral of New England is only the natural outcome of Gorge's ideas on administration. The idea was developed at a following meeting, when the Council decided to consider "fitt persons to bee elected to attend the said Councell and Service upon all occasions vizt. An Admiral, a Vice Treasurer, a secretary of Councell, a Solicitor of ye publike businesse, a Beadle for summoning the

Councell to their meetings." The appointment angered Captain John Smith, who always maintained that he had been appointed admiral of New England for life, though owing to various misfortunes he had never acted as such. Whether Argall ever did anything it is impossible to say, for the minutes of the Council end soon after his appointment, and the *Calendar of State Papers Colonial* reveals no trace of any activity on his part.

32 West, was however, active. The Council considered the expenses of the expedition in January, 1622-3, and the possibility of building a pinnace in New England, obviously for use in collecting the fishing licenses in waters where a larger ship could not be used. Towards the end of June, West arrived in New England "to be Admirall of all the country, to restrain interlopers, and such as came either to fish or trade upon the coast without license from them," *i.e.*, the Council of New England. Apparently the Council had decided in the Spring that West's expedition would not be sufficient, for Hubbard continues "In the end of August following arrived there Captain Robert Gorges, son of Sir Ferdinando, sent from the Council, as Lieutenant-
33 General over all New England, for preventing and reforming all such evils and abuses as had been complained of to be committed by the fishermen and others, who not only without order and leave frequented these coasts, but, when they were there, brought a reproach upon the nation by their lewdness and wickedness among the savages. . . ."

* * *

58 The personnel of the provincial court generally consisted of a few councillors, presided over by the governor or his deputy; among these councillors was often the admiral of

the colony. Before discussing the nature of and procedure used in such admiralty cases as arose in Virginia and Maryland, it is well to spend a little time in investigating the office and duties of a colonial admiral. Something on this subject has already been said but more may be added here. In North Atlantic waters the admiral was chiefly concerned with the attempt to control the fisheries. Sir Ferdinando Gorges and his colleagues conceived of an admiral mainly as an executive officer whose business was to see that the vessels which frequented the Banks or the coasts of Maine had proper licences from the Company of New England. In Virginia and Maryland fishing rights were not questioned, because there were no great fisheries to tempt adventurers from Europe. Yet fisheries were partly responsible for the appointment of an admiral of Virginia. . . .

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Maine *et al.* Ex. No. 690

Fenn, Thomas Percy, Jr., *The Origin of The Right of Fishery in Territorial Waters,* pp. 70-80, 93-94, 98-118, 122-26, 130-49, 155-57, 170-75, 196, 219-23 (1926).

* * *

70 The Regalia consist of the perquisites and prerogatives of the king or emperor. . . . :

* * *

It will be observed that such things as *portus* and *flumina navigabilia,* which were *res publicae* in the technical sense under Roman law, and were therefore owned by the *populi Romani* considered as a whole, are now vested in or appropriated by the king or emperor, or, at most, they reside in the office. It is to be presumed that the Regalia

carry with them the rights and powers necessary to give them effect. This is certainly true with respect to the *redditus piscationum*, for the feudal lawyers number the *ius piscandi* among the Regalia, even where they most carefully restrict its use.

* * *

73 In regard to the Regalia, Brussius writes that in his country, Scotland, the *redditus piscationum* is included. Salmon fisheries are embraced within the meaning of the term. He is in agreement with Craig in adding that these may not be granted save by a special *concessio* expressly given. Furthermore, salmon themselves are the property of the king, wherever they may be found, even in rivers.

The emphasis which feudal law places upon property rights is brought out with precision in the work of M. Hervé, a French lawyer and expert on feudal law. Every one knows, he writes, that ports and rivers are things common to all the world, and that every one has the right of fishing in them. But it is also true that one can acquire an exclusive right of fishing in them in a certain place, so that one may forbid another to fish before one's house. This private right can be acquired equally in public rivers and in the sea. M. Hervé would recognize, of course, that this provision is to be found in the classical Roman law, and represents the result of the mixture of the Roman with the feudal systems of law.

This right of fishing is a property right and not a personal one. It reposes in the property. Under the Roman law, if every one had the right to fish in public rivers, it was because every

74 one owned those rivers. Under a monarchy, where the sovereignty resides in a single person, such common rights are also concentrated in him. He alone may exercise them, in the name of all. It follows that the right of fishery is not a right essentially feudal. It is not as *Seigneur de fief* that the king possesses it; he would still have the right were he neither lord nor suzerain. As a matter of fact and of usage, this right is generally exercised by the lords of fiefs, and a feudal character is given it. Yet it remains a right of property. All rights inhering in public property reside in the king.

* * *

77 The writer is following the doctrine of Baldus, a jurisconsult of the fourteenth century who is cited with great frequency by his successors. Although most of his work lay in other fields, Baldus wrote a commentary on the feudal law. He defines the Regalia as the

jura praecipua Regis, vel Imperii, seu fisci Romanorum, vel cuiuscunque Regis, qui in regno suo est monarcha, licet Imperatore minor ambitu circuli.

The Prince is lord of his territory and of the sea subject to him. The portion of the sea subject to him is that which is adjacent to the coasts of his territory.

Porro territorium non est aliud quam terrae spatium minutum & armatum iurisdictione. In mari autem non dicitur territorium . . . sed dicitur districtus, id est, aquae spacium, seu latitudo similiter munita iruisdictione & imperio.

Baldus injects the theory of the adjacent sea into feudal law. Jurisdiction is no longer to be exercised anywhere over the sea; it is to be exercised in the sea adjacent to the territory of the Prince exercising it. This portion of

the sea is not called territory. There is no claim to *dominium* or *proprietas* in it, as yet. It is a district in which the Prince has a right of jurisdiction, a district attached for certain governmental purposes to the nearest territory. The source of this jurisdiction is to be found in the Prince – the King or Emperor – himself. It is a royal or imperial prerogative. It is, in a word, included in the Regalia. Presently it was to be an attribute of the office and not of the man. This theory arose in the later days of feudalism, for Baldus died in 1400. One hundred years later, Afflictis recorded the existence of an officer new to the law, the admiral, who was appointed by the Prince, and who ranked as the third of the principal officers of the realm.

It will have been noted that there were important rights included in the Regalia which are not recorded in the "Libri Feudorum." According to Amicangelo, another Italian feudalist, the Regalia owe their origin to the *ius gentium*, because the election of the king is by the *ius gentium*. Be that as it may, they undoubtedly had their foundation in customary law.

A distinction exists between fisheries and fishing, between the *reditus piscationum* and the *ius piscandi*. The power to grant either or both in the sea or in the public rivers was lodged in the Prince. He might delegate the latter, that is, the power and authority to grant the *ius piscandi*. He could grant a fishery to a lord from which the public could not be excluded provided that they paid a certain fee to the lord. He could grant a right of fishing to a private person in a fishery which he had granted to another. He could grant to a private person or to a corporation the right to the exclusive use of a public fishery once a week, say, from sun up to sun down on every

Friday in the year. Against the Prince there was one check, prescription from time immemorial. Against other private individuals, there was this check, and that of a special privilege granted by the Prince, or a special concession from him. The state of the law is too vague to be capable of precise definition. But this may be said: the *piscatio* was probably a location, a place where fish were known to gather. The *ius piscandi* seems to be the feudal equivalent for the modern right of fishery. The Prince, or the Crown, has the right of fishery in all public waters. So far as regards the public rivers, this right is a property right. With regard to the sea, the right is limited to the coastal waters for an unspecified distance off shore. The source of the right is not clear. In view of the fact that the sea had always been held to be open freely to all, it is probable that the right is a right to fish in certain parts of the sea, in certain *piscationes* off shore. On the high seas the Prince or the Crown had no rights of fishery, save those which every man had.

78 Whether the Prince's property right in the public rivers was based upon ownership of the underlying soil, or upon ownership of the flowing water, or upon ownership of both, is a problem left undefined. It is probable, having regard to the nature of the feudal system, that the Prince owned the soil. His prerogative of the right of fishery in tidal waters was not based upon a claim to ownership either of the soil or of the sea. At the most, he owned the fisheries, the places where the fish were caught. From ancient times the state had owned public fisheries, just as it – or the people – had owned the public rivers. The transference and concentration of power in the hands of the monarch which created the theory attributing to him the ownership of the rivers, as well as of the territory which composed his dominions, probably operated in a like

manner to ascribe to him ownership of the sea fisheries. The theory of territorial waters which began to take shape at the close of the fourteenth century was not a theory of
79 ownership of those waters, though it was both logical and inevitable as to reason and fact that it should issue in such a theory. The theory to which Baldus gave expression was one of the exclusive jurisdiction of the king or Emperor over the seas adjacent to his dominions. This jurisdiction, furthermore, was not to be used to force from other states a recognition of sovereignty – for there was no sovereignty – nor for the purpose of providing occasions for the gratification of royal or of national pride. It was to be used to safeguard the sea for the purposes of commerce, of navigation, and of industry. And, which is important, it was to prevent any other monarch or state from sending armed forces into those waters for that purpose. Beyond these generalizations it seems hardly safe to go. While there is a broad agreement of principles, the application of the law was bound to vary with the custom of the community. It was bound to vary, also, with the shifting relations of the king or Emperor to his great tenants in chief. A strong ruler could insist upon his prerogatives; a weak ruler could not afford to do so.

The influence of Roman legal conceptions upon feudal law is easily discernible, especially in the writings of those jurists who champion the community of use of the sea.
80 In the Assizes of Jerusalem, which is, perhaps, nearly pure feudal law, there is no mention of sea fisheries. No jurist could ignore the Roman law if he desired to write concerning the relation of the king to the right of fishing in the sea. The rights implicit in the possession of the Regalia had to be either restricted or expanded; the mere statement of these rights made a definition of the scope of their exercise almost

inevitable. Both feudal lawyers and jurisconsults alike were faced with this problem. Their solutions of it will be considered in the following chapter, and the doctrines of which they laid the foundations will be traced to their fruition in the great work of Hugo Grotius and the classic reply of his opponent, John Selden.

* * *

93 Fleta yields nothing except the usual provision in regard to the royal monopoly of sturgeon, and a provision that the customary division of whales caught on shore shall be followed – the head to the King, *et Regina caudam.*[5]

* * *

94 *Quo nunc ergo iure nostri Principes quod Natura voluit esse liberum et commune, servum propriumque faciunt? Quo iure Venetiis mare Adriaticum, Genuensibus Ligusticum servit?*

Quo iure? Balduinus had put the critical question. For Balduinus died in 1573. As will be seen below, the teachers of the contrary doctrine gained considerable strength

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[5] *Fleta, seu Commentarius Juris Anglicani,* bound with Joan. Seldenus, *Ad Fletam, Dissertatio Historica,* 2d. ed., London, 1685. P. 61, cap. 45: "De Sturgione aliter observetur, quod Rex illum integrum habebit propter privilegium regale. Cap. 46: De Balaena vero sufficit, si Rex habeat caput, et Regina caudam."

This is the last of an English theory concerning the freedom of the seas, during the period under discussion. Plowden did not, indeed, advocate any right of property in the sea; but he entertained a pronounced theory as to the scope of the King's jurisdiction. He will be noted below. Digges, Welwood, Boroughs and the rest went far beyond him and made it quite clear to everyone that the British seas were, at least so far as they were concerned, as British as the realm of England could possibly be.

during the last quarter of the sixteenth century. It has already been observed that the end of the century was a time when the love of the past was giving place to a keen interest in the present. This interest was as marked in the world of theory as it was in the world of fact. The authority of use and custom gained respect proportionally as the authority of the classic Roman law diminished in the estimation of the period. To-day, said a late writer, kings and princes are wont to claim under the name of territory the *dominium* of the sea, the ownership of the *sea!*

* * *

98 Bartolus of Saxoferrato, or Sassoferrato, 1314-57, was an Italian jurist and teacher of law at Pisa and Perugia, and a counsellor of Charles IV. His fame excels that of any other jurist of the middle age. . . . In Spain and
99 Portugal his opinions were for a long time given binding force by law. Not only is he reputed to have held first place in the schools, during his lifetime, even, but it is said that in the courts his authority was so great that the judges did not dare to contradict him. Apparently, to quote Bartolus was to silence the opposing view.

This unique influence was due not merely to Bartolus's preeminent ability. He lived at the close of one period and at the beginning of another. In the thought of the middle age there is a borderland where theology, politics and law meet. In the controversies between Church and State, and in political theory generally, this relationship is conspicuous. For example, it was possible to denounce heresy as treason. The peculiar product of the fusion of these three systems had a profound influence in the doctrines of the relation of the Prince to his people, of the

relation of the Prince to the Pope, and of his relation to God. It dominated political theory during the Reformation. It was influential in determining the structure of the modern state. A cursory reading of Grotius will show that it is the foundation of international law. Almost any discussion of the *ius naturale* will show an interplay between these three systems of thought. The *ius gentium* is obviously dependent on them. Bartolus was the great, if not the only channel through which this type of thought
100 flowed to the modern world. . . . .

* * *

". . . Such a mind was eminently fitted to sum up in itself the long ages of legal development, and to suggest the lines of future advance." If Bartolus was this kind of a man – and the weight of authority is with Figgis – his attitude upon the legal status of the sea is of the first
101 importance. It is perhaps not an exaggeration to say that no pronouncement more important had been given up to this time since the days of Justinian.

B. His Doctrine

Mare sub cuius territorio comprehenditur.

In a concise and forcible manner, Bartolus injects this doctrine formally into jurisprudence. It is given more fully in the *Gemma*, a collection of his sayings, as follows:

Mare dicitur illius Domini, sub cuius territorio comprehenditur.

In commenting upon the practice of certain states of driving *homines males* off the sea, Bartolus justifies it by an argument from analogy. As it is fitting for the *praeses*

to drive off or to punish evil doers on land, so it is likewise fitting for him to do so at sea. The word, *congruo*, probably conveys more than a mere sense of appropriateness. The *praeses* is fit to undertake this work. It is suitable to and consistent with his office. It is so eminently proper that he who suppresses crime on land should do so in the waters adjacent to his territory that it may be said that he has the right to do so. But if he has a good right, then to do so is good law, for the simple reason that it is *ius*. For *ius*, of course, carries the meaning of both right and law. Some such train of thought as this was probably in the mind of Bartolus; for this seems to be one of those "borderland" questions on which the mediaeval mind was able to focus at once theology, politics, and law. His reasoning is a compound of all three.

A city-state owns the islands located not far from its coasts and may destroy pirate strongholds on them: . . . .

* * *

102 The question of a state's property rights in the islands off its coasts arises in Bartolus's mind in connection with the suppression of piracy, just as does the question of maritime jurisdiction over the waters adjacent to its coasts. His train of thought is not dissimiliar. An island is regarded as part of the mainland, as it were, sticking to it. It is a fragment of the mainland. It goes with the territory nearest to it. The state which has property rights in that territory has also property rights in the island. The state extends its jursidction out to sea; it extends its power to hold property out to sea. The reasoning in both cases is practical, if not pragmatic.

In neither case is Bartolus arguing for a property right in the sea itself. In the first case, the state's jurisdiction over the sea adjacent to its coasts has its source in what may be called its police power. This power is already in

being, by virtue of its existence, be it vested in an emperor, king, or people. The power of a state to enforce the law within its own territory is not doubted. What law it is that is enforced is another question. Bartolus arrives at his doctrine simply by not restricting this power to the land. He is unable to see any reason why a state should not have exclusive rights of jurisdiction within its territorial waters. He has not postulated a new power or a new source of power. It is to the interest of a state to protect its coasts, and to make the neighboring sea safe for navigation. It would be more difficult for him to deny such a right to the state than it is for him to advocate it. There is no right of sovereignty over these waters; there is merely a right of jurisdiction over them.

In the second case, that of the islands, there is a property right involved. But it is a property right in the islands, not in the sea. He is aware of the doctrine that because
103 the sea is common to all, things in the sea are common to all and therefore no property right (of the sort he is advocating) is legally possible. But he waives this doctrine aside without troubling to refute it. The origin of this property right seems to be in the nature of the island's relations to the mainland. It belongs to it. The right existed, and the ownership of the island was a fact, before Pisa was troubled by the band of pirates which established a base there. The question concerning which the Pisans were in doubt was whether or not the pirates were on alien territory. It is interesting to note that as he writes his doctrine, Bartolus cites one of his own opinions in support of it.

The query arises, How near must an island be in order to come within the territory of the neighboring state? Bartolus gives an answer to this question in his tract on rivers.

* * *

Bartolus puts a double question: whether he who has jurisdiction in territory adjoining the sea has jurisdiction in the sea itself; *and* (if so), to what distance seaward. The first part of the question is answered in the affirmative. Then, instead of answering the other half, Bartolus passes to his discussion of islands. The reasoning here differs from that above. Since a "province" has jurisdic-
104 tion over the sea, it has jurisdiction over the islands in the said sea. He goes on from this point to state almost in parenthesis that those islands are said to belong to a "province" which are but a moderate distance from it. The rest of his discussion is taken up with a definition of the phrase, "moderate distance," and with a consideration of those islands which lie outside the distance specified, that is, those which are more than one hundred miles away. He does not return to the unanswered half of his question.

This passage from the *De Fluminibus* is frequently cited by later jurists. Caepolla, who refers to it with more exactness and with a fuller treatment than does any other writer, leaves the question as Bartolus leaves it. The general impression seems to be, however, that Bartolus is laying down a hundred mile limit to the jurisdiction of a state over the adjacent sea. It is probably correct to presume that this was his intention. Indeed, whether it was, or not, it follows from his reasoning. A state has jurisdiction over the sea adjacent to its territory. It has jurisdiction over islands in the said sea. It has jurisdiction over islands which are not distant farther than one hundred miles from its coast. Then the implication is plain, and the conclusion is unavoidable, that the state has jurisdiction over the sea to a distance of one hundred miles from its coast. The conclusion is inevitable because the state's jurisdiction

over the islands in the adjacent sea is made to depend upon the jurisdiction of the state over that part of the sea, and not upon any property right which the state may possess in them. Suppose an island to be one hundred and ten miles distant from land, and twenty-five miles from another island which is eighty-five miles from land. Then the first island belongs to the state which owns the second island. But would the jurisdiction of the state extend over the twenty-five miles of water intervening between the two islands? Or only over fifteen of those miles? Such questions as these are left for a later day to answer.

105 In may be observed that the doctrine of Bartolus is at once progressive and restrictive. From the point of view of those who admitted no maritime jurisdiction of an exclusive nature, he is revolutionary rather than progressive, for he is teaching the subversive doctrine that a state has sole rights of jurisdiction over a thing on which and in which all men have equal rights. But from the point of view of Venice and Genoa, and particularly, the former, he is rather more reactionary than progressive. His doctrine is in effect a limitation upon the sweeping claims of the Venetians to the gulf or sea of the Adriatic – claims which, moreover, they were making good by reason of their naval supremacy in that sea, and claims which they did not cease to assert until the fall of Venice in the eighteenth century. As has been noted, the Venetians claimed not only a right of exclusive jurisdiction in the Adriatic; they claimed the ownership of the sea. A just appreciation of the doctrine of Bartolus will not overlook this two-fold character which it possesses.

* * *

115 Caepolla adopts Bartolus's hundred-mile limit to the distance to which the Prince may exercise his jurisdiction over

the sea. This means that he holds the doctrine of the adjacent sea. The sea is ordinarily distinguished by the territory adjacent
116 to it. Or, put in another way, the adjacent sea is comprehended in the territory of a state as a district of that state. This, it will be recalled, is in agreement with the doctrine of Baldus. Caepolla observes that it is the most favored opinion. The basis of this jurisdiction is other than that of those cases where a state has acquired it by prescription.

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123 . . . [T]here is another theory according to which the sea comes within the meaning of the word, territory. In support of this theory is the notable jurist, Albericus Gentilis. His doctrine is to be found in the eighth chapter of the first book of his *Hispanicae Advocationis*, which bears the significant title, "De marino territorio tuendo."

Gentilis, 1550-1608, belongs to the modern Italian school of natural law. He is famous, of course, for his work in the field of international law. Like Grotius, he wanted to check the barbaric wars into which the countries of Europe were so frequently drawn. His test for the lawfulness of any war was in the principle of natural justice, which had its basis in the nature of mankind. But, unlike Grotius, he sought to derive his laws from the observance and appraisement of international practice. After 1537 he was professor *"regius juris civilis"* at Oxford.

He begins in Chapter VIII by referring to a controversy between Spain and the Dutch. The latter had made a strong protest because a Dutch vessel had been stopped on the high seas by a Spanish ship and had been forced to surrender certain booty which, it appears, had been taken from Spanish subjects. Gentilis takes an unfavorable view

of their representations, and states that the word, territory, is applied both to land and sea.

At ego, quod olim scripsi in libris bellicis, territorium et de terris dici, et de aquis.

He cites the "doctors" in general as saying that the Venetians and the Genoese, and others having a port or harbor, are said to have jurisdiction and *imperium* in the whole sea near them to a distance of one hundred miles, or even
124 more, if there are no other "provinces" near. And he adduces Bartolus as support for his statement. Strictly speaking, of course, Bartolus did not lay down an indefinite limit under the condition mentioned by Gentilis. He said that if an island which was more than one hundred miles distant from a state was near an island which was within that distance and which belonged to the state, then it also belonged to the state.

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124 Let the Dutch, he proceeds, and every one use the sea – but without violating foreign jurisdiction. Let them remember that there are things heretofore undefined which are defined to-day; and that the distinction in the *ius gentium* between dominions and jurisdictions must be most carefully observed.

Gentilis credits Baldus with his theory of *mare adiacens pars dilionis*, and with justice, for the adjacent sea, in the thought of the latter, was a *districtum* appertaining to the land, in which the *ius civile* is operative.

In addition to this doctrine and the Bartolist hundred-mile limit, there is the phrase, *mare portio terrae*, and the application of the idea contained in the word *territorium* to the sea. After Gentilis it is literally correct to speak of

territorial waters in international law. What Gentilis has to say is given additional significance because he is observing international practice and appraising it. . . .

Caspar Klock gives expression to this theory of territorial waters in the field of Roman jurisprudence, though perhaps in not quite so definite a fashion, or, at least, not so pointedly, as does Gentilis. . . . .

The sea to the distance of one hundred miles belongs to the nearest shore.

* * *

5. DOMINIUM MARIS

When the theory of *mare adiacens* hardened into a theory of exclusive jurisdiction, it made that of *dominium* inevitable. The tendency of the theory of the adjacent sea to develop a doctrine of state (or royal) ownership is apparent. The theory of territorial waters is latent, if not implicit, in the theory of littoral waters. It (the former theory) demands an extension of what to-day would be called the municipal law of the state concerned over the adjacent sea, and it rests upon an inclusion in the word, *territorium*, of *mare* as well as *terra*, or, precisely, of *mare adiacens* with *terra*. It will be perceived at once that the union of the adjacent sea with the land adjoining, although made primarily to facilitate the justification of a theory of jurisdiction over the former, is favorable to the growth of the notion that the state exercising this jurisdiction has a certain property right in the waters in question. A pirate, for example, caught *flagrante delicto* in the sea adjacent to the territory of State A by an officer of State A is tried in the courts of State A and by the law of State A. Furthermore, it is unlikely that an officer of State B

would venture to capture the pirate off the coast of State A at the time in which the theory of the adjacent sea had become a commonplace. If he did so under pressure of immediate necessity, he would be more than likely to surrender his man to the officers of State A. The selfconscious despots of the Renaissance would hardly suffer their coastal waters to be invaded by the naval forces of another monarch for the purpose of using his arms there, on any pretext. The growth of the modern states forced the old theory of cooperation in the suppression of piracy to be abandoned. With this relationship, then, which was at once both legal and political, between a state and the sea adjacent to its shores, gradually becoming generally accepted, the rights of property recognized on land could, with the appropriate modifications and qualifications, be extended to the coastal sea in much the same way in which the criminal law of the state had been extended there. Finally, the early belief that sovereignty is inseparable from ownership of the soil, made it a simple matter to predicate ownership of the sea. In the sovereign (monarch or republic)
131 only lay the right to exercise jurisdiction. The sovereign was the ultimate owner of all the land in the kingdom or republic. This, everyone knew. But the sovereign exercised jurisdiction over the sea. And when this theory began to receive careful attention from the jurists, he was exercising exclusive jurisdiction. It followed, therefore, that the sovereign must have a right of ownership in the sea, just as he had a right of ownership over his lands.

Now, the distance to which his rights in the sea extended was an entirely different question. The controversy over *mare liberum* versus *mare clausum*, which is about to receive attention, was serious primarily because the advocates of *mare clausum* placed an extravagant interpretation upon

the meaning of the term, adjacent sea. Grotius himself admitted the rights of a state to the ownership of its gulfs and bays. What agitated him was the claim of Spain and Portugal to divide the ocean between them. Selden was reasoning on sound principles when he championed the theory of territorial waters. The menace in his argument was his definition of them.

Aside from the question as to the extent of the territorial waters of a state, there was the further problem in regard to the restraints, if any, to which the sovereign's right of jurisdiction was subject. Undoubtedly this question was on a parity with the other. But it was so because of the material interests at stake – in the one case (omitting Venice and the Adriatic), the trade with the "East Indies"; in the other, the exploitation of the abundant herring fisheries off the coast of the British Isles. In the former case, thousands of miles were involved; in the latter case, some fourteen miles. But the wealth within the two districts was very great. Those on the outside wanted such restraints on the jurisdiction of the sovereign as would give them free access to it. Those on the inside wanted to admit foreigners, if at all, only on their own terms, and consequently admitted only such restraints as would not hinder them in realizing this desire.

It may be granted that, actually, and in practice, the potential wealth involved not only colored the views of the lawyers on the question as to the extent to which a sovereign may exercise his right of jurisdiction over his
132 territorial waters, but also that it influenced profoundly their definition of the area comprised within the meaning of that phrase – that is, the phrase, "territorial waters," or the other, "adjacent sea." But, it is submitted, that in the development of the theory of state

ownership of the sea, the question of the extent of the territorial waters precedes in point of logic – as it certainly does in point of time – the theory of the powers which the local sovereign possesses in those waters. The theory of the exclusive jurisdiction of the local sovereign in the adjacent sea made possible the theory of ownership of that sea. The next step was, not to define his jurisdiction, but to define the amount or area of sea covered by it.

The prizes at stake, however, befogged the issue. The Dutch appeared as antagonists both to Portugal and England. Against Portugal they argued for freedom of navigation and of trade. Especially they wanted freedom of trade, because a free right of navigation only would serve them little. The desire for free navigation was produced by the method which the Portuguese took to prevent freedom of trade. Had protective tariffs been in effect in the East Indies, the Dutch argument would have been quite different. What the Dutch were after was, really, not the open sea, but the open door. Against England, the Dutch argued for freedom of fishery. This was in essence an argument to take freely the products of that sea the use of which is common to all, and the proprietorship of which belongs to none. Since the herring frequented the coastal waters of the British Isles, it was necessary to restrict those waters to gulfs, bays, and inlets of the sea, with perhaps a strip of open sea off shore. Or, if a greater area was admitted, then to restrict the jurisdiction of the king in a manner calculated to make it impossible for him to tax or to bar foreign fishermen. Grotius, while attacking the Portuguese, had not overlooked the fishing industry. His doctrines on the free sea were sweeping enough to provoke a number of refutations from the English. It is interesting to note that his work passed almost unnoticed on the Conti-

133 nent for years. Of course the Spanish and Portuguese stood alone in their position. The English claims were a different matter. The principle could be admitted with advantage by other states, provided that there were placed reasonable bounds to the sea involved. And so it was that the rights of a king in his own waters were entangled with a controversy over the extent of those waters. And the former element has come down in history as the dominant element, and the controversy is called one over the freedom of the seas, following the favorite titles of the period – *mare liberum*, and *mare clausum*. This is true in spite of the fact that both sides admitted the freedom of the *high* seas – the vast ocean, as they called it. The question really was, for England and the United Provinces – and they are the important contestants – what was the main sea and what was not. The English claimed rights which could be granted only in strictly territorial waters; they knew it, and claimed an enormous area of sea as being within the realm of England. The Dutch, not taking any notice whatever of the argument from territorial waters, claimed the freedom of the seas for themselves, and opposed the English with the accusation that the high seas were being illegally enclosed, that illegal restraints were being placed upon the use of the sea. The two parties were arguing from different premises at this point, and sensing the common ground of difference without apparently being able to define it, used ambiguous adjectives and indulged in repetition. The argument became one over the rights of a king in waters not his own, when it reappeared in the autumn of 1914. That was the form it took when viewed through Dutch glasses in the seventeenth century.

The *right* of ownership, then, in *territorial* waters, was not the fundamental dispute in the controversy referred to, except in so far as unsound definitions of territorial waters

made it so. The *extent* of ownership over the sea was the kernel of the dispute. What the owner could do with his sea became of crucial importance because of the amount of sea claimed by him, and not because he claimed some part of the sea. That he should claim any part of the sea at all (excepting gulfs, bays, and inlets) scandalized the Dutch and became an issue only because the waters immed-
134 iately off shore were abundantly supplied with herring, and *not* because the claim marked a departure from accepted or familiar legal theory.

After due weight has been given to the distinctive characteristics of this controversy, it remains true that the lawyers who participated in it were the heirs of their past. The doctrine of *mare clausum* was made possible by the development of the theory of the adjacent sea, to which consideration has been given. The doctrine of *mare clausum* is based on that of the ownership of the sea, of *dominium maris*, and is the product of it. The word *dominium* is itself significant. In mediaeval legal Latin it connotes a mixture of the ideas expressed by the words *propietas* and *imperium*. It signifies at once ownership and lordship. It has itself undergone a development from the original meaning of ownership, which has left it ready to hand for the purposes of the moderns who use it.

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148 That is to say, these two questions were settled in principle. The lines were laid out along which international practice was to move. The principles were enunciated to which appeal could be made in the controversies of the future. The question whether *mare adiacens* could be owned as property was settled in the affirmative. That was the question which had to be settled; that was the question without an answer to which nothing else could be settled.

In the development of the original theory of the freedom of the sea into that of territorial waters there is a series of critical points. The first point is the doctrine of Paulus that a private individual may possess *proprium ius* in a definite part of the sea. The second is that doctrine of the Glossators which states that this private right may be acquired by privilege or by long-standing custom – *per privilegium vel per longam consuetudinem.* The third point is the doctrine that the *Princeps* may impose a servitude on the sea. For both these doctrines the authority of Azo is given in the *Corpus Iuris.* By a broad interpretation of the rights of the king or emperor as enumerated in the Regalia, and by a wide application of the laws of prescription to the sea and to maritime fisheries, later jurists broke down the original doctrine forbidding private appropriation of what is common to all. They added important exceptions to this doctrine, or law – for such it became by its incorporation into the Digest – until they interpreted away the meaning which it had once possessed. The fourth point is the enunciation of the theory of *mare adiacens* – of the adjacent sea. For this point Bartolus is responsible. Almost at once it received an accretion from Baldus, with his theory that the sea adjacent to a state is a district of that state over which the state's law is extended. These four points provide all the material necessary to create the theory of territorial waters, of *dominium maris.* Gentilis marked the fifth and last point when he intentionally applied the word *territorium* both to land and water. These are the five links in the chain which connects the classic doctrine of the freedom of the sea with the modern doctrine of territorial waters. Throughout the history of this development the open sea remains in theory free to all. At the beginning this freedom is sanctioned by law; at the end it is

sanctioned by expediency, or even by necessity. But at the beginning, this freedom was thought to be inviolable; at the end it was no longer thought so.

The opening years of the seventeenth century form the final period of the development of the theory of *dominium maris*. After that time further development became merely modifications of existing theory. This period must now be considered in some detail.

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219 IV. SUMMARY

The evidence produced in the foregoing pages points to the conclusion that the somewhat uncritical praise which has been given occasionally to Grotius's essay on the freedom of the sea is not altoghether warranted. The freedom of the high seas was not disputed by the advocates of a state's ownership of its territorial waters, with the possible exception of Selden. And even he conceded that, in practice, freedom of trade and of navigation should not be violated. His point that there is nothing in the *nature* of the sea to prevent its appropriation is sound. That the sea has not in fact been appropriated by the Powers is due to reasons of an entirely practical character. The only two countries which attempted to put into practice their claims to a monopoly of the western highways of traffic found that their case fell of its own weight. The fiats of the *ius gentium*, of the *ius naturale*, and of the *ius civile* simply had nothing to do with it. The reason why Spain and Portugal failed to make good their claim was this, that it was unworkable. At the other extreme lay the claims to absolute rights in territorial waters. Here, the weight of opinion is overwhelmingly in favor of the thesis that a state has the rights of ownership in the sea adjacent to its coasts. Grotius's position

220 on the matter is ambiguous. He separated gulfs, bays and inlets from the main sea; but he failed to clothe the state with tangible rights in these waters. He failed also to distinguish between that strip of coastal waters which had become known as the adjacent sea, and the main body of the sea. In his later work on the law of war and peace he modified his position somewhat on this latter question, but he failed there also to make any concession which would seem to countenance the existence of property rights in the sea. So far as can be gathered from his cautious statements on the whole subject, he seemed to think that the rights of the state in the waters in question extended only to the maintenance and enforcement of a certain jurisdiction over these waters, and to the protection of navigation and fishing therein. It may be said with some certainty that this is the view of "Mare liberum." When it is said that Selden and his colleagues were quick to see that Grotius had attacked the British claims in "Mare liberum," it should be remembered that it is his position on the adjacent sea which constituted the attack, and not his position on the high seas. For the Continental lawyers, also, who were not parties to the British controversy, the question concerned the adjacent sea only. Outside of Holland, the Grotian position found no support. Legal theory pronounced against the community of ownership, against a common proprietorship, of the littoral sea. The British claims, and, to a less degree, the Scandinavian claims, were extravagant to the point where they encroached upon the high sea. When Grotius denounced such pretensions, he spoke to the mark. But he denounced them for the wrong reason. This question is essentially different from the former one. That is to say, that the question, how far out to sea territorial waters extend, is essentially different from the question, whether there can be territorial waters. Grotius, in denouncing the pretensions referred to,

denounced them on the ground that there could be no territorial waters. . . . The real problem was, to restrict territorial waters within reasonable bounds. And here, oddly enough, Grotius pointed the way.

The problem, how to restrict the limits of territorial waters within reasonable, that is, within workable, bounds,
21 was a problem for diplimacy rather than for law. The boundary must be restricted sufficiently to remove territorial waters from the sphere of international rivalry, and to safeguard ocean traffic; within the scope of this restriction there might be a lack of uniformity as to the limits of the territorial waters of any particular state. Grotius performed an important service by suggesting that territorial waters – he called this portion of the sea, *proximum mare* – might be limited to so much as could be defended from the shore.

The theory of *dominium maris* holds that the rights of a state in its territorial waters are those of an owner over his property. The bare statement of the theory shows the need of an immediate qualification. Stypmann indicated the nature of the qualification required when he reserved the right of innocent passage for foreigners through such waters. For this property resembles at this point the property of a private individual, which is affected with a public interest under municipal law, although, in the latter case, the will of the state may prevail over the will of the private owner, whereas the control of a state over its territorial waters is absolute. Nevertheless, the existence of this public interest serves to guide the state in the exercise of its jurisdiction over its waters. The unqualified theory of *dominium maris* holds that the rights of a state over its territorial waters are those of a sovereign over his property.

Stypmann perceived that the necessities of international intercourse must limit the exercise of those rights.

The Continental defenders of the theory do not seem to have attempted to use it as a weapon for combating the pretensions of either Spain and Portugal, or of Great Britain. Nor do they seem to have been interested in the immediate furtherance of any particular nationalistic ambitions. This detached position was favorable to unbiased thought, as may be easily perceived. It was pointed out in the discussion of the origin of the dispute over the rights of a state in the sea adjacent to its coasts, in the preceding chapter, that the fundamental conflict of opinion was over the extent of the ownership of the sea, rather than over the rights of ownership of a state in its territorial waters. It was further noted that, although this
222 was the issue which had provoked the difference of opinion which found expression in the controversy between the advocates of a *mare liberum* and a *mare clausum*, this issue had been befogged by the divergent aspirations of the countries chiefly concerned. The British controversialists replied to a tract which was primarily concerned with attacking the claims made to the high seas by Spain and Portugal as if it had been an attack on British claims, whereas the British claims were not, essentially, the same as those of Spain and Portugal; while Grotius and his supporters made their arguments broad enough to comprehend the British claims, as if both sets of claims rested upon the same premises, the same bases, whereas in fact they did not. The point at which both sets of claims met and overlapped, or, in other words, the ground which was common to Spain and Portugal on the one hand, and to Great Britain on the other, was vaguely sensed by the parties to the controversy; but it was not clearly perceived, much less defined. The British defended

at great length what Grotius had not expressly – and, perhaps, not implicitly, for, as has been remarked, he is ambiguous on the point – denied, that is, the existence of *some* territorial waters. They perceived that he would deprive them of property rights in their coastal fisheries. And they defended their title to those rights by claiming a large part of the sea adjacent to the British Isles, including the whole of the British Channel. If they had done only this; if Selden had written his book to prove that the English kings had always owned the sea for a distance of five hundred, or fourteen miles offshore, then the issue would have been fairly clear. But they did not do this. They assumed that the existence of property rights in the sea must be demonstrated. They undertook to prove that the British sovereign possessed the title to the sea *for some distance offshore* by proving that he possessed a title to the sea. The very existence of property rights was thus called into question. The result was that the true issue was lost sight of, and the controversy raged around the new one. Yet the true issue remained to cloud thought and to warp judgments.

It was more easy to argue over the existence of territorial waters because a theory covering them had yet to be con-
223 structed. The work had been proceeding swiftly in the world of affairs; a theory was bound soon to be formulated. The controversy had this merit, that it forced a definition. But the controversialists were debarred by the exigencies of the dispute from performing this service. This is the point at which the Continental defenders of *dominium maris* come in. Aloof from the controversy, with no policies to defend, they were admirably placed for a study of the problem. The controversy had precipitated elements which had

hitherto been in solution. The European jurists (and particularly, the German jurists) studied the product and constructed their formulas. Boundaries to *mare adiacens* had already been proposed; they had been in existence, as propositions, since the age of Bartolus. The jurists left this problem to be settled by diplomacy. They concerned themselves with the nature of the rights of a sovereign in this sea. They arrived at the theory of *dominium maris.*

They arrived at this theory by two methods of reasoning. The first method involved an interchangeable use of *imperium* and *dominium*, a merging of the meaning of the one with the meaning of the other, so that the two became practically synonymous terms. The other method involved a separation of *imperium* and *dominium*, and was essentially realistic in its nature. Of the use of the first method, the work of Loccenius is perhaps the best illustration. Of the use of the second, Conring offers a first-rate example.

Maine *et al.* Ex. No. 693

Fulton, Thomas Wemyss, *The Sovereignty of the Sea*, pp. 39-45, 134-48, 152-53, 174, 192-93, 211-13, 216-41, 288-89, 301-02, 347, 352-65, 378-80, 409-13, 426-27, 440-45, 458-61, 469-70, 483-84, 487-88, 496-97, 506-07, 511-13, 517-18, 521-27, 539-41, 550-52, 571-75, 604-15, 650-52, 663-65, 681-732, 762-64 (1911).

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362 Along with the development of this idea came another, which was ultimately likewise engrafted on English law—that the crown had the exclusive right of property in the sea and in the soil beneath it. The origin of the idea is to be found in a treatise written in 1569 by Thomas

Digges. – He argued that as many things – as wrecks, treasure-trove, waifs and strays, which were originally common by the law of nature – now belonged to the Prince, so also should the sea, which was the chief of all waters, and could not by the civil law become the property of a subject. He held that just as the owners of the soil had the property in a river and its banks, the king had the interest and property in the "great salt river" environing the island, and in its shores and bottom; and he speaks of the sea as the "King's river," the "King's streme," and the "King's water," in which he had also jurisdiction. Digges also claimed that the fishings in the sea belonged to the crown, for "although the Kings of England have benne content to suffer fishermen *Jure gentium* to enjoy to theire owen use such fishe as by theire charges travill and adventure they can in the Englishe Seas take, Yet have the Kings of England for remembrance of this theire favoure that the memorie of theire propertie in the Seas shoulde not be extinguished, alwaie reserved to them selves the cheif fishe as Sturgeon, Whale, &c."

The contention that the crown had the right of property in the sea and its bed, denied by Plowden, received in the reign of James much fuller amplification at the hands
363 of Serjeant Callis, whose well-known lectures of the Statute of Sewers were delivered in 1622. Callis argued that in "our *Mare Anglicanum* the king had, by the common law of England, four "powers and properties": sovereignty (*imperium regale*), legal jurisdiction for the administration of justice, property in the soil under the sea and in the water, and possession and profits both real and personal. He cites in proof a number of authorities, legal and historical, such as were cited later by Selden. The statement in a case decided in the reign of Richard II. (1377-99), that "the sea

is within the legiance of the king as of his crown of England"; the charter of the Admiral giving him power in maritime cases throughout the realm of England; the phrases in certain statutes; the right to wreck and royal fishes, and so forth, "proved the King full Lord and owner of the seas, and that the seas be within the realm of England." The king rules on the sea, he held, "by the laws imperial" as by the Roole d'Oleron and others, but only in the case of shipping and for merchants and mariners; his rights of property in the bed and waters of the sea, and the personal profits (wreck, flotsam, &c.) accruing, were his by the common law. Callis did not deal with fishing, nor attempt to define the bounds of "the seas of England" in which the king had property and jurisdiction.

The interpretation of the law as to the rights of the crown in the seas, as propounded by Callis, was followed by Selden and Hale, and generally by the lawyers who came after him. Lord Chief-Justice Coke, in his *First Institute*, which was published in 1628, explains the old phrase "within the four seas" (*infra quatuor maria*) as meaning within the kingdom and dominions of England; for if a man be upon the sea of England he is "within the kingdom or realm of England, and within the ligeance of the king of England, as of his crown of England." In his *Fourth Institute*, which was not published, however, till 1644, ten years after his death, when treating of the Admiralty Court, Coke entered more fully into the question of the rights of the crown in the seas of England; and, as already mentioned, he looked upon the roll of Edward I., *De*
364 *Superioritate Maris*, as proving that the king's right of dominion over the sea had been expressly acknowledged by neighbouring nations.

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Maine *et al.* Ex. No. 712

Keller, Arthur S., etc., *Creation of Rights of Sovereignty through Symbolic Acts 1400-1800*, pp. 3-5, 148-51 (1938)

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IX: CONCLUSIONS

ON THE BASIS of the careful study made of the great mass of materials examined for the purposes of this book and relating to the acquisition of sovereignty over *terra nullius*, it has been found possible to arrive at certain general conclusions which may be said to be expressive of practices common to all the important maritime powers of Europe during a period of several centuries.

Thus, it may be stated first of all that, throughout this lengthy period, no state appeared to regard mere discovery, in the sense of "physical" discovery or simple "visual apprehension," as being in any way sufficient *per se* to establish a right of sovereignty over, or a valid title to, *terra nullius*. Furthermore, mere disembarkation upon any portion of such regions – or even extended penetration and exploration therein – was not regarded as sufficient itself to establish such a right or title. Nor did merely giving names to regions, capes, headlands, islands, valleys, peninsulas, rivers, streams, gulfs, harbors or bays have any such results. It should be added, however, that the term "discovery" was often rather loosely applied, and, in some instances, according to the attendant circumstances, may have been intended to include the performance of a formal ceremony of taking possession. It is, of course, obvious that, in such instances, more had occurred than a discovery in the sense of a mere visual apprehension.

Next, it may be asserted on the basis of the facts that the formal ceremony of taking of possession, the symbolic act, was generally regarded as being wholly sufficient *per se* to establish immediately a right of sovereignty over, or a valid title to, areas so claimed and did not require to be supplemented by the performance of other acts,
149 such as, for example, "effective occupation." A right or title so acquired and established was deemed good against all subsequent claims set up in opposition thereto unless, perhaps, transferred by conquest or treaty, relinquished, abandoned, or successfully opposed by continued occupation on the part of some other state. Naturally enough, the details of these formal ceremonies of taking of possession did vary, often quite markedly, among the various nations concerned, but still, and most important of all, what may be termed the ultimate legal effect thereof was the same. Thus, the Portuguese and the French, as it has been brought out in the preceding chapters, were usually content with the performance of ceremonies very simple in nature, such as the mere erection of a cross or other monument bearing the royal arms. The Dutch also adhered to the simplicities and usually erected no religious symbols whatever. On the other hand, the Spanish and the English usually employed a considerably greater degree of formality in their ceremonies, the former particularly being accustomed to observe an elaborate ritual.

With very few exceptions, the discoverers and explorers in the service of the European maritime nations did not specify with any degree of precision the extent of the territory which they claimed to have acquired for their sovereigns by acts of symbolic possession. The Spanish explorers purported at times to have acquired vast territories

and even entire oceans by a single act; they proceeded, nevertheless, to take possession separately of small islands or of localities on the mainland situated at short distances from each other. The English likewise performed such repeated acts of taking of possession where it was practicable to do so, as in Spitsbergen. There are also some indications, as in the correspondence relating to Guinea and Brazil, that the extent of a nation's possessions was connected with the presence of settlements, or actual control, but the materials examined herein do not permit any definite conclusions on this point.

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Maine ***et al.*** **Ex. No. 716.**

The Laws, Ordinances, and Institutions of the Admiralty of Great Britain, Civil and Military, *Vol. 1, pp. 1-13, 26-39, 112-18, 378-79, 394-95, 412-17 (1746).*

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38 Besides this honorary Part, the Dominion of the Sea entitles the lawful Possessors to the six following Prerogatives, which I hope will be always attended to with a scrupulous Exactness.

I. The Royalty of granting the Liberty of fishing for Pearl, Coral and Amber, and other precious Commodities.

II. To grant Licences to fish for whole Sturgeon, Pilchard, Salmon, Herring, and all other Sort of Fish whatsoever.

III. To impose Tribute on all Ships or Vessels fishing within the Limits of the *British* Seas.

IV. The regular Execution of Justice for all Crimes committed within the said Limits.

V. To grant or refuse free Passage to foreign Ships of War thro' those Seas, in the same Manner as Troops over the Land.

Which together includes the whole Extent of modern Dominion over the Sea; and which duly regarded, cannot fail of giving suitable Lustre and Dignity to the *British* State and Nation.

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Maine *et al.* Ex. No. 718.

Lediard, Thomas, *The Naval History of England*, Vol. 1, pp. 35-43 (1735).

CHAP. X.

35 A Short *Dissertation on the Right of our Kings to the Sovereignty or Dominion of the* British *Seas.*

The *Naval* Power of *England* beginning now visibly to encrease, and continuing for the future to do so from Reign to Reign, our Kings began likewise to be more jealous of any Encroachment upon their ancient and indisputable Right to the Sovereignty or Dominion of the *British Seas*, and more zealous in the Maintenance of it. I shall find Occasion, from Time to Time, to give Instances, in what Manner some of our Monarchs have insisted upon and maintained this their Right. It may not therefore be amiss previously to inform the Reader, (1.) *What is meant by the British Seas.* (2.) *Wherein consists the Sovereignty or Dominion of these Seas: And* (3.) *Whence proceeds the Right our Kings have ever pretended to and maintained to this*

Sovereignty or Dominion. This Place not being improper for my Purpose (for a Reason which I shall observed in the Sequel) I shall do it here, in as brief a Manner as possible. And

I. All that Part of the Main or Ocean, which environs the Island of *Great Britain*, is in general called the *British Ocean.* This is subdivided into four Parts, according to the four Cardinal Points of the Compass, and these are then together known by the Name of the four *British* Seas,
36 whence some of our ancient *Saxon* Monarchs took the Title of *Basileus quatuor Marium. (King or Emperour of the four Seas.)*

(1.) Towards the *East* is the *German* Ocean, generally called the *North*-but by the *Danes, Swedes,* and other Northern Regions, named the *West*-Sea: And the Boundaries on this Side are the Shoars of those Countries opposite to *Great Britain,* that Way, as the *Netherlands, Germany, Denmark* and *Norway.*

(2.) Southward is the *British* Ocean, properly, and by *Ptolemy* particularly, so called; one Part of which is that commonly called the *Channel,* or, by the *French, la Manche,* (the Sleeve) which divides *England* and *France.* This Way the Boundaries extend to the opposite Shoars of *France,* to those of *Spain,* as far as Cape *Finisterre,* and to an imaginary Line, drawn from that Cape, in the same Parallel of Latitude, to their Boundary on the *West,* hereafter mentioned; thus taking in that Part of the *British* Seas which consists of the *Channel,* the Bay of *Biscay,* and Part of the *Atlantick* Ocean. *Mela,* in his Treatise *de situ Orbis,* Lib. 2. Cap. III. Speaking of the *British* Sea, says, it reaches as far as the *Northern* Coast of *Spain.* And the *Arabian* Geographer (Clim. 4. Part I.) says, towards the

North, Andalusia, by which Name the *Arabians* comprehend all *Spain,* is washed with the *English* Sea, adding, there are nine Stages from *Toledo* to St. *Jago's,* which Place he says (*Clim. 5. Part* I.) is situated on a Promontory of the *English* Seas; And the same Author has divers other Passages of that Kind.

(3.) On the *West* is that Sea anciently called the *Vergivian* Ocean, which, where it washes the Coast of *Scotland,* is from thence called the *Deucalidonian* Sea. That Part of it which flows between *England* and *Ireland,* is sometimes called the *Irish* Sea, anciently the *Scythian Vale,* but now St. *George's* Channel, and the Rest the *Western* or *Atlantick* Ocean.

(4.) Northwards is the Sea anciently known by the several Names of the *Hyperborean, Deucaledonian,* and *Caledonian* Ocean, now the *Scotch* Sea; in which are situate the *Orcades, Thule* and other Islands.

The proper Boundaries of the *British* Seas for the *West* and *North,* on those Quarters, are generally reckoned a Line drawn from the aforementioned imaginary Line ex-
36 tending from Cape *Finisterre,* in the Longitude of three and twenty Degrees *West* from *London,* to the Latitude of sixty-three Degrees, and thence another Line drawn, in that Parallel of Latitude, to the Middle Point of the Land *Van Staten* in *Norway;* Thereby taking in, to the *West,* that Part of them which consists of Part of the *Atlantick* Ocean, and the *Irish*-Sea, or *St. George's* Channel: (For anciently, as Mr. *Selden* observes, *Albion* and *Ireland* were many Times equally called *British* Isles, and *Britannides,* for a Proof of which he quotes many Authors:) And, to the North, that called the *Caledonian* Ocean, or *Scotch* Sea.

To the *West* and *North*, the Sea-Dominion of the Kings of *Great Britain* may properly be said to extend a great deal farther than the abovementioned Boundaries of the *British* Seas, on those Quarters. For tho' (as Mr. *Selden* observes) the vast *Western* and *Northern* Ocean (stretching out to so great a Latitude as to reach, on the one Hand, the Shoars of *America;* and, on the other, those of *Greenland*, and Parts utterly unknown) cannot all be called the *British* Seas, yet hath the King of *Great Britain* most ample Rights on both those Seas, beyond the Bounds of the *British* Name: As he most certainly has, even as far to the *West*, as *Newfoundland*, and the adjacent Parts of *North America*, by Virtue of first Invention and Occupancy thereof by *Sebastian Cabot*, for King *Henry* VII. and of a more full Possession and Occupancy by Sir *Henry Gilbert*, for Queen *Elizabeth:* And to the *North*, as far as the Shores of *Greenland*, by Virtue of the same Title of first Invention, by Sir *Hugh Willoughby*, for *Edward* VI.
36 and of the full Occupancy thereof, and the Discovery of the Use and Profit of those Seas, in the Whale-fishery, by the *English Muscovy* Company, for Queen *Mary*, and Queen *Elizabeth*, of all which I shall have Occasion to speak more particularly when I come to those Reigns. However, within the Limits before laid down, the Respect due to His Majesty's Sovereignty (of which I shall say more below) is and ought to be given.

II. The Sovereignty or Dominion in the *British* Seas consists in an exclusive Propriety over these Seas, as well with Regard to the Passage thro' them, as the Fishing within them.

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42 The Duty of the Flag, of which I just made Mention above, being a consecutive Acknowledgment, that the Right and *Dominion* of the *Seas* are in him to whose Flag others strike and pay that Hommage, implying that the Prince grants a general Licence for Ships to pass thro' his *Seas*, that are his Friends, paying him that Duty; I shall say a Word or two wherein consists this Duty of the Flag.

The Duty required is, in a few Words, this; That all Ships or Vessels, which the *British* Men of War meet with on those Seas, do strike their Flag, and lower their Top-sail; or, where they have no Flag, that they lower their Topsail only, in Acknowledgment of His Majesty's Sovereignty therein.

This Custom of striking the Flag, or Top-sail, has prevailed in the *British* Seas, likewise, by Prescription of Time immemorial, having been ever attendant on the Crown thereof; and so is to be looked upon, not as an honorary Salute or Ceremony, but as an absolute Sign of the Acknowledgment of the Right of that Dominion. For the Antiquity of which I refer to the ancient and ample Testimony, in that memorable Record of King *John*, entitled the *Ordinance* at *Hastings*, of which I have already given a Copy, and a Translation, in that King's Reign.

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Maine *et al.* Ex. No. 719

Lounsbury, Ralph Greenlee, The British Fishery at Newfoundland, 1634-1763, pp. 30-31, 50-55, 61, 76-95, 102-04, 108-16, 126-33, 137, 147, 182-89, 229-43 (1969).

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50 . . . The West Country people tried continuously from 1621 to 1628 to obtain the passage of legislation which would establish the "free" fishery on a statutory basis and prohibit monopolies such as that which Sir Ferdinando Gorges was attempting to enforce on the coast of New England or that which Guy's group desired at Newfoundland. On April 17, 1621, "An Act for the freer liberty of fishing and fishing voyages to be made and performed in the seacoast and places of Newfoundland, Virginia, New England, and other seacoasts and parts of America" was introduced in the House of Commons. The bill proclaimed that the free right of engaging in the fishery tended greatly to increase the number of ships and seamen, but that owing to recent attempts to interfere with the freedom of the fishermen, it should hereafter be provided that all English subjects should have the free right to fish on the shores of America, to select places for curing fish according to priority of arrival, and to take wood for fuel and repairs. The bill passed the third reading on December 1 of the same year, but it was never considered by the House of Lords. Undaunted by this failure the West Country interests tried again in 1624, a similar bill
51 being introduced in the Commons on February 25. It was amended in committee, and brought up for the third reading on April 29, but consideration was deferred until May 4, when it was finally read and debated, though no vote appears to have been taken. The identical bill seems to have been resubmitted in 1625, when it passed the lower chamber, but again failed to receive consideration from the Lords. The West Country members of the House of Commons persisted in their attempts to pass such legislation, the bill being reintroduced regularly in each session of Parliament until 1628. Friends of the "free" fishery never secured the desired protection by statute, and con-

firmation of the old fishing customs had to be secured from the crown during the years when Charles I ruled without parliament.

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53 The reason for the stir created over the New England fishery arose not only from the more favorable situation of that region as a place of permanent settlement, but also from the fact that the monopolists were able to entrench themselves more firmly in the more southerly region than was possible at Newfoundland. The failure of the London and Bristol Company was in large part due to its attempt to drive out a well established vested interest, the beginnings of which date far back into the sixteenth century. On the other hand, the patentees of New England developed the fishery there concurrently with the establishment of permanent settlements, and the western adventurers who attempted to fish in that region were the interlopers.

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61 The war with France intensified the rivalry of the two nations in the North American fisheries. The various projects of colonization undertaken by the French and English in northeastern America were the direct result of increasing commercial competition. In not a few cases plantations were projected as much for the protection of the fisheries as for the exploitation of the territories occupied. Sir William Alexander's attempt in Nova Scotia, the Kirke project in Canada, and later the grant to the marquis of Hamilton, the earl of Pembroke, and Sir David Kirke in Newfoundland were designed partly to offset French expansion in the fisheries. The French likewise strove to extend the bounds of their control over land and

water. Their fisheries were closed to all but subjects of the French king, and they planned to create a great training school for seamen in the North Atlantic fisheries. They developed a sedentary fishery along the coasts of Acadia and Canada. In the process of extending their fishing industry they drove Lord Ochiltree's colony out of Cape Breton Island. All of these activities were but the prologue to the great struggle which was to take place after the Civil Wars and in the eighteenth century for control of the new continent.

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103 . . . By 1656, the government was well aware of the importance of Newfoundland and the other English fisheries. During this period some relief was given to the western adventurers by relaxing the requirements relative to the impressment of seamen in the Newfoundland trade. In 1659, when the Council of Trade was established by act of parliament, one of its duties was to encourage the fishing on the coasts of England, Scotland, Ireland, and Newfoundland. It is significant that the New England fishery was omitted from the act, probably because the people of that region were conducting the industry so successfully that they had no cause to bring pressure upon the home government. . . .

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Maine *et al.* **Ex. No. 720**

McFarland, Raymond, *A History of the New England Fisheries,* **pp. 26-35, 64, 69-75, 78-81, 98-101, 113-20, 125-27 (1911).**

26 During these years the Newfoundland fishing business prospered and increased with all nations engaged in it.

The profits already were so manifest that the English early desired a monopoly of the privilege of making and curing the fish on the island. Merchants had begun to quarrel among themselves for the advantage of shore locations. After the accession of Elizabeth to the throne there was greater activity in her seafaring subjects. In 1577, there was a total of 315 sails at Newfoundland, some authorities placing the number as high as four hundred. France was still in the lead with 150 ships. Spain had about 100, Portugal had 50, while England had but fifteen sails. England still sent fishing vessels to Iceland, and this fact may account for the small number sent to Newfoundland. Sabine states that the English ships were superior to those of the other nations, that they gave protection to the others, and exacted tribute or payment for the service.

Nearly half a century had now passed since the English made their first attempt to establish a permanent settlement in America. The merchants of the day realized the disadvantage of carrying on the fisheries at so great a distance from the base of supply; they saw that a colony in the New World would facilitate the prosecution of the Newfoundland fisheries and would lead to the development of other kinds of business. Further attempts at colonization, therefore, were quickened by the desire to place the American fishing interests on a more economical basis.

In 1578, Sir Humphrey Gilbert had secured letters patent to discover, settle and regulate these remote countries. Previous to his departure from England the government sent Sir Thomas Hampshire to the fishing grounds of
27 Newfoundland for the purpose of settling disputes about

the preemption of shore stations. Gilbert arrived at Newfoundland in 1583 with a charter for colonization, the first of its kind that was issued by the English government. He

took possession of the island and all surrounding lands within a circumference of two hundred leagues in the name of Queen Elizabeth. His right was acknowledged by the fishermen of the vessels at Saint John's at the time of his arrival, who paid him quit-rent for privileges that he granted to them.

England's claim to Newfoundland and its fishing grounds rested on the results of the discovery by Cabot in 1497. Subsequently, her rights to this claim were emphasized by Gilbert's acts at this time. Apparently the English held the right to exclude the vessels of all other nations from the fishing grounds; possibly she compelled the acknowledgment of this right, for in 1585 Sir Bernard Drake with a fleet of ships captured and sent back to England several vessels of the fishing fleet laden with furs and fish.

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31 While the French were engaged in colonizing in Acadia and in exploring the adjacent coasts, the English, too, were making explorations and discoveries for themselves on the New England coast. Bartholomew Gosnold, in March, 1602, made the first direct voyage across the At-
32 lantic to New England and commenced the fisheries on these shores. He gave to Cape Cod its present name on account of the multitude of fish that he took near it. Continuing his way southward he built a storehouse and fort on Elizabeth Island, intending to establish a permanent settlement there. But when the time came for his ship to return, the intended colonists to a man embarked aboard the vessel and returned with Gosnold to England. Gosnold spread most favorable reports of the new country, declaring among other things that the fishing was superior to that on the banks of Newfoundland.

Several merchants of Bristol became interested in such enterprises and sent out Martin Pring in 1603 with two vessels. Pring reached the coast of Maine near Penobscot Bay, discovered and named Fox Island from several silver-gray foxes that he saw there, and coasted as far south as Martha's Vineyard. He entered Plymouth Harbor where he remained six weeks, exploring the region, becoming acquainted with the natives, gathering cargoes of sassafras,
32 and even planting seeds to test the soil. He gave the name of Saint John's Harbor to the place, and, after loading his vessels, sailed for England. He confirmed Gosnold's statement that the fisheries of New England were superior to those of Newfoundland. "Thus two years before Champlain explored Plymouth Harbor, naming it Port of Cape Saint Louis, ten years before the Dutch visited the place, calling it Crane Bay, and seventeen years before the arrival of the Leyden Pilgrims, Englishmen became familiar with the whole region, and loaded their ships with the fragrant products of the neighboring woods."

In 1605, George Waymouth, under the patronage of several Englishmen of rank, came to the Maine coast in the vicinity of Penobscot Bay. Waymouth, like Gosnold and Pring, considered the fishing prospects of the coast of Maine greater than those of Newfoundland. An account
33 of the voyage published in London the same year relates that as they were setting sail for England they caught very large fish, so that there was good ground to warrant "in a short voyage, with good fishers, to make a more profitable return from hence than from Newfoundland; the fish being so much greater, better fed," and more to the same purpose.

The effect of these voyages and reports was to arouse the zeal of other Englishmen to undertake colonization in this quarter of the New World. The narrative of Waymouth's voyage was published at once, and attracted the notice of Sir John Popham, chief-justice of England. Popham, with his brother George, Sir Ferdinando Gorges, and other men of influence, became interested in a project to found a colony near the fishing grounds of New England. Accordingly, in 1607, a vessel was sent out, which reached the mouth of the Kennebec River in August. At a place called Saint George the colonists built cabins, a storehouse and some slight fortifications; they also built a pinnance called the "Virginia," the first vessel built in New England, which crossed the Atlantic several times. Under the command of their president, George Popham, forty-five emigrants were left on the shore for that winter. The following year a ship returned to announce the death of the chief-justice; the colonists became disheartened at the prospects of the enterprise, and the settlement was abandoned.

This attempt to establish a colony on the coast of Maine sprang from a desire on the part of English merchants to have a permanent base in New England for the better prosecution of the shore fisheries. Great credit is due to Sir Ferdinando Gorges for his interest in American colonization. He was an Episcopalian, a firm friend of the Stuarts, and a member of the Plymouth Council. His immediate objects were to establish fisheries, to erect saw-
34 mills, and to open communication with the Indians. "It may be admitted that his purposes were entirely personal, and that he aimed solely to acquire wealth; but still, whatever were his motives, the voyage of Challon, in 1605; the enterprise of the Pophams and the Gilberts to the Kennebec, the following year, in which he had an interest; the

voyages for fishing and trade of Richard Vines, his agent, steadily pursued for years in a ship purchased with his own money; the adventure of Dermer to the island of Monhegan, under his auspices in 1619; the aid he offered to Sir William Alexander, in 1621, to procure the patent of Nova Scotia; the grant obtained by John Mason and himself to the country between the Merrimac and Kennebec rivers, in 1622; and the subsequent grant in his own individual right, to the territory between the Piscataqua and Kennebec, . . . were all beneficial to New England, and hastened its settlement." The policy of Gorges has been described as one of peace and good-will, and he himself has been styled the Father of New England Colonization.

English traders and fishermen appeared on the coast of Maine with a strong force in 1611. There seem to have been scattered settlers in the region of Pemaquid, and doubtless the fur dealers had agents in this region who lived there the year round. Three years later the New England coast was visited by the father of the Virginia Colony, Capt. John Smith. He touched the coast near the Penobscot River, explored the bays and harbors, visited Cape Ann, Cape Cod, Massachusetts Bay, entered Saint John's Harbor and changed its name to Plymouth, and gave to this whole region the beloved name of New England.

Smith had printed in London, in 1616, "A Description of New England" which was "writ with his oune hand," and, together with maps of the region, was distributed throughout the western counties of England. In this account of his voyages Smith pays considerable attention to the condition of the fisheries, entering into elaborate details. He tells us that they were successful in taking 17,000

fish in the vicinity of Monhegan Island, although their intentions had been to "take whales, and make trials of a mine of gold and copper." The better quality of the fish of this catch were sold in England for "five pounds the hundredth, the rest by ill usage betwixt three pounds and fifty shillings." Another ship stayed on the coast to fit herself with dry fish, which later sold at a good price in Spain. Smith makes the prediction that the fisheries of New England would prove a greater treasure than the gold and silver mines of the king of Spain. He goes on to draw a contrast between the relative advantages afforded by Newfoundland and New England in the fisheries, always with the advantage in favor of the latter region. His references to the fisheries of Newfoundland would lead one to infer that annually 800 sail of vessels were freighted with fish from that place.

The result of all these voyages and explorations, especially of those made since the opening of the seventeenth century, was directly influential in developing English fisheries in New England and in shaping and stimulating permanent colonization. . . . .

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64 Previous to the year 1650, the colony of Plymouth had permitted the inhabitants of Hull to seine for fish at Cape Cod. Some irregularities took place at the Cape about this time and the colony took the matter into their own hands. Mr. John Stone was forbidden to fish longer in that region. On the other hand, permission was given to three residents of Plymouth, and to others from Plymouth, Nauset, or Duxbury who should join them, to engage in the bass fishery at Cape Cod , and to use wood as they might need. The next year the privilege was given to the same persons and to William Bradford for three years'

time. The regulations provided for the establishment of two companies only to engage in the fisheries there. The fisheries of Cape Cod were carried on by the Plymouth Colony, usually by annual leases, until the union of the colony with Massachusetts Bay in 1692. During the greater part of the period they were subject to continual annoyance from the Massachusetts fishermen. When the colonies became united, the inter-colonial troubles ceased.

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72 The relations between the fishermen of New England and their French neighbors were critical and hostile. A brief explanation of the political conditions at the time will readily account for this animosity. Acadia was the scene of strife, partly because of the excellent fisheries in its waters that each party wished to monopolize, partly because the land had been held alternately by each country, either through seizure or concession. When Acadia passed into the possession of France in 1667 the bounds of the province were not clearly defined; the English claimed that the western boundary was the Penobscot River, the French laid claim to the land as far west as the Kennebec River. Consequently, the region was again open to strife and quarrels between the two classes of fishermen. The French took pains to embitter the Indians against the English; and in several instances used the Indians as their allies in making attacks upon the settlements, especially in the frontier region between the Merrimac River and Pemaquid. This stretch of the coast of Maine was the scene of atrocious warfare during the forty years that followed.

De Bourg, the French governor of Acadia, in 1675, not only prohibited his people from intercourse with the Protestant fishermen, but also levied a tax of four hundred codfish on every English colonial vessel found fishing on

the coasts of Acadia. the French officers seized all who did not pay the fine, and took from them whatever fish they had aboard, together with the provisions and outfits. Two years later, about twenty fishermen from Salem were
73 captured on the coast of Maine by the Indians. In the fight that ensued, several men were killed and a score were wounded. When news of the engagement reached Salem, a large vessel was fitted out and sent to recapture the boats and men; but the natives, plundering and abandoning the ketches, left before their pursuers could do them harm. "In the lapse of a few years," says Sabine, "the fishermen at Cape Porpoise were either slaughtered or driven off, and the settlement there laid desolute; a fishing smack was intercepted near Portland, three of her crew killed, and the remainder carried into captivity; eight fishing vessels were captured at the Fox Islands; the coast for more than a hundred miles was abandoned, and the wretched men who depended upon the sea for support, without shelter, and too scattered for concert and resistance, were compelled to suspend their employments."

It had now become evident to the thoughtful people of New England that the only way to secure the peaceful prosecution of their fisheries along the coasts of Maine and Nova Scotia was by the expulsion of the French. The accession of William and Mary to the throne of England brought on war between that country and France. The struggle was taken up by the colonists on this side. Sir William Phipps, a native of Maine, led an expedition against Nova Scotia in 1690, which he succeeded in capturing from the French. The victory was fruitless, however, as the province was re-taken by the French the next year.

The French, realizing the importance of the American fisheries, renewed their efforts to retain hold upon their colonies. Under the leadership of Baron de Castin, a trading fort was established at the mouth of the Penobscot, now the town of Castine. The French officials and Jesuits

74 enlisted the sympathy and services of the Indians, who assisted them in carrying on their depredations against the English colonists. The fort at last was taken by Iberville and Castine in 1696, thus extending the frontier of the French dominion into the heart of Maine, and putting to an end, for a time, the fisheries in that region. This condition of affairs emphasized rather than weakened the conviction in the minds of the New Englanders that the French should be driven from the North Atlantic coast of America.

By the treaty of peace at Ryswick, in 1697, the French retained possession of the whole coast, islands and fishing grounds, from the Penobscot River to beyond Labrador, with the exception of the eastern half of Newfoundland, which was held by the English. The country lying between the Penobscot and Kennebec Rivers was left in dispute, but it was claimed by the French in spite of the fact that no settlements had been made there to substantiate their claim.

The evil effects of the treaty were soon manifest. Scarcely a year had elapsed before the French laid claim to the sole ownership of all the fisheries. The king of France sent over an order for the seizure of all vessels other than French found in Nova Scotia waters. A rigid enforcement of this order was attempted. Bonaventure, of the ship-of-war *Envieux*, boarded and sent home every English colonial vessel found trespassing within his jurisdiction. From Villabon, governor of Nova Scotia, came an official despatch to Massachusetts that he had received instructions from his royal

master to seize every colonial fisherman found east of the Kennebec River.

At the end of the century the strife between the French and English "for the monopoly and the mastery" of affairs in America had no immediate prospect of settlement. Of the two, the French had the advantage. They laid claim to all the fishing grounds between Maine and Labrador. The only fisheries that were open and free to the English subjects were those of the eastern half of Newfoundland and that part of New England between the Kennebec River and Long Island Sound. . . .

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During the course of their development in the eighteenth century the fisheries of New England attained a commanding position in commerce, in legislation, and in international affairs. In extent and value, the fisheries reached their culmination at the outbreak of the Revolutionary War when over a thousand vessels gave employment to upwards of ten thousand men. For three score years they played an active and aggressive part in the struggle between England and France for mastery in North America, indirectly by keeping England awake to the necessity of securing the provincial fishing grounds for her own subjects; directly, by the capture of Nova Scotia and the taking of Louisburg, the stronghold of France in America. When the common foe had been driven from the field the colonies and the mother country turned upon each other. The colonies openly violated measures that were passed prejudicial to their interests. England looked upon her colonial subjects as means for developing her industries and influence at home, she attempted to enforce her laws upon the people of America, and, failing in that, passed a law that was

designed to cripple the commerce of New England and to drive her fishermen from the sea.

The beginning of the reign of Queen Anne found France and England involved in a new war. One of the causes of the struggle was the claim of France to a part of Maine and to the whole of the fishing grounds from the Kennebec River to Labrador. The French seemed determined to
79 defend all their claims. They had between 400 and 500 vessels engaged in the fishery; they were well armed; they outdid their competitors in the quantity of fish that they caught, claiming, at the opening of the century, that their catch of codfish was equal to the supply of all continental or Catholic Europe; their fishermen were first in European markets, and their fish sold at a larger profit than that of their rivals. The outlook for England to retain what few fishing privileges she possessed in America was nearly as dubious as was the prospect that she could regain in war the advantages that had been lost through shameful treaty.

The people of New England, feeling keenly the loss of a province that had been won very largely by their valor, and stirred to action by the loss of the privilege to fish upon the Acadian fishing grounds, needed little urging from the mother country to enter heartily into the contest. They employed armed vessels of their own; they swept the coast of Nova Scotia; they equipped a fleet at Boston and twice attempted the conquest of that province; and they furnished four battalions of fifteen hundred men and thirty transport vessels to Nicholson when, in 1710, he captured Port Royal, thus finally winning Nova Scotia as a province under the crown of Great Britain.

Peace was concluded by the treaty of Utrecht in 1713. By this treaty the British statesmen attained, or supposed that they had attained, what had been their ambition for many years, – the supremacy in the fisheries of the American seas. All Nova Scotia, or ancient Acadia with its boundaries, was made over to the Queen of England and her successors. The French were excluded from fishing on the coast of that province or within thirty leagues of it, from Sable Island to the southwest. Newfoundland with the adjacent islands came wholly into the right of Great Britain, as did Hudson Bay with its borders. On
80 the other hand, the French were given possession of, and the right to fortify, the Island of Cape Breton and all other islands both within the mouth of the Gulf of Saint Lawrence and in the Gulf itself. At Newfoundland they were allowed to catch fish and to dry them on land from Cape Bonavista to the northern point of the island, and thence down the western coast as far as Point Riche. They were prohibited from settling or fortifying any place on the island of Newfoundland.

When all things are considered one must conclude that the treaty was greatly to the advantage of Great Britain. If adhered to strictly, it meant that the fishermen of New England would secure a monopoly of the fisheries of the coast of Maine, the Bay of Fundy, and the shore and bank fisheries of Nova Scotia, with equal chance to compete with French fishermen in all other fisheries. The narrow limits of the French possessions would result in a serious curtailment of their fisheries. Butter opposition, however, was aroused in England because France had been given any privileges whatever in American waters. Lord Oxford was impeached because he dared to advise his sovereign that

"the subjects of France should have the liberty of fishing and drying fish in Newfoundland."

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99 When the time came for determining conditions of peace in 1763 there was a strong party in England opposed to granting to the subjects of France any privileges in Amer-
100 ica. The causes for so determined an attitude are not difficult to be seen. Time and time again France had been the favored party in negotiations referring to rights and privileges in North America. Beginning with the treaty of Saint Germain, in 1632, concessions were made favorable to the subjects of France. These were continued by the terms of the treaty of Breda, in 1667, confirmed by the treaty of London twenty-one years later, increased by that of Ryswick, in 1697, and so changed by the treaty of Utrecht that French fisheries, instead of being seriously curtailed, actually increased under its provisions during the half-century preceding the close of the Seven Years War.

The prosperity of their rivals was viewed by the fishermen of New England and Great Britain with envy and with dread. The record of their own military triumphs in Nova Scotia, Cape Breton and Quebec made the New Englander feel that the French were privileged to enjoy what by right of conquest should have belonged to them fifty or more years previous. Their recent success in the Gulf of Saint Lawrence had demonstrated clearly the true value of those fishing grounds and served to increase the feeling of resentment. But beyond the question of justice

and economy was the more significant one of permanent menace. The people of New England never could feel safe in pursuing this industry of the sea nor could they be assured of its continuance as long as the French remained in permanent possession of the land and much of the sea in regions adjoining their own, on the north and east. The colonists had hoped for more than a half-century that the idea of excluding the French from North America might prevail in English politics. England at heart hoped for the same, but heretofore her continental interests had led her always to sacrifice the welfare of her colonies in America when settling accounts with France. From the Stuarts
101 down to the American Revolution it was the policy of England not only to neglect but even to oppress and restrain the commerce and navigation of New England. The continued neglect of the colonists' interests and the strong protests of the people served to arouse and maintain a sentiment in England for the exclusion of the French from America.

The terms of the treaty were extremely harsh towards the French. By a stroke of the pen France transferred her empire in America to the crown of Great Britain. She lost forever the control of the vast region extending from the mouth of the Mississippi to the Rockies, northward to the Hudson Bay region, and eastward to the Alleghenies, through the valley of the Saint Lawrence, and out to the shores of the Atlantic. The only territory retained by France was the small islands of St. Pierre and Miquelon, situated on the Newfoundland coast. The labors of Champlain, Hennepin and La Salle in establishing a mighty French power in America were set at naught in a single day. Added to the losses of power and territory was the serious curtailment of her fishing privileges. Henceforth

France was practically excluded from shore fisheries at Nova Scotia, Cape Breton Island, the islands of the Gulf of Saint Lawrence and the southern coast of Newfoundland. The three league limit applied to the Gulf of Saint Lawrence would exclude the subjects of France from its richest shore fisheries, leaving them only the deeper waters of that inland sea.

The dreams of France for supremacy in America were over, her hopes for a monopoly of the fishing industries were shattered. The ravages of war, the loss of territory, and the restraint placed upon her fisheries were too powerful agents for her merchants and fishermen to combat successfully. France never again regained her prestige in American waters, although she had 250 vessels employed at Newfoundland in 1768.

* * *

113 Lord North recognized the great importance of the fisheries to the New England people; and he made it plain in his bill that he could conceive no quicker or surer method of securing obedience to British laws than to strike directly at the corner-stone of New England industries. The conditions of the bill that referred to the fisheries were very explicit. All vessels and ships which were the property of persons living in New England were prohibited from carrying on the fisheries upon the banks of Newfoundland, on the coast of Labrador, within the Gulf of Saint Lawrence, or upon the coasts of Cape Breton, or of Nova Scotia, or any other part of the coast of North America. The penalty for disobedience was forfeiture of the vessel, her cargo, apparatus and supplies. British war ships were encouraged to visit, examine and search all vessels suspected of carrying on these fisheries contrary to the provi-

114 sions of the bill. The prohibitions and restraints imposed by the act upon trade, commerce, and the fisheries of those colonies were to cease when it was made clear that the trade and commerce of his Majesty's subjects could be carried on without interruption.

Lord North supported his measure by declaring "that as the Americans had refused to trade with Great Britain, it was but just that they should be deprived of the right to trade with any other nation. In particular, he said that the fisheries upon the Banks of Newfoundland, and the other Banks of America, were their (Great Britain's) undoubted right, and that, therefore, such disposition might be made of them as the government pleased. The two houses, he continued, had declared that a rebellion existed in Massachusetts, and that it was just to deprive that province of its fisheries; that though a government still existed in New Hampshire, the royal authority was weak, that a quantity of powder had been taken out of a fort there by an armed mob; and that, besides, the vicinity of that province of Massachusetts Bay was such, that if it were not included, the purpose of the act would be defeated. . . .

* * *

115 For the opponents, Dunning was of opinion that the Americans had a right to the banks of Newfoundland, that there was no rebellion in Massachusetts, but even if so, he failed to see why New Hampshire, Rhode Island and Connecticut should be punished for acts of another province. He declared that "the ministry were the best authors for a receipt to *make* rebellion."

Governor Johnstone said that the measure was absurd and cruel, that the project to starve a whole people, except such as the governor should think proper to favor, was inhuman; the God of nature had given these fisheries

to *New* England and not to *Old* England; his long experience in the British navy had taught him that it was a constant practice of the service for the British cruisers to share the fishing craft of an enemy's coast, thinking it savage and barbarous to deprive the miserable inhabitants of the seacoast of their daily food and the means of procuring it.

* * *

Maine *et al.* Ex. No. 721

Maine Historical Society,
***Collections,* Vol. V, pp. 75-81 (1857).**
Instructions for the Settlement of Pemaquid

* * *

77 It shall not be Lawfull for any Vessells Crew that belongeth not to the Government to make a Voyage in the Government, except he hath an house & staye within the Government on penalty of forfeiture of paying for makeing his voyage.

It shall not be lawfull for any Vessell or Vessells that do not belong to this Goverm' to make an herring Voyage at Mount Niles (?) or any other place within this Government upon penalty thought fitt by you.

It shall not be lawfull for fishermen to keep any more dogges then one to a family on such penalty & forfeiture as shall be thought fitt by you.

* * *

78 That all Vessells out of any Government if they com to trade or fish shall first enter at Pemaquid or the places appointed & that they shall not goe into any other Harbour except by stress of Weather but first to Cleare & give an Account of their design & not to break bulk before they have so Cleared & then proceed to trade or fish as license or permitt may be granted on penalty.

That no Vessell or boates Crew shall break bulk or dispose of any fish till the first of June on penalty.

* * *

Maine *et al.* Ex. No. 722

Malynes, Gerald, *Lex Mercatoria: Or, The Ancient Law-Merchant*, p. 2 (1686).

* * *

2 Princes and Potentates by their Prerogatives (respecting the Law of Nations) do permit amongst themselves a free travelling by land through their several Kingdoms, Territories, and Dominions, unless they be open enemies: they hold likewise a community of the Seas for Navigation, as also a distinct dominion of the Seas adjoyning to the Territories and Jurisdiction of their countries, they take Custom, Subsidies and all manner of Imposition upon the commodities imported and exported out of their Harbours, Havens, and Ports, as also for the fishing in their Seas, Streams and Dominions; of all which the Merchant is to take especiall notice, to avoid danger in the Traffic and Trade with their Subjects, for non-payment of the same, which they claim *jure gentium*.

* * *

Maine *et al.* Ex. No. 726

Molloy, Charles, *De Jure Maritimo et Navali: Or A Treatise of Affairs Maritime, and of Commerce*, Vol. 1, pp. 72-73, 82-83, 102-31 (1769).

* * *

83 XI. Piracy committed by the Subjects of the *French* King, or of any other Prince or Republick, in amity with the Crown of *England* upon the *British* Seas, is punishable properly by the Crown of *England* only, for the Kings of the same have *isiud regimen & dominium exclusive* of the Kings of *France*, and all other Princes and States whatsoever.

* * *

103 II. That Princes may have an *exclusive property in the Sovereignty of the several parts of the Sea, and in the passage, Fishing and Shores,* is so evidently true by way of fact, as no man that is not desperately impudent can deny it;
104 the Considerations of the general *practice* in all Maritime Countries, the necessity of *order* in mutual Commerce, and the *Safety* of mens persons, goods, and lives, hath taught even the most *Barbarous Nations* to know by the Light of *human Reason,* that *Laws* are as equally necessary for the Government and Preservation of the Sea, as those that negotiate and trade on the firm Land; and that to make *Laws,* and to give them the *Life* of Execution, must of necessity require a *supream Authority;* for to leave every part of the Sea and Shores to an *arbitrary and promiscuous Use,* without a correcting and securing Power in case of wrong or danger, is to make Men in the like Condition with the Fishes, where the greater devour and swallow the less.

* * *

109 VIII. Now the Duty of the Flag is no more but a consecutive acknowledgment that the *Right* and *Dominion* of the *British Seas* (not as a bare *Honorary Salute* or *Ceremony,* but as an *absolute Sign* of the Right and *Sovereignty* of those *Seas* where they are obliged to strike Sail; are in him to whose *Flag* they veil, and pay that duty to; and in substance is no more, but that the King grants a general Licence for Ships to pass through his Seas, that are his Friends, paying that obeisance and duty, like those services when Lords grant out Estates, reserving a *Rose* or *Pepper-Corn,* the value of which is not regarded, but the

remembrance and acknowledgment of their *Benefactor's Right* and *Dominion.*

* * *

118 XIII. This being the *value* which this Nation did always place upon the *Right of the Flag,* the which they never did regard only as a Civility and Respect, but as a principal Testimony of the unquestionable Right of this Nation to the Dominion and Superiority of the adjacent Seas, acknowledged generally by all the Neighbour *States* and *Princes of Europe,* and must be paid and acknowledged
119 by all *Princes* in the *World,* that shall be, or pass on the same.

The Effects of this *Dominion Universal,* or *Sovereignty* which accrue to a *Prince* are these:

1. Not only the Regality of the fishing for Pearl, Coral, Amber, &c. but likewise the Advantage of all Fish Royal, as Whales, Sturgeon, &c. and not only those, but also the direction and disposal of all other Fish, according, as they shall seem to deserve the regards of the Publick, as in *Spain, Portugal,* &c. is used.

2. The prescribing of Laws and Rules for Navigation, not only to his own Subjects, but unto others Strangers, whether they be Princes of equal strength and dignity with himself, or any way inferior. Thus the *Romans* did confine the *Carthaginians* to equip out no Fleets; and forbade *Antiochus* to build any more than twelve Ships of War: And if Tradition informs me right, Queen *Elizabeth* inderdicted the then *French* King to build any other or more Ships of War than what they then had, without her leave first obtained. The *Athenians* prohibited all *Median* Ships

of War to come within their Seas, and prescribed to the *Lacedemonians* with what manner of Vessels they should sail. All Histories are full of such Precedents, which Princes have enacted, either upon Agreements enforced upon the Conquered, or Capitulations betwixt them and others (their equals or inferiors) for mutual Conveniences.

3. The Power of imposing Customs, Gabels, and Taxes upon those that navigate in their Seas, or otherwise fish therein; which they do upon several rightful Claims, as protecting them from Pirates, and all other Acts of Hostilities, or assisting them with Lights and Seamarks; for which advantages common Equity obligeth those that reap benefit thereby, to repay it with some acknowledgment, which ought to be proportioned according to the favour received, and the Expence which the Prince is at to continue it unto them.

4. As it is incumbent on a Prince duly to execute Justice in his Kingdoms by Land, so the Sea being his Territory, it is requisite and a necessary effect of his Dominion, that he cause Justice to be administred in case of Maritime Delinquencies.

5. That in Case any Ships navigate in those Seas, they shall salute his floating Castles, the Ships of War, by *lowering the Topsail, striking the Flag* (those are the most usual Courses) in like manner as they do his Forts upon Land; by which sort of Submissions they are put in remembrance, that they are come into a Territory, wherein they are to own a Sovereign Power and Jurisdiction, and receive Protection from it.

These are the proper Effects of a real and absolute Sovereignty over the Seas; which how they are possessed by the *Venetians*, this ensuing Account will declare.

* * *

124 XIV. The *Maritime Dominion* by the *Laws of England* were always accounted the *Four Seas;* such as are born thereon are not *Aliens,* and to be within them is to be within the *Ligeance* of the *King* and *Realm of England.*

* * *

126 XV. The Importance of the Dominion of the Sea unto this Nation, is very great, for on that alone depends our Security, our Wealth, our Glory; from hence it is, that
127 *England* hath a Right to all those Advantages and Emoluments, which the *Venetian* Republick draws from the *Adriatick* Sea, where the Ships of the *Grand Signior,* of the *Emperor,* King of *Spain,* and *Pope pay* Customs, to maintain those *Fleets,* which give Laws to them within the *Gulph;* 'tis hereby that the *English* can shut up or open these Seas for Ships or Fleets to pass or repass them; whereto Queen *Elizabeth* had so special a regard, that when the King of *Denmark* and the *Hansiatick* Towns sollicited her Majesty to permit them free passage, they transporting Corn into *Spain,* she refused them; and when a *Protestant Fleet of Hamburgers* and others, had presumed to do so, notwithstanding her prohibition, she caused her *Naval Royal* to seize, take, burn, and spoil them, when they were passed her Maritime Territory, within sight of *Lisbon;* yielding this reason for her justification, That they not only relieved her enemy with provisions, but "had presumptuously made use of her Seas, without obtaining her Royal Permission for so doing:" 'Tis from hence, that the Crown of *England* can justly demand an account of any Ship or Ships occurring in those Seas, what their Business, and what their Intentions are; and prohibit any Prince or Republick to enter there with potent Fleets, without pre-acquainting his Majesty, and ob-

taining his Royal Permission; without which Dominion and Sovereignty, *England* can never live secure on shore; it being easy for any Foreign Fleets to amuse us with specious pretences, and in their passage to invade and surprise us. . . .

* * *

Maine *et al.* Ex. No. 728

Moore, Stuart A., *A History of the Foreshore and The Law Relating Thereto with a Hitherto Unpublished Treatise By Lord Hale, Lord Hale's "De Jure Maris," and Hall's Essay on the Rights of the Crown in the Sea-shore*, pp. xxvii-liv, 20-21, 41, 50-53, 69-70, 95-96, 110, 139-40, 180-84, 233, 260-65, 668-75, 708-59, 865-69, 908-15 (3d ed. 1888).

* * *

110 In the Public Records of the reign of Edward I, and especially in the inquisitions post-mortem, there will be found many records shewing that sea fisheries and ports and the soil of the foreshore were parcel of many manors round the coast. Space does not permit of a detailed description of them in this work, but they, together with the records hereinbefore described, go to shew that at any rate a very large proportion of the foreshore of the kingdom, if not the whole of it, except in the King's demesne manors, has been granted out subject to the rights of the public and the jurisdiction of the Crown.

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[The following portions of Exhibit 728 are extracts from Robert Hall's *Essay on the Rights of the Crown in the Sea-shore*, (1875 ed.) with Moore's editorial comments.]

668 Over the British seas, the King of England claims an absolute dominion and ownership, as Lord Paramount, against all the world. Whatever opinions foreign nations may entertain in regard to the validity of such claim, yet the subjects of the King of England do, by the common law of the realm, acknowledge and declare it to be his ancient and indisputable right.

This dominion and ownership over the British seas, vested by our law in the King, is not confined to the mere usufruct of the water, and the maritime jurisdiction, but it includes the very *fundum* or soil at the bottom of the sea. "The sea is the King's proper inheritance," and he is "Lord of the Great Waste," both land and water; "*tam "aquae quam soli.*" Selden, in his celebrated treatise on the Dominion of the Seas, would seem to contemplate this ownership of the King, as combining both jurisdiction and ownership; the one, indeed, would seem to involve the other, if Selden's doctrine to its full extent be admitted.

There are eminent writers upon natural and upon national law, who have controverted Selden's doctrines, and have denied the King of England's exclusive dominion, and consequently his ownership over the British seas; but however this may be, and probably will ever continue, *vexata quaestio* between such writers, we know that the
669 writers on the common and municipal law of England, as well as the decisions of our judicial courts, all speak the same language, and appropriate the dominion of the British seas *tam aquae quam soli*, to the King.

This dominion not only extends over the open seas, but also over all *creeks, arms of the sea, havens, ports*, and *tide-rivers*, as far as the reach of the tide around the coasts

of the kingdom. All waters, in short, which communicate with the sea, and are within the *flux* and *reflux* of its tides, are part and parcel of the sea itself, and subject, in all respects, to the like ownership. This is abundantly proved by the cases hereinafter referred to, where the public *right of fishing* in the creeks, arms of the sea, havens, ports, tide-rivers, &c., of the kingdom has been, in many instances, established upon the principle that they are *part of the sea*, and of the King's dominion, and as such, liable to the common law right of the subject to fish therein; of which right we shall, in a future page, take notice. (*h*)

670 Lord Hale, in the treatise ascribed to him, aptly compares the King's property in the sea and tide-rivers, creeks, &c., to the ownership of lords of manors in the common or waste lands of the manor. The soil and freehold of the

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(*h*) [The soil of the sea, estuaries, and navigable rivers, within the British dominions, was originally in the Crown, and remains so still, except in those cases where it can be proved to have legally passed into the hands of private persons. Phear on Rights of Water, p. 41. See Malcolmson *v.* O'Dea, 10 H. of L. Cases 593; R. *v.* Stimpson, 32 L.J. M.C. 208; Att.-Gen. *v.* Chambers, per Alderson, B., 4 De G.M. & G. 206, S. C. 23 L. J. Ch. 665; Blundell *v.* Caterall, per Bayley, J., 5 B. & Ald. 304; Carter *v.* Murcot, 4 Burr. 2164; but subject to the right of passage over them, see Gann *v.* Free Fishers of Whitstable Co., 11 H. of L. Cases 192, S.C. 20 C. B. N.S. 1 and 35 L.J.C.P. 29; Colchester, Mayor of, *v.* Brooke, 7 Q.B. 339, S.C. 9 Jur. 1090. In England (where it has not been granted away—Ed.) it is held to be the property reserved to the sovereign; but in Scotland it is presumed to be granted as part and pertinent of the adjacent lands, under the burthen of the Crown's right as trustee for the public uses. Bell on Law of Scotland, 5th edit. 251. See Duchess of Sutherland *v.* Watson, 6 Macph. 199, Jan. 1863. (See Scotch cases, *ante*, p. 573.—Ed.) . . . .

671 waste belong to the lord, but subject to certain rights of the manorial tenants; such as common of pasture, piscary, turbary, ways, &c., claimed and enjoyed by them, by the custom of the manor, in and out of such waste lands. So the king is lord of the great waste of the sea, subject to certain beneficial rights and privileges of fishing, navigation, &c., immemorially enjoyed by his subjects therein, by the custom of the realm, which is the common law.

The title of the King of England to the land or soil *aqua maris cooperta*, is similar to his ancient title to all the *terra firma* in his dominions, as the first and original proprietor and lord paramount. It is a fundamental principle of our laws of property in land, that all the lands in the realm belonged originally to the King; and, according to the feudal principles of our ancient laws of tenure, the landowners of England are, to this day, *tenants* to the King, holding their lands of him, as their lord paramount.

672 That part of the land which the King and his ancestors *have never granted out to the subject*, remains to the King, as his *demesnes*, in absolute ownership. The *terra firma* of England has become, almost entirely, the property (by grant and tenure) of the subject; but the *terra aqua maris cooperta* still remains to the King in wide and barren ownership.

* * *

709 The franchises, liberties, profits, and advantages derivable from the *sea*, may be considered as follows: –

1st. Fishing, *(o)* public and general, or private and several.

710 2nd. The use of the sea for the transportation of merchandise in traffic, and for ports, or for any other purpose of use or enjoyment to which it can be applied.

3rd. The perquisite of what in our law is called Wreck, *(p)* being the unclaimed ships and cargo wrecked on the shore.

The uses and profits of the *shore* are, – 1. Fishing; 2. Wreck, and its accompaniments flotsam, &c.; 3. Egress and regress, and right of Way, for the purpose of navigation, fishing, bathing, and other uses of the sea; 4. Ports; 5. The digging and carrying away its soil and materials for building, ballast, manure, &c.

Now, as we have already attributed the absolute ownership of the sea, and sea-shore, to the King, *ab origine*, – it

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709 *(o)* Whale, sturgeon, and porpoise, whenever and by whomsoever caught in the British seas, are the property of the Crown by royal prerogative. They each constitute what in our law is called a royal
710 franchise. Such franchises, however, were formerly granted away by the Crown to a subject; limited within certain districts, as a manor, hundred, &c. In Scotland, salmon seems to have been inter regalia. See Erskine's Principles.

(p) Wreck is also a royal franchise, and with the perquisites called flotsam, jetsam, and lagan, was formerly often granted within certain territorial limits to the subject, as within a manor, hundred, &c. 1 Bl. Com. 290.

The above regalia, or royal franchises, are possessed by the Crown, not in respect of the land or soil of the shore, or the ownership of the sea, but by the royal prerogative, in distinct and peculiar ownership.

711 might be thought that the above perquisites are absolutely his own, and grantable exclusively to any one of his subjects. But according to the acknowledged law of the land, although the King is owner of this great waste, *yet the common people of England have regularly a liberty of fishing in the sea, and creeks and arms thereof, and in navigable rivers within the tides, as a public common of piscary.*

This public or general right of fishing in the sea, claimed by the subject, is a beneficial privilege enjoyed by British subjects, time out of mind. Whether, in fact, it was originally a public grant from the King, or whether it was a reservation by the people of such right, when they vested the rest of the property of the sea in him, or whether it be one of those natural and necessary rights which, like the air we breathe, has ever been free and unquestioned in enjoyment, is immaterial; for the conclusion is the same; *viz.* that such right of fishing has immemorially belonged to, and been enjoyed by the public, and that, in point of title, it is admitted to be held and enjoyed *by common right, i.e.,* by the common law, and custom of the Realm.

713 The use of the sea, *as a great high way,* for the transportation of merchandise, or any other purpose for which its waters can be usefully navigated, is also a liberty or privilege belonging of common right to the people of England, by the same title as the fishery.

But wreck, and royal fish, are royal franchises, belonging exclusively to the King, by the Prerogative of the Crown
714 or to individuals, deriving them, as an exclusive private possession from the Crown. For the present we will confine our view to the *fishery.*

715 The public right, or common of piscary, claimed and allowed by the common law to the people of England in the sea, extends, not only over the open sea, but over all bays, creeks, ports, havens, arms of the sea, and tide-rivers, up to the reach of the tide, and also, as it would seem, *over and upon the sea-shore itself,* for such kinds of fish
716 as are usually caught upon the rocks, and sands of the coast. But in some cases, statute law has set bounds to the exercise of this right, in respect of seasons, particular kinds of fish, and manner of fishing. There are also other excepted cases; *viz.* where private individuals, or Corporate bodies, claim and enjoy a separate fishery, in some particular places in derogation and exclusion of the general right. *(c)*

This divides the right of fishery into "communis pisca-

(c) (These cases are very numerous. The Editor has made a large collection of documents from the public records which shews the existence of several fisheries throughout the rivers and estuaries of the kingdom. The collection, though large, is by no means complete or exhaustive. There is, however, very little doubt that in ancient times, when fish both from fresh and salt water was an exceedingly valuable article of food, the rights of fisheries were jealously watched. Every non-tidal river was covered with several fisheries from the source to the tide, and in nearly all the tidal rivers there existed similar fisheries extending all over the tidal part of the river and far into the estuary, and in many cases they exist upon the open shore of the sea. A list of the places in which records are found of the existence of several fisheries both in tidal and non-tidal waters, with some remarks on this subject, is given in the Appendix II. at the end of this volume. Mr. Hall's remarks would lead the reader to infer that cases of several fisheries in the tidal water were as rare as cases of foreshore in the hands of the subject are according to his contention. The facts are precisely opposed to the inference he endeavours to draw. See the Appendix II.–Ed.).

717 ria," or the public common of piscary mentioned above, and the *several*, or *private* fishery belonging to particular owners, and excluding all other persons. The *several* fishery is claimed and enjoyed by *prescription*, or *ancient usage*, presupposing a grant, or by express grant from the Crown, anterior to Magna Charta. *(f)*

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(f) [In Allen *v.* Donelly, 5 Ir. C. L. Rep. 229, the petitioner claimed an exclusive right of fishing in an arm of the sea, and a public navigable river, and the petitioner prayed that he might be quieted in possession by an injunction. The respondent relied on the general common law right of fishery in the sea, but it was held that the Court had jurisdiction to entertain such a suit, and the petitioner need not be left exclusively to his common law remedy. In O'Neill *v.* Allen, 9 Ir. C. L. R. 132, the plaintiff in support of a claim to a several fishery in the open sea, proved an adventurer's certificate of the year 1666 acts of ownership by parties unconnected with the person found entitled to the fishery by the certificate, were proved from 1668 to 1701. No such act was proved from that date to 1798, but from 1798 to 1857 there was undisturbed user by the O'Neill family, from whom the plaintiff derived. It was held that a several fishery was rightly found, that the granting of a patent subsequently to 1668 might have been presumed; but that 17 & 18, Car. 2, c. 2, rendered such presumption unnecessary. Whether a several fishery is such a franchise as can be lost by non-user was not decided, but if it were, the absence of evidence of user from 1701 to 1799, did not amount to proof of non-user. (It has since been decided that a several fishery cannot be abandoned: Neill *v.* Duke of Devonshire, 8 App. Cas. 151.–Ed.). See also Little *v.* Wingfield, 8 Ir. C. L. Rep. 279; and 11 Ir. C. L. Rep. 63; Malcolmson *v.* O'Dea, 10 House of Lords Cases, 593. And, in the United States, the right of fishery may be granted by the States in the navigable waters in their borders, to individuals, provided the free use of the waters for purposes of navigation and commercial intercourse be not interrupted; I Kent Com. 489; Rogers *v.* Jones, I Wend. 237. An exclusive right, however, must be shown, and if

(continued)

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APPENDIX II.

Notes as to the Existence of Several Fisheries around the Coasts and in the Tidal and Non-tidal Rivers of the Kingdom.

As to the existence of a several fishery upon the sea-shore and in tidal rivers, Mr. Hall, *ante*, p. 716, in treating of the public right of fishing in the sea and tidal waters, says that the right is general, but that "there are also other excepted cases, *viz.* where private individuals or corporate bodies claim and enjoy a separate fishery in some particular places in derogation and exclusion of the general right." He gives three instances only, and would seem to treat several fisheries as he does express grants of foreshore. He is evidently under the impression that cases of several fisheries in the hands of a subject are infrequent and exceptional. In this he is wholly mistaken. The true fact is, as can be shewn from the records, that all, or almost all, tidal rivers and estuaries were in ancient times, and where the right still remains valuable still are, covered by several fisheries in the hands of the subject. The River Tweed is entirely covered by them; the Tyne also from its mouth upwards; the Aln, the Coquet, the Wansbeck, the Wear, and the Tees are in the same case; many of the manors on the Humber have several fisheries appurtenant to them; the tidal waters of the Ouse, Derwent, Ayre, Calder, and Don

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(f) (continued) it can be shown, it may be exercised exclusively, though the presumption is against it, unless a prescriptive right, or express legislative grant, can be given in evidence; for such right shall not be presumed, but the contrary, *prima facie*. Schuhe, 70. See Commonwealth *v.* Charlestown, 18 Mass. (I Pick.) Rep. 180; Storer *v.* Freeman, 6 Mass. R. 435; Delaware and Maryland Railway Co. *v.* Stump, 8 Gill & J. (Md.) 479; Day *v.* Day, 4 Ind. 262. See also Angell on Watercourses, p. 70, 6th edit.

were covered by several fisheries appurtenant to or parcel of the manors on the banks; the case is the same with respect to the Trent, Witham, the Welland, the Nene, the Ouse, the Cam, the Aire, the Wavency, the Stour, the Colne, the Blackwater, the Crouch, the Thames on the coast of Essex, the Swale, the Christchurch Avon, the Exe, the Teign, the Dart, the Tamar, the Fal, the Severn, the Wye, the Dee, the Mersey, the Ribble, the Lune, the Eden, the Derwent, and the Solway Frith. If reference were made to the
909 grants and records relating to manors situate upon tidal rivers and estuaries there is no doubt that several fisheries would be found to be parcel of every one of them. With regard to fisheries upon the open sea-coast it is clear that they existed from the earliest time. Magna Carta, c. 23, which orders all kiddels to be destroyed throughout England, specially excepts those *per costeram maris;* and Hale remarks that "this exception of weirs upon the sea-coast, and likewise frequent examples, make it appear that there might be such private interests, not only in point of liberty, but in point of propriety, on the sea-coast and below the low-water mark, for such were regularly all weirs." The records shew that these several fisheries existed all round the coast, the lords of the manors having weirs placed upon the foreshore wherever the shore was suitable for that kind of fishery; kiddel fishing was universal throughout the open shore of the county of Essex. The Quo Warranto Rolls and the Hundred Rolls shew numerous instances of such fisheries in the counties of York, Lincoln, Norfolk, Suffolk, Kent, and elsewhere; the entries relating to them have not been set out in the previous treatise, but several have been incidentally noted (see pp. 48, 49, 50, 52, 53, 54, 55, 57, 58, 59, 60, 64, 65, 79, 88, 89, 102, 103, 104, 109, 145, 146, 153, 154, 156, 160, 163, 164, 167); in fact, there

is practically no doubt that the whole foreshore of the kingdom wherever it was fit for fishing by weirs was covered by several fisheries. With regard to non-tidal waters there is no doubt whatever that in ancient times the whole of them were embraced in several fisheries as parcel of the manors which either abutted on or included the rivers.

The following very imperfect list refers to places in which fisheries are shewn to have existed from notes of records in the Editor's collection. The list might be amplified if the inquisitions and extents of manors were inspected, the calendars of these documents not giving particulars as to fisheries. The Editor is fully conscious that this list is very imperfect, but it is here printed to shew that Mr. Hall's suggestion as to fisheries – *viz.*, that they are rare and infrequent in the hands of a subject – is as unfounded as his assumption that the foreshore had only been granted but in very exceptional cases.

* * *

Maine *et al.* Ex. No. 729

Moore, Stuart A., *The History and Law of Fisheries*, pp. xxxviii-xliii, 2-7, 12-14, 19-27, 32-36, 95-108, 178-87, 191-92, 199-202, 227-31, 284-85, 294-97, 374-77 (1903).

* * *

xlii In whatever way the right to create several fisheries in tidal waters arose, it is clear that in early times before the reign of Henry II, the power was extensively exercised, and several fisheries which are now in existence almost completely cover the whole of the tidal estuaries and many parts of the coasts of the kingdom. Textwriters deriving their knowledge only from decided and reported cases have

considered that these fisheries so granted were exceptional and few in number. This is a fallacy, for it can be shown by records that they existed in almost every piece of tidal water round the coasts which was naturally available for the
xliii profitable exercise of an exclusive fishery. Numerous several fisheries in tidal waters were in existence before the date of Domesday, and in non-tidal waters the fisheries appear to have been all appropriated to the lords of the manors.

* * *

35 1. EXCLUSIVE FISHERIES are those in which one has the sole and exclusive right of fishing, either by reason of the ownership of the soil and its profits, or because the right of fishing is derived from the owner of the soil. These fisheries, in both tidal and non tidal waters, are sometimes described as "several" and sometimes as "free."

Exclusive fisheries may be of two kinds – corporeal or incorporeal.

Corporeal, or, as they have been termed, *territorial* fisheries, comprise both the soil and the profit of the soil, *viz.*, the fishing. Such are – (a) fisheries worked by fixed engines, as weirs, kiddles, stake nets, bucks, &c.; (b) fisheries in the hands of the lords of manors of which they were originally parcel, or in the hands of grantees of the lords of manors when they have been granted out as entire fisheries comprising the soil and the fishing; (c) fisheries in gross granted by the Crown to monasteries, corporations, &c. Corporeal fisheries may be held in gross, or by copy of Court roll, or as parcel of a manor.

Incorporeal fisheries are those which have been granted without the soil thereunder. These may have been created

by grant of the Crown in the nature of a franchise (if any such exist), or by grants by the lords of manors or owners of the soil and fishing thereon, with a reservation of the soil to the grantors. Incorporeal fisheries may be held either in gross or as appurtenant to a manor or particular tenement.

* * *

178 In 1571 is the first instance of the protection of fishing-nets at sea (the statute 13 Eliz. c. 11). The Act enacts that, "for the avoyding of the lewde outrages commytted and done upon the sea coasts of Norfolk and Suffolk by the Catches, Mongers, and Picardes pretending to buy fresh herrings, and which do cut in sunder dyvers peeces of Fyshermen's news traveling the High Seas to take fresh Herrings, to the utter undoing of the said poore Fishermen." It was therefore enacted that "no ships, boats, or vessel called Catch, Monger, and Picarde" shall, between 14th September and 14th November, from sunset to sunrise, ancker on the mayne sea or in the Common Streame or Trade of fyshing where the fishermen use to dryve, upon pain of forfeiture of their ship and tackle, or the value thereof. Half the value is to be the King's, and half is to go to the bailiffs of Yarmouth to recompense the parties whose nets were cut and for the repair of the haven there.

In 1603 was passed the Act 1 James I. c. 23, relating to the Cornish pilchard fishery. This Act is still in force, and is printed hereafter.

In 1605 was passed the Act of 3 James I. c. 12, for the better preservation of sea fish. The preamble is interesting, as showing the view then taken as to the propagation of sea fish: "Forasmuch as it is certainly known by daily experience that the Brood of Sea fish is spawned and lieth in still waters, where it may have rest to receive

nourishment and grow to Perfection, and that it is there destroyed by Wears, Draw-nets, and nets with Canvas, or like engines, in the Middle or Bosom of them, in Harbours, Havens and Creeks within this Realm, to the great damage and Hurt of Fishermen and hindrance of the Commonwealth; for that every Wear near the Main Sea, taketh in Twelve Hours sometimes the quantity of Five Bushels, sometimes Ten, sometimes Twenty or Thirty Bushels of the Brood of Sea fish; and also those which use Draw-nets, nets with Canvas, or Engines in the midst of them, do every day they fish destroy the Brood of all the sorts of fish
179 aforesaid in great multitudes." It was therefore enacted that no one should set up any new wears along the Sea Shore, or in any Haven, Harbour, or Creek within five miles of the Mouth of any Haven or Creek, or should willingly take, destroy, or spoil any spawn, fry, or brood of any sea fish in any wear or other device; and no one was to fish within the above limits with any Draw-net or Drag-net with meshes of less than one and a half inches from knot to knot, except for taking Smoulds in Norfolk, or with any net with canvas or other device by which fry might be destroyed."

The Act was not to apply to nets for herrings, pilchards, sprats, or lavidnian, or to the Isle of Anglesey.

In 1662 the Act of 14 Charles II. c. 28, forbade the use of drift-nets, trammels, or stream-nets within a league and a half of the coast of Cornwall and Devon from the 1st June to the 30th November. This was solely for the protection of the pilchard Seine-net fishery. The Act also made it a penal offence to purloin pilchards from nets, boats, or cellars.

In 1670 was passed the Act of 22 & 23 Charles II. c. 25(e), entitled An Act for the better preservation of the game, and for securing warrens not inclosed, and the several fishings of this realm. It forbade any one to take fish without the consent of the owner in any river, stew-pond, mote, or other water. This was followed by more stringent measures in 1692. In that year the Act of 4 & 5 Will. & Mary, c. 23, forbade every person who was not the owner or occupier of a fishery for the time being to keep nets, rods, or other fishing implements. This was not to apply to the makers and sellers of such implements, nor to any fisherman or his apprentice lawfully authorised to fish in navigable rivers or waters with lawful nets and engines; but every one of them might (according to the laws and orders made and to be made or settled for the good order, rule and government of such navigable rivers and waters), use the trade of fishing.

In 1699 the Act for making Billingsgate a market for fish (10 & 11 Will. III. c. 24) prohibited the landing of lobsters that were not eight inches in length from the peak of the nose to the middle fin of the tail.

In 1714 the Act of 1 Geo. I. st. 2, c. 18, enacts that, as the breed and fry of sea fish has been of late years greatly prejudiced and destroyed by the using of too small size or mesh, and by other illegal and unwarrantable practices, no one shall use at sea, upon the coast of England, any trawl-net, drag-net, or set-net for catching any kind of fish except herrings, pilchards, sprats, or lavidnian, which has any mesh of less size than three and a half inches
180 from knot to knot, or which has any false or double

bottom, cod, or pouch. The Act also specifies the sizes of fish that may not be sold.

* * *

181 In 1771 was passed the Act of 11 Geo. III. c. 31, relating to herrings. Sections 11-13 are still in force.

In 1791 the Act of 31 Geo. III. c. 51, entitled An Act for better protecting of the several Oyster Fisheries within this Kingdom, was passed. It recites: "Whereas the maintaining and preserving the several oyster fisheries of this kingdom is a great national object, and whereas the laws now in being are not sufficient effectually to maintain and preserve the said fisheries and to prevent the destroying of the oyster brood." It therefore made it a misdemeanour for any person, not lawfully entitled, to fish with or use any net, trawl, dredge, or other instrument within the limits of any oyster fishery. This provision was not to apply to persons fishing for floating fish in the waters or creeks within the limits of any oyster fishery with any net adapted for catching floating fish only.

This Act was added to in 1808 by the Act 48 Geo. III. c. 144, which made it a felony to wilfully steal, take and carry away oysters or oyster brood, from any oyster bed or oyster laying, or oyster fishery, being the property of any person or body politic or corporate, and sufficiently marked out as such.

* * *

APPENDIX.

STATUTES.

[Note.–*The black figures in the margin indicate the pages on which the particular section is referred to.*]

9 HEN. III. MAGNA CHARTA. A.D. 1224.

C.16. – Nulla riparia decetero defendatur nisi ille que fuerunt in defenso tempore Regis Henrici avi nostri per cadem loca et cosdem terminos sicut esse consueverunt tempore suo.

No banks (rivers) shall be defended from henceforth but such as were in defence in the time of King Henry our grandfather, by the same places and the same bounds as they were wont to be in his time.

C.26. – Omnes kidelli decetero deponantur penitus per Tamisiam et Mede weyam et per totam Angliam nisi per costeram maris.

All weirs from henceforth shall be utterly put down through Thames and Medway, and through all England, except by the sea-coasts.

17 EDW. II., STAT. 1, c. 11.

Item habet warectum maris per totum regnum; wallenas et sturgiones captos in mari vel alibi infra regnum, exceptis quibusdam locis privilegiatis per Regis.

Also the King shall have wreck of the sea throughout the realm; whales and sturgeons taken in the sea or elsewhere within the realm, except in certain places privileged by the King.

* * *

229 11 GEO. III. c. 31.

An Act for the Encouragement of the White Herring Fishery. [1771.]

WHEREAS the carrying on and improvement of the British White Herring Fisheries are of great importance to these kingdoms, by increasing the trade and navigation thereof, and being a nursery for seamen, and otherwise a means of employing and providing for great numbers of industrious poor, provided that reasonable encouragement be given to such persons as are willing to carry on the said Fisheries: . . .

230

1-10. [Repealed by 31 & 32 Vict. c. 45.]

11. And . . . all and every person or persons employed in the said Fisheries may fish in any part of the British seas, and shall have and exercise the free use of all ports, harbours, shores and forelands in Great Britain, or the islands belonging to the Crown of Great Britain, below the highest high-water mark, ...

* * *

Maine *et al.* Ex. No. 730

New Plymouth Colony, *Records* (Nathaniel B. Shurtleff ed.), Vol. V. *Court Orders:* 1668-1678, pp. 62-63, 104, 244-45 (1856).

* * *

63 In answare unto the petition perfered to this Court by Mr. John Prince and Mr. Nathaniel Bosworth, of the towne of Hull, allies Nantaskett, in the behalfe of the said towne, to have libertie to imploy some boates and theire companies for the takeing of mackerell with netts, att the season thereof, att Cape Codd, this Court doth graunt unto them libertie for two boates and there companies, to take mackerell there att the season thereof; soe as they make payment of what is due to the collonie from forraigners, nothwithstanding any order of Court extant, prohibiting others to fish there. [1671].

* * *

104 An Order directed to Thomas Paine, the Water Bayley.

This Court being enformed that few or none of ours are like to fish att the Cape by saine, and that divers strangers desire libertie there to fish, these are therfore to impower you, in the behalfe of the Court, to give libertie to such strangers as shall desire there to fish, carrying orderly and paying such dues as by Court order is provided; and this shalbe youer warrant therin for this p̃sent season. [1672].

* * *

244 The country have sett and to farme lett theire priviledges and proffitts of fishing att the cape unto the Treasurer, Mr. Huckens, Mr. Gray, and Thomas Paine, for the terme of seven yeers from the date hereof, for and in consideration of the sume of thirty pounds a yeer, to be payed in currant silver mony, to be payed att or before the first of May yeerly. It is mutually agreed between the Court and the p̃tenors, that it shalbe improved by our

owne people, but incase they shall refuse, that then it shalbe att the libertie of the p̃tenors to admitt of any other, out of the collonie, to improve it with them; and the Court appoint Cornett Studson and Mr. Nathaniel Thomas to make leasses to the p̃tenors, and to receive the countryes mony for it, for the countryes use, as it is due and payable.

244 To the intent that the townes of this govrment might have seasonable notice of the p̃mises, order was given by the Generall Court to the deputies of the severall townes of this jurisdiction, to acquaint theire townes that such as will fish att Cape Codd for mackerell, &c., should appeer att Plymouth, when the comittee appointed to settle the countryes debts should meet, which is to be on the second Tusday in August next after the date heerof, att which time those whoe have hiered the fishing there of the country wilbe p̃sent, to agree with them. [1677].

The fift of June, 1678. That the farmers of the fishing
245 att Cape Cod, and other privilidges there, according to theire indentures, may be secured from mollestation in what is leased out to them, it is ordered by this Court, that whosoever shall attempt to gett fish there without order, or otherwise molest such as are orderly by the farmers imployed there, any sayne heared out by intruders to gett fish there, and the fish by them soe taken, and any vessel, goods, or estate of any other kind shalbe seized for the collonies use, out of which all damage done there by such molesters, with all chargc that may arise therby, shalbe fully payed, and such seizures to be made by vertue of warrant from the Govr or some one of the Assistants.

June, 1678. It is ordered by the Court, that it shalbe in the libertie of the leassers of the privilidges of the cape

fishing, to admitt of the one halfe of the improvers thereof to be off any of the collonie of the Massachusetts, as they may see reason.

* * *

Maine *et al.* Ex. No. 731.

New Plymouth Colony, *Records* (Nathaniel B. Shurtleff ed.), Vol. VI. *Court Orders: 1678-1691*, pp. 18, 56, 102-03, 252-53, 31, 81, 132, 139-40, 218-19 (1856).

* * *

252 *At a Generall Court holden at Plimouth November 4th, 1690.*

* * *

ORDERED, that for the prevention of contests and suits by whale killers, –

1. This Court doth order, that all whales killed or wounded by any man & left at sea, sd whale killers that killed or wounded sd whale shall presently repaire to some prudent person whome the Court shall appoint, and there give in the wounds of sd whale, the time & place when & where killed or wounded; and sd person so appointed shall presently comitt it to record, and his record shall be allowed good testimony in law.

* * *

3. That whatever person or persons shall cut up or deface any whale fish, by cutting, stabbing, or launcing, after come on shore or at sea, if a drift, unless of necessity to towe it to shore, before it hath been viewed by the

person appointed thereto, and a record taken by him, shall
253 lose their right to said fish, & pay a fine of ten pounds to the county. And sd viewers shall seize sd fish for the owners use, or the effects thereof, and sd viewer shall have power to make a deputy or deputies under his hand, and to have six shillings for [each] whale so viewed & recorded of the owners thereof.

4. That whosoever finds, takes, or cuts up any drift whale found on the stream, a mile from the shore, not appearing to be killed by any man, shall be the x first sieze and secure them, paying an hogshead of oyle to ye county for every such whale.

* * *

139 *Att the Generall Court held att New Plymouth, July the fourth, 1684.*

Mr. William Clarke, of Plymouth, came into the Court and tendered, that if this Court would make a law to prohibitt the catching of mackerell with saines in any p̃te of this collonie, hee would and did engage to the Court that hee would give and pay unto the Treasurer thirty pound pr annum, for seaven yeares, in currant New England mony, for the basse fishing att Cape Codd; wherupon this Court passed an order to prohibit sayning for mackerell, and ordered the Treasurer to make a lease to the said Clark of Cape Codd, onely for basse fishing, seaven yeer, for the said sum of 30£ per annum.

* * *

140 This Court takeing into theire serious consideration the great damage that this collonie and our naighbours is likely

to sustaine by the catching of mackerell with netts and saines att Cape Codd, or else where neare any shore in his collonie, to the great destruction of fish, and to the discurragement of severall fishermen, –

This Court doth therfore enacte, and be it heerby enacted, by the authoritie therof, that noe pson or psons whatsoever, after the publication heerof, shall catch or draw on shore any mackerell, with nett or netts, sayne or saines, in any p̃te of this collonie; and if any pson or psons shall heerafter presume to catch any mackerell by setting or shooling any nett or sayne, every such pson or psons soe offending as aforsaid shall forfeite for his or theire said offence all such netts or saynes as shalbe soe improved, and all such mackerell as shalbe soe caught by him or them, and shall alsoe forfeite every such vessell, and all such vessells, or boates, as shalbe imployed therin, whether catch, sloop, or boat, as shalbe imployed in taking or carrying away any such fish, if att any time the pson or psons soe offending be taken within the govment, or the vallue therof, the one moiety to the collonie, and the other moyety to the informer, that shall procecute the same. . . . [1684].

* * *

Maine *et al.* Ex. No. 732

New Plymouth Colony, *Records* (David Pulsifer ed.), Vol. 11, *Laws: 1623-1682*, pp. 134, 220, 228-29, 233 (1861).

* * *

220 Wheras great Complaint is made of great abuse by reason of ffishermen that are strangers who ffishing on some of the ffishing ground on our Coast in Catches dresing and

splitting theire ffish aboard through theire Garbidg overboard to the great anoyance of ffish which hath and may prove greatly detrementall to the Countrey; It is ordered by the Court that somthing be directed from this Court to the Court of the Massachusetts to request them to take some effectuall course for the restraint of such abuse as much as may bee; . . . . [1668].

* * *

228 Wheras the Providence of God hath made Cape Code comodious for us for ffishing with saines; and some careles psons have anoyed the same by casting theire ballast neare the shore where such conveniency is; or by leaveing the Garbidge of ffish or dead ffish to lye there roting wherby such anoyance is; This Court doth therfore order that whosoever shall treaspas in any of the said kinds of Annoyance shall pay the sume of forty shillings to the Collonies use for every such default unto the pson that the Court doth appoint to looke after the same; alsoe this Court doth further order that whosoever of our Inhabitants that draw Mackerell on shore there; shall pay to the Collonies use sixpence p barrell for every barrell soe taken or the quantity that may amount to a barrell: and for every barrell or the quantitie therof soe taken by any fforaigners in the aforsaid place shalbe payed one shilling and sixpence to the Collonies use by the pson or psons that soe ffish there and att the begining of any voyage attempted there; the pson or psons soe doeing shall att the enterance on the voyage put in sufficient Cecuritie unto the pson appointed by the Court under this trust for the payment of the aforsaid sume or sumes; . . . . [1670].

* * *

Wheras wee have formerly seen Great Inconvenience of taking Makerell att unseasonable times wherby there encrease is greatly deminished and that it hath bine proposed to the Court of the Massachusetts that some course
229 might be taken for preventing the same and that they have lately drawne up an order about the same this Court doth enacte and order that henceforth noe makerell shalbe caught except for spending while fresh before the first of July. Annually on penaltie of the losse of the same the one halfe ot the Informer and the other halfe to the use of the Collonie; and this order to take place from the 20th of this Instant June;

* * *

233 It is enacted by the Court that the one halfe of the Excise due to the Country on the Mackerell to be caugt att the Cape bee henceforth abated: *viz:* that wheras it was twelve pence a barrell to our owne it shall henceforth be but sixpence a barrell from our owne and wheras it was formerly two shillings a barrell to fforraignors it shall henceforth be but twelve pence a barrell to fforraignrs; except any shall come in before the next Court and rent the said nrivilidge of Cape ffishing; . . . [1673].

Maine *et al.* **Ex. No. 734**

Osgood, Herbert L., ***The American Colonies in the Seventeenth Century,*** **Vol. 1,** ***The Chartered Colonies,*** **pp. 98-102, 376-79 (1904).**

* * *

478 Interest attaches to the experiment of Plymouth with a government monopoly in the mackerel fishery at Cape Cod, and also to the enforcement of its royalty over drift whales.

In 1646, when the excise was first enacted, a license fee was imposed on fishing at the Cape. In 1661 the rate for non-residents was fixed at 6*d.* per quintal. In 1670 inhabitants of the colony were required to pay 6*d.* per barrel for mackerel brought to shore there, and strangers, 1*s.* 6*d.* per barrel. A water bailiff was specially appointed to collect the impost and enforce the act. In 1677 the colony leased its privileges in this fishery for seven years at £30 per year. In 1684 the treasurer was ordered to lease the fishery for another period of years; and it was leased, though the con-
479 contract was broken by the lessor before the period had elapsed. For a time the trade to the Kennebec river seems also to have been leased by the colony, but the revenue from that source was temporary and very slight.

* * *

Maine *et al.* Ex. No. 739

Potter, Pitman B., *The Feedom of the Seas in History, Law, and Politics,* pp. 36-37, 48-81 (1924).

* * *

36 With the breaking of Roman power, the Mediterranean states which had exercised maritime dominion in previous years regained control over certain maritime areas near their territories. Pisa and Tuscany once more controlled
37 the Tyrrhenian Sea, and imposed tolls upon those entering its waters. The Genoese did likewise in the Ligurian Gulf. Venice – somewhat later – acquired a dominion of the Adriatic which was variously described by contemporary writers, as a "seignory," a "royalty," an "empire," and so on. It was said that they possessed "as full a jurisdiction

in the sea as in the city," that the neighboring gulf "belonged" to them. In various terms their lordship was described by many commentators, and Venice became a second Athens in her day, her maritime authority being admitted at one time or another even by Spain and the Empire.

* * *

Maine *et al.* Ex. No. 742

Sabine, Lorenzo, *Report on the Principal Fisheries of the American Seas*, S. Doc. No. 22, 32d Cong., 2d Sess., pp. 181, 184-91, 196-210, 214-15, 227, 269-89, 293-95, 303, 315-24, 354-55 (Jan. 15, 1853).

* * *

185 Sagacious men in New England had now seen for years that the expulsion of the French was the only measure that would secure peace in the prosecution of the fisheries, and they endeavored to enlist the sympathy and co-operation of the mother country. The war between France and England which followed the accession of William and Mary was no sooner proclaimed at Boston than the general court of
186 Massachusetts commenced preparations for the conquest of Nova Scotia and Canada. Sir William Phips, who was born and bred among the fishermen of Maine, was intrusted with the command of an expedition against both. He reduced the first, and established a government; but his enterprise in the St. Lawrence was disastrous. It is of interest to add, that the first paper money emitted in America was issued by Massachusetts to defray the expenses of these military operations.

At the peace of Ryswick, in 1697, it was stipulated that mutual restitution should be made of all conquests during the war; and, much to the dissatisfaction of the English colonists, Nova Scotia returned once more to the undisputed possession of the French. The strife in America had been avowedly for the fisheries, and for territory north and west; and this treaty, which, with the exception of the eastern half of Newfoundland, secured to France the whole coasts, the islands, and the fishing-grounds from Maine to beyond Labrador and Hudson's Bay, besides Canada and the valley of the Mississippi, was regarded as dishonorable to England and wantonly injurious to colonial industry and peace.

The evil consequences of the treaty of Ryswick were soon manifest. A year had not elapsed before the French government promulgated a claim to the sole ownership of the fisheries. In 1698, a frigate bound from France to Nova Scotia furnished the master of a Massachusetts vessel with a translated order from the king, which authorized the seizure of all vessels not of the French flag that should be found fishing on the coast. General publicity of the order followed, and its execution was rigidly enforced. Bonaventure, in the ship-of-war Enviux boarded and sent home every English colonial vessel that appeared on his cruising-ground; while Villabon, governor of Nova Scotia, in an official despatch to the executive of Massachusetts, declared that instructions from his royal master demanded of him the seizure of every American fisherman that ventured *east of the Kennebeck river, in Maine.* The claim was monstrous. If I understand its extent, the only fisheries which were to be open and free to vessels of the English flag were those westerly from the Kennebeck to Cape Cod, and those of the western half of Newfoundland. It seems never to have occurred to a single French statesman that the supply of fish in our seas is inexhaustible,

and that, reserving certain and sufficient coasts for the exclusive use of their own people, other coasts might have been secured to their rivals, without injury to any, and with advantage to all. In fact, evidence that such a plan was suggested by our fathers, or by the ministry "at home," does not, I think, exist. On both sides the strife was for the monopoly and for the mastery.

Richard, Earl Bellamont, arrived in Boston in 1699, and, having assumed the administration of affairs in Massachusetts, pointedly referred to these pretensions in a speech to the general court, and to the execrable treachery of the Stuart who had parted last with Nova Scotia and "the
187 noble fishery on its coast." But his lordship could afford no redress.

In the first year of the reign of Queen Anne, the two nations were again involved in war. Among its causes was the claim of France to a part of Maine and to the whole of the fishing-grounds. The people of New England, driven from the Acadian seas by the common enemy, needed no solicitation from the mother country to engage heartily in the contest. On the other hand, employing armed vessels of their own, they were hardly restrained, in their zeal and success, from hanging as common pirates some of the French officers who had been the instruments of interrupting their pursuits in the forbidden waters.

Nor was this all. They attempted the conquest of Nova Scotia, and equipped a fleet at Boston. The enterprise failed. Promised ships from England three years later, but disappointed, a second expedition failed also.

At last, in 1710, Nova Scotia became an English colony. Its reduction was a duty assumed by the ministry, while, in truth, it was accomplished principally by colonists and

colonial resources. Of the force assembled at Boston, six ships and a corps of marines were, indeed, sent from England; but the remainder, thirty vessels and four regiments, were furnished by the four northern colonies. Strange it was that Anne, the last of her family who occupied the throne, should have permanently annexed to the English crown the colony and the "noble fishery" which all of her line had sported with so freely and so disastrously.

* * *

199 In 1778, the project was renewed. In the instructions to Franklin, he was directed to urge upon the French court the certainty of ruining the British fisheries on the Banks of Newfoundland, and consequently the British marine, by reducing Halifax and Quebec. Accompanying his instructions was a plan for capturing these places, in which the benefits of their acquisition to France and the United States were distinctly pointed out. They were of importance to France, it was said, because "the fishery of Newfoundland is justly considered the basis of a good marine;" and because "the possession of these two places necessarily secures to the party and their friends the island and fisheries." Among the benefits to the United States would be the acquisition of "two States to the Union," and the securing of the fisheries jointly with France, "to the total exclusion of Great Britain."

* * *

214 In 1583 Sir Humphrey Gilbert, under the first charter that passed the great seal of England for colonization in America, arrived at Newfoundland. He found thirty-six vessels in the harbor of St. John of different nations, and

was refused entrance; but on hearing that he had a commission from Queen Elizabeth, they submitted.

He took possession of the island with great pomp and ceremony, and granted lands and privileges to fishermen in fee, on condition of the payment of quit-rent. It is important to remark that the right of England to Newfoundland and its fishing-grounds rests on the discovery of Cabot, in 1497, and on the possession of Gilbert at this time.

* * *

Assuming full title to the island and the fisheries, the Eng-
215 lish seem, for the moment, to have attempted to exclude the vessels of other nations, or, at least, to have compelled an acknowledgment of subjection to them as vested with proprietary rights. We find that, in 1585, a fleet of ships under Sir Bernard Drake made prizes of several vessels laden with fish and furs, which he sent to England.

* * *

274 . . . . And to settle the question, we may refer to "A brief Narrative of the *true* grounds and causes of the first planting of New England," by Edward Winslow, one of the most distinguished of their number, and who succeeded Bradford as their governor. No original copy of this tract is supposed to be in America; but a few years since the Rev. Mr. Ellis, of Charlestown, found one in a printed volume in the British museum, copied it for the Rev. Dr. Young, who has placed it in the "Chronicles of the Pilgrims."

Winslow, in this narrative, speaks of an interview between King James and the agents of the Puritans who went over to England from Leyden in 1618 to solicit his consent to their going to America. The monarch asked them, "What profit might arise?" He was answered in a single word – "Fishing." Whereupon James replied: "So God have my soul, 'tis an honest trade; 'twas the Apostle's own calling."

Can anything be more conclusive?

* * *

278 The [Plymouth Colony] fisheries, I conclude, were considered public property, and were generally leased to individuals for the benefit of the colony, or of particular towns. The subject of "rents" and of "profits" is continually referred to in the records, and orders to grant leases to petitioners, or to protect lessees in the enjoyment of the privileges stipulated in the covenants with them, are of frequent occurrence. An ordinance of the latter description of extreme severity was passed in 1678 – the court directing that all fishing vessels not belonging to the colony should be seized for public use by warrant from the governor, or one of his assistants, and that the lessees of the colony fisheries should be entitled to damages, to be paid them out of the proceeds of the vessels seized and confiscated. The people of Massachusetts were alone exempted from the penalties of this extreme measure.

* * *

282 In 1631, Aldsworth and Eldridge, two merchants of Bristol, England, obtained a grant known as the "Pemaquid patent," which gave them the exclusive right to fish in their own waters.

The patent embraced several thousand acres of land on the main, the Damariscove islands, and all other islands within nine leagues of the shore; and thus, whether designedly or otherwise, included Monhegan. The whole territory, though now almost in the centre of the sea-coast of Maine, was east of Gorges' eastern boundary, and therefore within the French claim. It would seem that a fishery was established at Richman's, or Richmond's Isle, near Portland, previous to 1631; since, in that year Prince records, in his annals, that Governor Winthrop was informed of the murder there of Walter Bagnall and another person, by "Squidecasset," an Indian sachem; which isle, says Prince, was part of a tract of land granted to Mr. Trelan, a merchant of Plymouth, England, who had "settled a place for fishing, built a ship, and improved many servants for fishing and planting." . . . .

* * *

354 THE MACKEREL FISHERY.

From the settlement of New England to the year 1852.

It is frequently said that the mackerel fishery is of very recent origin, or that, at least, *vessels* were not employed in it until about the close of the last or the beginning of the present century. Both suppositions are entirely erroneous. The Indians, regardless of the beautiful form and color of the fish, called it wauwunnekeseag, on account of its fatness. There is mention of it in the earliest records of the country. Winthrop relates that, in 1633, the ship Griffin, two days before her arrival at Boston, lost a passenger by drowning, as he was casting forth a line to catch mackerel. The first settlers must have commenced the fishery soon after, since – to omit several minor incidents – we have the fact that Allerton, one of

the Pilgrims who came over in the Mayflower, received mackerel for sale at New Haven, on "half profits," in the year 1653. That the business was prosecuted with success is evident from the additional fact, that in 1660 the commissioners of the colonies of New England recommended to the general courts of the confederacy to regulate it, "considering" that "the fish is the most staple com-
355 modity of this country." The mackerel fishery at Cape Code was held by the government of the colony of Plymouth as public property, and its profits were appropriated to public uses. The records show that it was rented, from time to time, to individuals, who paid stipulated sums, and that a *part of the fund to support the first free-school established by our Pilgrim fathers was derived from it.*

The proposition to found and endow a school of this description seems to have been made in 1663, but not to have been adopted until seven years later, when the general court, "upon due and serious consideration, did freely give and grant all such profits as might or should annually accrue to the colony," from this and the bass and herring fisheries, at the same place. In 1689, the "rent of the Cape fishery was added to the appropriation for magistrates' salary for that year."

Exact statements as to the progress and extent of the mackerel fishery previous to the Revolution, are hardly to be found; but it is still certain that the people of Rhode Island and Connecticut, as well as those of Massachusetts, were "largely concerned in it," and that fleets of sloops employed in it were often seen upon the coast and in the harbors. It is certain, also, that about the year 1770, the town of Scituate, alone, owned upwards of thirty vessels that were annually fitted out as "mackerel catchers;" and

that the whole number of vessels in Massachusetts was not less than one hundred. Soon after the peace of 1783, a writer in a Boston newspaper, in a series of articles on American commerce, said that the mackerel fishery "was of more value to Massachusetts than would be the pearl fisheries of Ceylon."

* * *

Maine *et al.* Ex. No. 743

Schultes, Henry, *An Essay on Aquatic Rights; Intended as an Illustration of the Law relative to Fishing*, pp. 2-4 (1811).

* * *

3 This general immunity must be understood to be confined to that people, within whose territorial boundaries such rivers or seas were contained; for, although by the law of nature the sea is open to all mankind, the right of fishing in ports and rivers could never have been considered, or intended to be admitted, as an universal right. Nor could a foreign power send vessels to navigate within the limits of such maritime districts, or take fresh running water on the shore without permission expressed or implied. Neither can the interests of maritime states admit a promiscuous liberty to strangers to fish or navigate within their seas, since it might affect both their personal security and personal sustenation. Their personal security would be endangered, by the facility afforded to foreign powers to make inimical incursions upon them; and their

food might be lessened by the exhaustion of their fisheries. For, though fishing is abundant in the sea, it is manifest that it may, in part, be exhausted, especially if all nations should desire such a right and liberty near the coasts of any particular country; and, as it is very usual that some particular kind of fish, or, perhaps, some more
4 precious commodity, as pearls, coral, amber, or the like, are to be found only in one part of the sea, and that of no considerable extent, the congregation of many people to that part must necessarily prejudice the people of the neighbouring shore. In this case, then, there is no reason why the borderers should not rather challenge to themselves this happiness of a wealthy shore or sea, than those who are seated at a distance from it. And according to Bodinus, by a kind of common right enjoyed by all princes of maritime countries, the particular sovereign may command and control those who approach within sixty miles of his shore.

* * *

Maine *et al.* Ex. No. 747

Smith, Herbert Arthur, *Great Britain and the Law of Nations*, Vol. II-Territory (Part I), pp. 113, 137-44, 204-05 (1935).

* * *

138 The enactment of this statute was the result of the decision of the Court for Crown Cases Reserved in the celebrated case of *R. v. Keyn*, decided in 1876. The case arose out of a collision between a German and a British ship two miles from Dover pier, a passenger in

the British ship being drowned as a result of the accident. Keyn, the commanding officer of the German vessel, the *Franconia*, was indicted and convicted for manslaughter at the Central Criminal Court. By a bare majority of seven judges to six the appellate tribunal held that the conviction could not be sustained.

Technically the opinion of the majority amounted to no more than a decision that the jurisdiction asserted by the Crown was not conferred by any existing English statute, and therefore it is not strictly a decision upon the broader question of international law. Of the seven judges composing the majority five were of opinion that it was competent for Parliament, without violating the law of nations, to confer such jurisdiction, if it saw fit to do so. In other words, eleven out of the thirteen judges were agreed that territorial waters were within the sovereignty of the riparian state, and of these eleven six held that the existing pro-
139 visions of the English criminal law conferred sufficient jurisdiction to punish the offence in question.

It is unnecessary here to recapitulate in detail the earlier material which was exhaustively examined in the various judgments delivered. It was beyond dispute that in numerous instances Parliament had enacted statutes affecting both British and foreign vessels within territorial waters. None of these statutes expressly conferred the criminal jurisdiction claimed by the Crown in the case before the Court, and the minority differed from the majority chiefly in holding that the jurisdiction was conferred by the common law. Only two judges (Chief Baron Kelly and Sir Robert Phillimore) were of opinion that a statute conferring such jurisdiction would exceed the rights given to the riparian state by the law of nations. We may therefore take it as clear that in 1876 the great preponderance of judicial opin-

ion in England was in favour of the view, now re-affirmed in the British memorandum, that "the rights which States possess over their territorial waters are rights of sovereignty".

The decision occasioned considerable surprise, and the Act of 1878 was enacted to remove all doubts upon the attitude of Great Britain towards the question. In introducing the bill in the House of Lords the Lord Chancellor (Lord Cairns) gave expression to the general feeling of surprise and apprehension which had been evoked, and his predecessor, Lord Selborne, spoke in the same sense. Lord Cairns further pointed out that in 1848 a warrant issued under the provisions of the Customs Regulation Act, which had not been cited to the court, extended the limits of the port of Dover to the three-mile limit, thus including the place where the collision occurred.

Before this case came up it does not appear that the general question of sovereignty in territorial waters was ever presented in a form calling for judicial or executive decision. But there is abundant incidental evidence to the
140 effect that expert opinion in this country considered the jurisdiction exercised in territorial waters to be based upon sovereignty. In the present volume the reader may refer to the language used on various occasions by the Law Officers, particularly to the opinions given in the course of the oyster fisheries dispute with France. In these opinions it is evidently assumed, rather than asserted, that the "territory" or "dominion" of Great Britain includes the zone of territorial waters, which are subject both to the common law and to the legislation of Parliament.

* * *

Maine *et al.* Ex. No. 751

Stock, Leo Francis, *Proceedings and Debates of the British Parliaments respecting North America*, Vol. II, pp. 4, 352-53 (1927).

* * *

In 1685-1686, the Chevalier de Troyes, with about 80 men, subdued Moose Factory, Fort Rupert, and Albany, the three English forts that held the key to the Hudson Bay country (George Bryce, *The Remarkable History of the Hudson's Bay Company*, pp 50-52; Beckles Willson, *The Great Company*, 1900, I. 161-171; *Cal. St. P. Col.*, 1685-1688, pp. 366, 368, 388-390, 426, 658, 660-662). In the declaration of war, May 7, it was stated: "That it was not long since the French took licenses from the governor of Newfoundland to fish in the seas upon that coast, and paid a tribute for such licenses, as an acknowledgement of the sole right of the crown of England to that island; yet of late the encroachments of the French upon that island, and his Majesty's subjects trade and fishery, had been more like the invasions of an enemy, than becoming friends, who enjoyed the advantages of that trade only by permission. But that the French king should invade his Majesty's Charibbee Islands, and possess himself of the province of New York, and of Hudson's Bay, in a hostile manner, detaining some of his Majesty's subjects under the hardship of imprisonment, and causing others to be inhumanly killed, were actions not becoming even an enemy; and yet that he was so far from declaring himself so, that at that very time he was negotiating, here in England, by his ministers, a treaty of neutrality and good correspondence in America." Timberland, *The History and*

Proceedings of the House of Lords, I. 301; the date is erroneously given as May 4 (*cf. L. J.,* XIV, 203).

* * *

Maine *et al.* Ex. No. 762

Wynne, William, *The Life of Sir Leoline Jenkins,* Vol. 1, pp. 85-99 (1724).

* * *

lxxxv *A Charge given at a Session of Admiralty within the Cinque Ports,* Sept. 2. 1668. *by* Dr. L. Jenkins.

Gentlemen of the Jury,

You are here empannelled and sworn to make a diligent Enquiry, and a true Presentment of all Crimes, Offences, and Abuses, that have been already committed, or are now prevailing within the Jurisdiction of the Admiralty of the Cinque Ports.

* * *

lxxxvi *First,* As to most of those Crimes and Offences that are enquirable, by the *Laws of the Realm,* I shall not need to say any more, but that *whatsoever is Treason* or Felony, Murther or Manslaugher, Mayhem, Riot, Larceny, or Misdemeanour, upon the main Land, within the Body of any County, the same changes not its Nature, Name, or Punishment, when 'tis committed upon the Sea, within the Jurisdiction of the Admiral.

* * *

And such was the Generosity of our ancient *English,* such the Abhorrence of our Laws against Pirates and Sea-

Rovers, that if any of the King's Subjects robb'd or murthered a Foreigner upon our Seas, or within our Ports,
lxxvii though the Foreigner happened to be of a Nation in Hostility against the King, yet if he had the King's Passport, or the Lord Admiral's, the Offender was punished, not as a Felon only, but this Crime was made High Treason, in that great Prince *Henry* V. Time; and not only himself, but all his Accomplices, were to suffer as Traytors against the Crown and Dignity of the King.

* * *

The *Laws of Oleron*, are the ancient universally received Customs of the *Western* Part of the World; which *Rich.* I. of immortal Memory, being upon his Return from the Holy War, thought fit to review and reform; and then to give them the Stamp of his Royal Authority. These Laws all the Sea-faring Nations of this *Western* Part of the World, soon after received and entertained from the *English*, by way of Deference to the Soveraignty of our Kings in the *British* Ocean, and to the Judgment of our Countrymen in Sea-Affairs.

* * *

lxxviii You are to enquire, whether any *Fishermen*, Subjects of the *French* King, do presume to fish upon this Coast, *without special License* from his Royal Highness; and if they have License, whether they fish with any other Nets than such as are of the *English* Size? The Offenders and their Boats are to be seized on, in any Port where they happen to come.

You are to enquire, whether any do *annoy your navigable Rivers*, or his Majesty's Ports, by throwing into them any Rubbish, Filth, or Ballast, or by taking up their Ballast in udue or improper Places; And after all *Regratters*

and *Forestallers* of the Market upon the Water; that is, such as do way-lay, and buy up any manner of Provision or Merchandise, before it be brought into the Port of Discharge; and do sell it again by Retail in the same Port, or within 4 Miles of it.

The Lord Warden, by vertue of his Office of Admiral, has a special Trust reposed in him, in Matters relating to War, and for the maintaining of his Majesty's Soveraignty in these Seas.

You are therefore to enquire, whether any Commander at Sea has, upon any Occasion, neglected to require and exact the just Respects, Deference, and Salutes, due to his *Majesty's Flag* from all Foreign Ships, and hath not fought, and, if need were, sunk such Ships as have refused that ancient Acknowledgment, which all Nations have Time out of Mind paid to the Banner of *England.*

If I should give you in Charge to enquire, if any Foreigners have refused to *strike* to *Dover-Castle*, and to salute it, (as I think I might do, without leading you out of the Jurisdiction of our Commission) every Stranger and Foreigner that hears me, would think the Enquiry very reasonable; because it hath been always usual, they know, to pay that Tribute of Respect, in lieu of the Safety and Protection every Ship is sure to find there.

* * *

xc *A Charge given at an Admiralty Sessions held at the* Old-Baily, *by Sir* L. Jenkins. *Taken by a good Hand.*

Gentlemen,

His Majesty's Commission, in virtue of which you have been summon'd, impannell'd, and sworn, being now read over, it is proper for you, in order to the better Discharge of your Trust, to be inform'd,

1. With the Nature and Scope of the Commission.

2. With the Extent and Limits of it, as it differs from Commissions of the same Name, before you take in Charge those particular Matters which are made enquirable by it.

* * *

Every *Englishman* knows, that his Majesty hath an undoubted Empire and Soveraignty in the Seas that environ these his Kingdoms, which by the ancient Statute Laws, are called the *quatuor Maria*, by Foreigners, and by our modern Treaties, the *British* Seas. And it is certain, that Empire or Soveraignty is precarious, nominal, or titular only, where the Soveraign doth not keep and maintain the Publick Peace. To keep the Peace, and to punish those that violate it, being the chief *Ensigne*, as well as the principal Business of all Empire and Government; 'tis this that gives his Majesty a Right, and indeed lays on him an indispensible Obligation, to keep the Publick Peace upon the Seas; that is, to preserve his Subjects and Allies in their Possessions and Properties upon these Seas, and in all Freedom and Security to pass to and fro on them, upon their lawful Occasions.

But besides these four Seas, which are the peculiar Care, and as it were, Part of the Domaine of the Crown of *England*, his Majesty hath a Concern and Authority (in Right of his *Imperial* Crown) to preserve the publick Peace, and to maintain the Freedom and Security of Navigation all the World over: So that not the utmost Bound of the *Atlantick* Ocean, not any Corner of the *Mediterranean*, nor any Part in the *South* or other Seas, but that if the Peace of God and the King be violated upon any of his Subjects, or upon his Allies or their Subjects, and the Offender be afterwards brought up or laid hold on in any of his Majesty's Ports, such Breach of the Peace is to be enquired of, and tryed in Vertue of a Commission of Oyer and Terminer, as this is, in such County, Liberty, or Place, as his Majesty shall please to direct. So long an Arm hath God, by the Laws, given to his Vicegerent the King; and so odious are the Crimes of *Piracy*, Bloodshed, Robbery, and other Violences upon the Sea, that Justice observes and reaches the Malefactors, even in the remotest Corners of the World, and Vengeance pursues them close at the Heels to their own Homes; where they seldom escape those Punishments they have deserved.

* * *

xci This Power and Jurisdiction which his Majesty hath at Sea in those remoter Parts of the World, is but in Concurrence with all other Soveraign Princes that have Ships and Subjects at Sea; and it is on this special Regard that *Pirates* are called *Hostes Humani Genesis;* in that as they do give themselves the Liberty of making a Prey without Distinction of all Nations, and all manner of People; and do, as much as in them lies, hinder that mutual Amity and Supplies, which Providence hath ordained as the Means

to cherish and preserve that Humanity and Sociableness, which distinguishes not only Christians, but all Men, from Savages and Beasts of Prey; So all Nations and Soveraign Princes that meet with them, have a just and competent Authority to execute the Law upon them: And they are therefore esteemed to be out of the Protection of all Princes, and of all Laws; because every *Magistrate that bears the Sword for the Terror of those that do evil,* is to draw it against them; and is made a Minister to execute Justice upon them, whenever they can lay hold of them. . . .

* * *

There is another Sort of Confederacy much more dangerous than all this, because it involves in it a publick Affront to the Crown and Dignity, to the Right and Soveraignty of the King, and also a publick Disgrace and Reproach to this Nation. It is, when Foreigners Privateers, or others, do confederate and refuse to give and allow to his Majesty, his ancient *Right of the Flag upon his four Seas;* or his undoubted *Right of Sanctuary* in his Ports, and other Places of Safety, commonly called the *King's Chambers;* or when they conspire to disallow his Right of safe Conduct to such Ships as his Majesty shall grant his Royal Letters of safe Conduct to pass these Seas in a Time of War, as this is. All these are direct Confederacies against the King, to usurp his Rights, and by degrees to incroach upon a Possession, the most constant, uninterrupted, and ancient, in the whole World.

You are therefore to enquire, if any Foreign Ship, Man of War, or other, being met with in any Part of the four *British* Seas, hath refused to *strike her Flag,* and *lower her Top-sail,* to any of his Majesty's Ships or Vessels,

carrying his Majesty's Flag, Ensign, or Jack. Or if any Captain or Commander of any Ship or Vessel, carrying the King's Flag, Jack, or Ensign, hath not demanded that Respect due to the King's Colours, when it was delayed, or refused, or not paid at the due Time, and after the accustomed Manner, and hath not pursued such Refusers as *Pirates.* Or if any Foreign Men of War have presumed to wear any of his *Majesty's Colours,* or the Colours of any Prince or Nation, saving their own, in these Seas. Which is ever the true Badge of a *Pirate,* and those that do it, are to be pursued as such.

The next Thing is, the *Right of Sanctuary* and *safe Conduct,* which the King hath Time out of Mind exercised, not only in his Harbours and Ports, but especially in his *Chambers;* that is, in those Tracts of Sea which are between some of the most eminent Promontories, or Points of Land (a straight imaginary Line being drawn between them); for instance between *Flamborough Head* and the *Sporn,* between the *North Foreland,* and the *South Foreland;* between *Portland* and the *Start;* between the *Land's End* and *Milford;* these Chambers being so reputed Time out of Mind, and so return'd in the Year 1604; (about 70 Years ago) by Jurors upon their Oath, to the Court of Admiralty.

You are therefore to enquire, if any Men of War under Foreign Commissions, from any of the Parties now in War, do lie hovering near any of his Majesty's Ports, Havens, or Harbours; or skulking within any of those Spaces called the *King's Chambers,* in order to surprize Merchants Ships belonging to the King's Friends and Allies, and to snap them as they are coming or going out of our Ports; you are to present such if you know any, and the King's Majesty is to be inform'd of it out of the

Records and Presentments of this Court; that they may be seized and arrested, if they be driven, or do come in, or else may be fetch'd in by his Majesty's Ships, and punish'd as wilful Violators of the Treaties his Majesty hath with his Neighbours, and as malicious Disturbers of our Trade.

You are to enquire if any Men of War have presumed to search, stop, or carry away by Force, our Merchant Ships in their Course at Sea, under Pretence or Suspicion that they belonged to their Enemies; if they have brought them out of their Course to their own Ports without sufficient Cause, such as is allow'd of by Treaty between his Majesty and the Prince or State from which the Man of War hath his Commission; that is a grievous Trespass, and the Party that hath done it, coming into any of his Majesty's Ports, may be arrested, and his Ship made to answer and satisfie the Merchant's Damage. If they have robb'd or pillaged them, it is downright *Piracy*, as I have already told you.

You are to enquire, if any foreign Men of War have broken the safe Conduct granted by his Majesty to any of his Allies within the four Seas, or have presumed to fight or act Hostilities against each other, when any of his Majesty's Men of War were in Sight, and had given the Signal to forbear and keep the Peace. These Rights of the *Flag*, of giving *Sanctuary*, *Protection*, and *safe Conduct*, are Emanations of his Majesty's Soveraignty in these Seas, and where you know of any Thing done to the Infringement, or in Derogation of them, you are to present and specifie the Particulars, to the End they may be laid before his Majesty, that he may, in his Royal Wisdom, provide some Remedy and Redress, either by giving Orders to his Men of War at Sea, or to his Officers in Port, to arrest such Ship and Commanders, as shall have offended in any of these Particulars, or else may, by his Ministers and Ambassadors abroad, demand such Reparation and Satisfaction, as by the Law of Nations is due.

xcvi Having done with the Crimes and Offences, specially directed in the Statute of *Hen.* VIII, to be here enquired of; I shall in a very few Words tell you, what you are to enquire of upon *other Statutes* related to and specially *cited in this Commission*, for the due Execution of which, the Justices of this Court are specially appointed by his Majesty, to be his Justices of Peace and Goal-Delivery.

You are to enquire of all *Nusances and Abuses upon our Salt-Waters* and Navigable *Rivers*, beneath those Bridges that are next the Sea; by erecting of Water-Mills, Wears, Stakes, or Kiddles, whereby the free Course and Passage of Boats and Vessels is hindred, or the young Fry of Fish destroy'd, and you are to present as many as are within the Limits of this Commission.

* * *

You are to enquire of all such as use any *unlawful Arts*, Engines, Nets, or Means, to *catch Fish* withal upon the Sea, or below the lowest Bridges, contrary to the Statutes in that Behalf provided, and contrary to the ancient Ordinances of the Admiralty, likewise such as do destroy Fish out of proper Seasons, or while they are of an *unsizeable Growth*, and particularly such as dredge for *Oysters*, between the *3d* of *May* and the 14 of *September*, that is, out of the Seasons prefix'd by the ancient Statutes of the Admiralty.

You are to enquire of all *Forestallers*, *Regratters*, and *Engrossers* of our Merchandizes and Provisions, while they are yet upon the Sea, or in our Rivers in the Way to our Ports or Markets, or diverted them from coming to Market, thereby to keep up the Rate of their Commodities. This was anciently *Felony* in some Cases, and is still severely punishable by Law.

* * *

Maine *et al.* Ex. No. 768

Commissioners For Trade and Plantations, Journal of 1718-1722, pp. 31-35, 43, 53-54-90-98, 100, 102, 104-05, 122, 209, 217, 361-62 (1925)

* * *

Their Lordships taking into consideration the business relating to the boundaries of His Majesty's Plantations in America, and to the incroachment of the French upon them, read,

Mr. Nelson's memorial relating to the means the French use, to gain the Indians to their interest, and methods

proposed to be used by us for our defence and security against the designs of the French. Plantations General A., Fol. 42.

Mr. Nelson's scheme to reduce Canada, with an account of those settlements. Plantations General A., Fol. 54.

Representation from the Board concerning the Northern Colonies of America, recommending the methods proposed by Mr. Nelson for propagating the British interest in those colonies and proposing the constituting of a Captain General, dated Sept. 30th, 1696. Plantations General A., Fol. 59.

Letter from Mr. Randolph to the Board, dated at New York the 16th May, 1698, about the boundaries between the English and French plantations. Plantations General A., Fol. 305.

Letter to Mr. Secretary Vernon about the encroachments of the French upon the English territories on the Continent of America, and the right of fishery in the adjoyning seas. Dated 17th Feb., 1698/99. Plantations General B., Fol. 12.

Letter to Mr. Secry. Vernon about the encroachments of the French upon the eastern parts of New England both by sea and land. Dated 29th December, 1698. New England B., Fol. 84.

* * *

U.S. Ex. No. 4

Answer of State of California, Part I.

* * *

33 11. As an illustration of an early grant by a King of England of land under the sea, in 1658 the French port of Dunkirk passed to England, which thereafter claimed the ownership not only of the uplands but of the submerged lands in the Channel adjacent to Dunkirk. On October 27, 1662, Charles II sold to France, Dunkirk and its dependencies for the sum of 5,000,000 francs. This sale and transfer included the owership of submerged lands in the Channel off the coast of France adjoining Dunkirk.

> "The sale of Dunkirk and its dependencies *included submerged lands in tidal waters,* tideways, foreshores, uplands, quays, docks, canals, forts, guns, ammunition and the great cathedral." (MERSHON, "THE POWER OF THE CROWN IN THE VALLEY OF THE HUDSON" (1925), p. 13.)

* * *

U.S. Ex. No. 8

Brief for the State of California in Opposition to Motion for Judgment

23 This Court and the courts of our States have repeatedly declared what the common law of England was in 1776 with regard to those rights of the Crown to which the original States succeeded. The following are a few of the leading cases on this subject:

Martin v. Waddell, 16 Pet. 367, 412 (1842), by Mr. Chief Justice Taney:

> "It is said by Hale, in his treatise *de Jure Maris*, Harg. Law Tracts 11, when speaking of the navigable waters, and the sea on the coasts within the jurisdiction of the British crown, 'that although the king is the owner of this great *coast*,[18] and as a consequent of his propriety, hath the primary right of fishing in the sea, and creeks and arms thereof, yet the common people of England have, regularly, a liberty of fishing in the sea, or creeks or arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained of it, unless in such places, creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty.' "

Weber v. Board of Harbor Comm., 85 U.S. 57, 65 (1873), by Mr. Chief Justice Field:

> "By that law [the common law] the title to the shore of the sea, and of the arms of the sea, and in the *soils under tidewaters*[19] is, in England, in the king, and, in this country, in the State."

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[18] The word used by Hale is "waste," here misquoted as "coast."

[19] "Tidewaters" obviously includes the waters of the ocean, all of which are affected by the tides. This Court held in *Manchester v. Massachusetts*, 139 U.S. 240, 258 (1891):

> " . . . the minimum limit of the territorial jurisdiction of a nation over tidewaters is a marine league from its coast . . . "

See, also, H.A. Marmer, Assistant Chief of the Division of Tides of the United States Coast and Geodetic Survey, *The Tides* (1926), pp. 132, 133.

(Continued)

Shively v. Bowlby, 152 U.S. 1, 13 (1894), by Mr. Justice Gray:

> "In England, from the time of Lord Hale, it has been treated as settled that *the title in the soil of the sea*, or of arms of the sea, below ordinary high water mark, *is in the King*, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage; [citing cases] and that this title, *jus privatum*, whether in the King or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing."

Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 65 (1851), by Chief Justice Shaw:

> "By the common law of England, as it stood long before the emigration of our ancestors to this country and the settlement of the colony of Massachusetts, *the title to the land or property in the soil, under the sea*, and over which the tide waters ebbed and flowed, including flats, or the sea-shore, lying between high and low water mark, *was in the king*, as the representative of the sovereign power of the country. But it was held by a rule equally well settled, that this right of property was held by the king in trust, for public uses, established by ancient custom or regulated by law, the principal of which were for fishing and navigation."

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19 (Continued) The term "tidewaters" is not to be confused with "tidelands" which sometimes, but by no means always, is used to refer to the narrow strip of land between high and low tide. See note, Appendix F, p. 118, where "tidelands" is construed by a California court to include submerged lands below low-water mark.

25 *Weston v. Sampson*, 62 Mass. (8 Cush.), 346, 351-352 (1851), by Chief Justice Shaw:

> "... *the king is held to be owner of the soil under the sea*, which royal right, by the common law of England, extends over the shore where the tide ebbs and flows to ordinary high water mark."

Commonwealth v. Roxbury, 75 Mass. (9 Gray), 451, 482 (1857), by Chief Justice Shaw:

> "We had considered it settled beyond controversy that, by the common law of England, *the right of soil, not only in the sea, the fundus maris, was in the king*, but also in the sea shore, the land between high and low water mark ...
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> * * * * * * *
>
> "... at the time of the granting of the colony charters herein before stated, the king held the sea shores *as well as the land under the sea*; ... he held the same *publici juris* for the use and benefit of all the subjects, for all useful purposes, the principal of which were navigation, and the fisheries."

People v. New York & S.I. Ferry Co., 68 N.Y. 71, 76 (1877):[20]

> "The title to lands under tide-waters, within the realm of England, were, by the common law, deemed to be vested in the king as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade and intercourse. ... In the treatise De Jure Maris (p. 22)

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[20] Quoted with approval by Mr. Justice Field in *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 458 (1892).

Lord Hale says: 'The *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers and arms of the sea are affected to public use;' . . . "

26 *Rogers v. Jones*, 9 N.Y. Com. L. (1 Wend.) 237, 256 (1828):

"In England, it hath always been holden that the King is lord of the whole shore. He has the property *tam aqua quam soli* and all profits *in the sea*, and all navigable rivers."

Gough v. Bell, 22 N.J.L. (2 Zab.) 441, 455 (1850):

"The ancient rule of the common law is, that the . . . title to the *shore* between ordinary high and low water mark, *as well as the title to the soil under the water*, belongs, *prima facie*, to the sovereign. *Hale de Jure Maris, part* 1, *cap* 4; *case of the River Banne*, Davies 152; *Woolrich on Waters*, 20; . . ."

Arnold v. Mundy, 6 N.J.L. (1 Halst.), 1, at 74 (1821):

"Lord Hale says, 'the sea, and the arms of the sea, and the navigable rivers in which the tide ebbs and flows, are of the dominion of the king, as of his proper inheritance; and that this dominion, embraces, also, the shores, . . .' "

Narragansett Real Estate Co. v. McKenzie, 82 Atl. 801, at 810 (R.J., 1912):

"It is well settled in England that *the title in the bed of the ocean is in the sovereign*, subject to the *jus publicum* – the right of navigation and fishery of which the public cannot be deprived. *In this country, where the people are sovereign, the title to the bed*

of the ocean is in the state, which represents the sovereign power; . . . "[21]

* * *

31 B. The Original States in 1776 Succeeded to All Rights and Property of the English Crown.

In the previous section it has, we submit, been demonstrated that the English Crown did own lands below low-water mark and outside "inland waters" prior to 1776. The *extent* of the sovereign's ownership will be discussed later. (*Infra,* pp. 174 *et seq.*) We are concerned here only with the principle that such ownership existed.

This Court has repeatedly held that all the rights and properties of the Crown (not theretofore granted) passed on July 4, 1776 to the thirteen States as separate and independent states. *Each state* succeeded to all the rights and properties of the Crown within its own jurisdiction and territory.

A few of the leading cases holding that the States, independently, succeeded to all rights of the Crown are:

Martin v. Waddell, 16 Pet. 367, 410 (1842):

"For when the Revolution took place, the people of each state became themselves sovereign; and in

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[21] Other cases containing similar statements as to the common law of England are: *New York, B. H. & H. R. Co. v. Horgan,* 56 Atl. 179, at 180 (R. I., 1903); *Armour & Co. v. City of Newport,* 110 Atl. 645, at 646 (R. I., 1920); *Simmons v. French,* 25 Conn. 345, at 351 (1856); *Furman v. City of New York,* 7 New York Superior Court 17, at 33 (1851). There are no authorities to the contrary.

that character hold the absolute right to *all their navigable waters and the soils under them*, for their own common use, subject only to the rights since surrendered by the Constitution to the general government."

The above statement is quoted with approval in *Munford v. Wardwell*, 6 Wall. 423, 436 (1867) and also in *Illinois Central Ry. Co. v. Illinois*, 146 U.S. 387, 456 (1892).

Shively v. Bowlby, 152 U.S. 1, 14-16 (1894):

"And upon the American Revolution, *all the rights of the Crown and of Parliament vested in the several States*, subject to the rights surrendered to the national government by the Constitution of the United States."

Appleby v. City of New York, 271 U.S. 364, 381 (1926):

"Upon the American Revolution, all the proprietary rights of the Crown and Parliament in, and all their dominion over, lands under tidewater vested in the several States, subject to the powers surrendered to the National Government by the Constitution of the United States."

County of St. Clair v. Lovingston, 90 U.S. 46, at 68 (1874):

"By the American Revolution the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them. The shores of navigable waters and the soil under them were not granted by the constitution to the United States, but were reserved to the States respectively."

Massachusetts v. New York, 271 U.S. 65, 85-86 (1926):

"The English possessions in America were claimed by right of discovery. The rights of property and dominion in the lands discovered by those acting under royal authority were held to vest in the Crown, which under the principles of the British Constitution was deemed to hold them as a part of the public domain for the benefit of the nation. Upon these principles rest the various English royal charters and grants of territory on the Continent of North America. *Johnson v. McIntosh*, 8 Wheat. 543, 577 *et seq.*, 595. As a result of the Revolution, the people of each State became sovereign and *in that capacity ac-*
33 *quired the rights of the Crown* in the public domain (*Martin v. Waddell*, 16 Peters 367, 410), . . ."

Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 82 (1851):

"This right of dominion and controlling power over the sea and its coasts, shores, and tide waters, when relinquished by the parent country, must vest somewhere; and, *as between the several states and the United States*, whatever may have been the doubts on the subject, *it is settled that it vested in the several states*, in their sovereign capacity, respectively, *and was not transferred to the United States by the adoption of the constitution* intended to form a more perfect union."

People v. Trinity Church, 22 N.Y. 44, 46 (1860):

"When, by the Revolution, the Colony of New York became separated from the Crown of Great Britain, and a republican government was formed, the People succeeded the King in the ownership of

all lands within the State which had not already been granted away, . . ."

It would hardly seem that more authority is needed to establish the fact that the States did succeed to all rights of the Crown in navigable waters and the soils under them. Whether some elements of "external sovereignty" may have passed direct to the "United States" as an entity separate from the individual States as claimed by plaintiff, is a different question. Plaintiff makes this assertion (Br. pp. 76-78) upon the authority of *obiter dicta* in *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936).

Even if it should be conceded that "external sovereignty" passed from the Crown over the heads of the States to the "United States," it would be immaterial in this case because of the incontrovertible fact that the vesting of external sovereignty in the central government, *from whatever source*, was entirely *unaccompanied by any cession of territory.*

* * *

2. Jurisdiction, Territory and Ownership Are Coextensive.

The application of the principle above set forth is especially clear in the case of the original thirteen States because these States existed before the Federal Government was formed. It is, of course, true that large areas of land within these States had been granted by the prior sovereign and remained in the possession of their owners under the new sovereign. But no questions are raised as to the Original States such as those raised in connection with the Acts admitting new States to the Union. When the original States became independent there was no

reservation to anyone of the primary disposal of the public lands. Persons holding land under valid grants continued to hold such land, but all other lands necessarily vested in the new sovereign whose ownership was, therefore (except as to such prior grants) fully *co-extensive with its territorial jurisdiction.* Since it has been demonstrated that the territorial jurisdiction of the original States included a belt of the sea, it follows indubitably that the original States must have owned the bed of this belt of marginal sea. And since, as we have shown, they did not cede it to the Federal Government, they must continue to own it.

The principles we have been discussing, namely, (1) that the ownership of the original States in the bed of the sea was and is co-extensive with their territorial jurisdictions, and (2) that such lands were not ceded to the Federal Government, have been expressly stated by this Court in many decisions and are implicit in the rulings
51 of the Court in all its decisions dealing with the ownership of lands beneath navigable waters.

We propose now to take up a series of decisions illustrative of the application of both these principles by this Court.

(a) NEW YORK v. CONNECTICUT, 4 DALL. 1 (1799).

This case involved title to a strip of land claimed by both States, and both States had made grants to individuals within the disputed territory. In other words, the land had, in the first instance, belonged to either one or the other of the two States. The attorney general for New York argued that the case involved not only the question of the jurisdiction of the respective states but

"... it involves the right of soil, which, in relation to a great part of New York, results from the right of jurisdiction; so that, deciding the latter, is virtually a decision of the former." (p. 4.)

There was no final decision in the case but the reported decision quotes Justice Patterson as stating in the course of the argument that

"Generally speaking, the proposition is true, that as to states, *jurisdiction and the right of soil go together.*" (p. 4, note (b).)

(b) UNITED STATES v. BEVANS, 3 WHEAT. 336 (1818).

This case involved the jurisdiction of Massachusetts to prosecute for the crime of murder committed on a ship in Boston Harbor some distance from the land. The decision is of vital importance as showing the relationship
52 between jurisdiction, territory and ownership. The court, by Chief Justice Marshall, held (pp. 386-387):

"... What then is the extent of jurisdiction which a state possesses? We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power. The place described is unquestionably *within the original territory of Massachusetts.* It is, then, within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to the United States."

The argument made in the *Bevans* case was basically the same as that advanced by plaintiff in the present case, namely, that there is something inherent in the distribution of powers under the Constitution between the States and the Federal Government (Br. pp. 72 *et seq.*) which gives the Federal Government title to the lands beneath

navigable waters. In the *Bevans* case the argument was that the vesting of admiralty and maritime jurisdiction in the Federal Government was an actual cession of the waters of the State which would have given the Federal Government exclusive jurisdiction over the offense charged. In response to this Chief Justice Marshall said (p. 388):

> "Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise? This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States *is not intended for the cession of territory*, or of general jurisdiction. It is obviously designed for other purposes. It is in the
> 53 *8th section of the 2d article,*[46] *we are to look for cessions of territory* and of exclusive jurisdiction. . . . It is observable, that the power of exclusive legislation (which is jurisdiction) is united with *cession of territory, which is to be the free act of the states.*"

It is clear from the above quotation that the ownership of territory and general jurisdiction of the State were, in the first instance, co-extensive.

The reason Chief Justice Marshall said that the constitutional grant of admiralty and maritime jurisdiction to the Federal Government was not a cession of territory was to negative the claim that the United States had general political jurisdiction over the area in question. The holding that the territory had not been ceded to the United States was, therefore, not *dictum*, but was necessary

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[46] The reference to the 2d article is obviously a textual error; the article referred to is the 1st article.

to the decision of the case. If Boston Harbor belonged to the United States, it would have had jurisdiction. The Court had to determine that there was no ownership in the United States in order to determine that the United States had no jurisdiction.

It is of course true that, in the words of the decision, the offense in the *Bevans* case took place within a harbor. In view of the fact that plaintiff in this case does not concede that Massachusetts Bay is a "true bay" (Br. p. 254), plaintiff is certainly not in a position to say that the effect of this decision is limited to "inland waters." However, for the purpose of this discussion we may assume that the offense in the *Bevans* case was committed within a "true" harbor. The fact remains that the decision was not predicated upon any distinction between inland waters and marginal sea. The essence of the decision is that constitutional grants of power involve no cession of territory. If this principle is applicable in Boston Harbor it must be applicable anywhere within the State's territorial jurisdiction. And if this principle is applicable to grants of admiralty and maritime jurisdiction, it must also be applicable to grants to the Federal Government of other powers, *whether external or internal in character.* Furthermore, when Chief Justice Marshall said that there had been no cession of territory by the State, he must have believed that the State could have made a cession. If the State had no title to cede, the statement that it had made no cession would have been meaningless. Implicit in this decision is the basic proposition above stated, that the State of Massachusetts owned all the lands within its territorial jurisdiction not previously granted to other parties.

(c) CORFIELD V. CORYELL, 6 FED CAS. NO. 3,230, P. 546 (1823).

The principle thus announced by Chief Justice Marshall has been followed with respect to other powers vested in the Federal Government by the Constitution. An early decision on this point is *Corfield v. Coryell*, 6 Fed. Cas. No. 3,230, p. 546. This case involved the validity of a statute of New Jersey regulating the taking of oysters within the *waters of the state*.

Again, in this case, argument similar to that made by plaintiff here was advanced, namely, that constitutional grants of power to Congress to regulate interstate and foreign commerce gave the Federal Government paramount power over the waters within the State of New Jersey.
55 It was in regard to this point that Mr. Justice Washington said (p. 551):

> ". . . The grant to congress to regulate commerce on the *navigable waters belonging to the several states*, renders those waters the public property of the United States, for all the purposes of navigation and commercial intercourse; subject only to congressional regulation. *But this grant contains no cession, either express or implied, of territory, or of public or private property.*"[47]

In this case, as in the *Bevans* case, the ground of the decision was not that the act was committed in a bay, but that it was committed within the territory of the

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[47] Followed with approval by this Court on several occasions: *Smith v. Maryland*, 18 How. 71, 74 (1855); *Manchester v. Massachusetts*, 139 U.S. 240, 262 (1891).

State and that there had been no cession of that territory to the Federal Government.[48]

(d) RHODE ISLAND V. MASSACHUSETTS, 12 PET. 657 (1838).

An important application of the principles of the *Bevans* and *Corfield* cases was made by this Court in the case of *Rhode Island v. Massachusetts*, which appears in the Supreme Court reports eight times. In the third reported decision, 12 Pet. 657, 733 (1838), the argument was advanced that ownership of land by the State depended on whether or not the land was within the State's jurisdiction which, in turn, depended on the location of the State's boundary. On this question the court said, relating to the disputed boundary line (pp. 733-734):

> "The locality of that line is matter of fact, and when ascertained, separates the territory of one from the other; for neither state can have any right beyond its territorial boundary. It follows, that when a place is within the boundary, it is a part of the territory of a state; *title, jurisdiction and sovereignty are inseparable incidents, and remain so, till the state makes some cession.* The plain language of this court in the *United States v. Bevans*, 3 Wheat. 386 *et seq.*, saves the necessity of any reasoning on this subject * * * *Title, jurisdiction, sovereignty, are, therefore, dependent questions, necessarily settled, when boundary is ascertained, which, being the line of territory, is the line of power over it;* . . . "

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48 In *Corfield v. Coryell* (p. 546) the Attorney General of New Jersey asserted that the "territorial jurisdiction" of New Jersey extended "on the sea, to at least a marine league," and the Act under consideration applied to all the "waters of the state."

This decision demonstrates that the principles of the *Bevans* case govern the question of ownership as well as jurisdiction. Thus, the ownership of lands by a State (except as they have been granted out) is co-extensive with the State's jurisdiction.

(e) MARTIN V. WADDELL, 16 PET. 366 (1842).

In this case the Court explicitly applied the principle under discussion, that all lands within the jurisdiction of the State not previously granted belong to the State.

> ". . . According to the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation, and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative. It has been already shown, that this principle was as fully recognized in America as in the island of Great Britain." (p. 410.)

57 Upon this fundamental ground the Court held that the people of the State of New Jersey (p. 410)[49]

> ". . . hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government."

(f) POLLARD'S LESSEE V. HAGAN, 3 HOW. 212 (1845).

We shall discuss this case later in connection with the discussion of the effect of the reservation in the Acts

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[49] This case involved land in Raritan Bay, but it is doubtful whether Raritan Bay is a "true bay" as that term is used by plaintiff. However, assuming it to be a "true bay," the decision was not predicated on that fact but on the fundamental fact that the land was under navigable waters *within the territory of the State.*

admitting new States to the Union of the "primary disposal of the public lands." At this point we desire to refer only to the fact that the decision in this case is predicated on the same fundamental principle that ownership by the State is co-extensive with its jurisdiction. On this point the Court said (p. 228):

> "Alabama, is, therefore entitled to the sovereignty and jurisdiction over *all the territory within her limits*, . . . "

Sovereignty and jurisdiction were held to include ownership and upon this principle the Court held, on the authority of *Martin v. Waddell* (p. 229) that

> " . . . to Alabama belong the navigable waters, and soils under them . . . "

58 (g) DUNHAM V. LAMPHERE, 69 MASS. (3 GRAY) 268 (1855).[50]

This case involved the validity of a Massachusetts statute regulating the taking of fish in "the open sea," "within one mile of Gravel Island." The first question was whether the act took place *within the territory of the State*. On this question the court said, by Shaw, Chief Justice (p. 269):

> *"Being within a mile of the shore puts it beyond doubt that it was within the territorial limits of the State*, although there might in many cases be some difficulty in ascertaining precisely where that limit is. We suppose the rule to be, *that these limits extend a marine league, or three geographical miles, from the shore;* . . . "

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50 Decided four years before Massachusetts statute fixing seaward boundary of Massachusetts at 3 miles from shore.

The court then considered the question whether

> ". . . the right both of *property and dominion over the sea-shore, within the territorial limits* of a sovereign state, and all its incidents – navigation, fishing and all other incidental benefits – . . . belong properly to the general government or remain with the state government" (pp. 271-2).

The court answered this question unequivocally by holding that dominion and control over these waters, when relinquished by the government of Great Britain, did

> "fully and absolutely vest in the several states. This had been definitely settled by the supreme court of the United States." (Citing *Pollard v. Hagan.*)

It is vitally important to note that here the court applied the principle that ownership is co-extensive with jurisdiction
59 in lands beneath the open sea within the three-mile belt, basing its decision to the authority of *Pollard v. Hagan.*

The question at once arises: Why did the court cite *Pollard v. Hagan,* which is a case involving only the question of *ownership*, as authority in a case involving only the question of *jurisdiction?* And the answer is that jurisdiction and ownership by a state of land within its boundaries are based on the same fundamental principle. If the state owned the property it had jurisdiction. *Pollard v. Hagan* was cited to show that the state did own the area in question.[51] But the converse is equally true. If the state has jurisdiction it likewise has ownership

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[51] The reference to *Pollard v. Hagan,* shows that the Massachusetts court did not consider that the principle of *Pollard v. Hagan* was limited to "inland waters."

(except as it has been granted away.)[52] And since the state has jurisdiction to the limits of its territorial boundaries, so it has ownership to the same limits. The inland waters and the high and low tides are false quantities in the problem. The controlling factors are (1) that the land in question is within the boundaries of the state, and (2) such land has not been granted or ceded to the Federal Government.

(h) COMMONWEALTH OF MASSACHUSETTS V. MANCHESTER, 152 MASS. 230, 9 L.R.A. 236 (1890).

This case involved the validity of a statute regulating the use of nets or seines for taking fish in the waters of
60 Buzzard's Bay.[53] The decision was rendered in 1890 by a unanimous court, of which Mr. Justice Holmes was then a member, the opinion being written by Chief Justice Field.

The court was asked to overrule *Dunham v. Lamphere* but refused to do so. The principle of *Dunham v. Lamphere* was followed as the controlling authority.

It is important to note that the arguments of defendant in the *Manchester* case were strikingly similar to those of

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52 It must be borne in mind that we are now considering the ownership of lands beneath the marginal sea within the *original States*, so no question is involved of the effect of a reservation of lands over which the State might have jurisdiction without ownership. The effect of such a reservation will be considered in connection with the Act of Admission of California and other new States.

53 We may assume, for the purpose of this discussion, that Buzzard's Bay would be classed as "inland water" although it was strenuously argued that Buzzard's Bay was, in a legal sense, "open sea."

plaintiff in the present case, both as to the rights derived from "the position of the national sovereign" and also as to the superior right of the Federal Government to control the fisheries. Plaintiff in the present case asserts (Br. p. 87) that

> "... the exclusive right to take the fish found in the waters bordering the littoral nation is, for its full enjoyment, largely dependent upon the powers of the United States."

This is one phase of plaintiff's argument that the United States, by performing its constitutional duties, can acquire rights for itself *as against the States.* The argument in the *Manchester* case was essentially the same. Manchester's position and the court's answer to it are set forth in the following quotation (9 L.R.A. 241):

> "But it is argued that if the fisheries of Buzzard's Bay are within the control of either the State of Massachusetts or of the United States, this control by the Constitution of the United States is exclusively with the United States. The question is therefore whether the Statutes of Massachusetts which have
> 61 been cited are repugnant to the Constitution and laws of the United States. *There is no belt of land under the sea adjacent to the coast which is the property of the United States and not the property of the States."*

Here we have a definite and unqualified statement by a Court comprised of such able jurists as Chief Justice Shaw and Justice Holmes that the United States owns no belt of land adjacent to the coast of any State. It is difficult to believe that this Court did not know what it was talking about when it made this statement. Furthermore, this statement was not *obiter dictum*, for the same reasons

that Chief Justice Marshall's statements regarding the cession of territory in *United States v. Bevans* were not *obiter dicta*. The statement was made as an answer to Manchester's contention that the control of fisheries was vested in the Federal Government by the Constitution. Therefore, although the *Manchester* case is a jurisdictional case, the court had to find that the United States did not own the land under the sea in order to negative the possibility that jurisdiction was in the United States.

The fact that the case of *Dunham v. Lamphere* involved the open sea, whereas the *Manchester* case involved Buzzard's Bay, is vitally important when it is seen that *both cases are decided upon the same principle*, namely, that the offense was committed within "the territorial limits of the State, . . ." The ruling which pertained to the open sea was used as authority for the case which arose in Buzzard's Bay. It would be hard to find stronger evidence of the proposition that there are no "pivotal" or "crucial"[54] distinctions between these waters by reason of which one
62 is vested in the Federal Government and the other in the State, as asserted by plaintiff in this case.

(i) MANCHESTER V. MASSACHUSETTS, 139 U.S. 240 (1891).

In the above case this Court affirmed in all particulars the decision of the Massachusetts court just discussed. Again, the striking similarity between the contention of Manchester and those of plaintiff in the present case will be observed. The Court sums up the arguments for Manchester in the first paragraph of the decision, as follows (p. 254):

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[54] Plaintiff's Br. pp. 9, 66.

"The principal contentions in this court on the part of the defendant are that, . . . when she [Massachusetts] became one of the United States, she surrendered to the general government her right of control over the fisheries of the ocean, and *transferred to it her rights over the waters adjacent to the coast and a part of the ocean;* that, as by the Constitution, article 3, section 2, the judicial power of the United States is made to extend to *all cases of admiralty and maritime jurisdiction*, it is consistent only with that view that the rights in respect of fisheries should be regarded as *national rights*, and be enforced only in national courts; that the *proprietary right* of Massachusetts is confined to the *body of the county;* that the offense committed by the defendant was committed *outside of that territory, in a locality where legislative control did not rest upon title in the soil and waters*, but upon rights of sovereignty inseparably connected *with national character* . . . "

Further to see the significance of these contentions, it is important to quote from the brief of plaintiff in error,
63 apparently written by Joseph H. Choate. From this brief we quote the following (pp. 8-9):

"Our argument is that the territory of Massachusetts was defined under the law of England, and that when she adopted the Constitution her domain was limited, as far as proprietary title is concerned, by the body of the county, in accordance with the established principles of that law.

"It was *without this territory* that the offense with which Manchester is charged took place, in a locality where legislative control did not rest upon title in the soil and waters, *but upon rights of sovereignty inseparably connected with national character* . . . "

This Court rejected the entire argument that Federal control rested upon rights "inseparably connected with national character" and applied the principle of *United States v. Bevans* and other decisions which hold that the vesting of sovereign powers in the Federal Government did not constitute a cession of territory (139 U.S. pp. 260, 261, 263, 264).

In support of the argument that Massachusetts had no jurisdiction below low-water mark, Mr. Choate also relied on the case of *Queen v. Keyn*. As we have stated, (*supra*, pp. 28-29), this Court in the *Manchester* case held the *Keyn* case to be wholly inapplicable.

Two important cases relied upon by the Court in the *Manchester* case were *Smith v. Maryland* and *McCready v. Virginia*. The following brief quotations from these cases show that in both of them the Court applied the principle that the original States own the beds of all navigable waters within their limits.

64 (j) SMITH V. MARYLAND, 18 HOW. 71, 74 (1855):

"Whatever soil below low-water mark is the subject of exclusive propriety and ownership, belongs to the State on whose maritime border, and within whose territory it lies, subject to any lawful grants of that soil by the State, or the sovereign power which governed its territory before the declaration of independence. Pollard's Lessee v. Hagan, 3 How. 212; Martin v. Waddell, 16 Pet. 367; Den v. The Jersey Co., 15 How. 426.

"But this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common

liberty of taking fish, as well shellfish as floating fish. Martin v. Waddell; Den v. Jersey Co.; Corfield v. Coryell, 4 Wash. R. 376; Fleet v. Hagemen, 14 Wend. 42; Arnold v. Munday, 1 Halst. 1; Parker v. Cutler Milldam Corporation, 2 Appleton (Me.) R. 353; Peck v. Lockwood, 5 Day. 22; Weston et al. v. Sampson, et al., 8 Cush. 347. The State holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. *This power results from the ownership of the soil, from the legislative jurisdiction of the State over it,* and from its duty to preserve unimpaired those public uses for which the soil is held. Vattel, b. 1, c. 20, s. 246; Corfield v. Coryell, 4 Wash. R. 376. It has been exercised by many of
65 the States. See Angell on Tide Waters, 145, 156, 170, 192-3."

(k) McCready v. Virginia, 94 U.S. 391, 394 (1876):

"The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. *Pollard's Lessee v. Hagan,* 3 How. 212; *Smith v. Maryland,* 18 How. 74; *Mumford v. Wardwell,* 6 Wall. 436; *Weber v. Harbor Commissioners,* 18 *id.* 66. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. *Martin v. Waddell,* 16 Pet. 410."

We submit that plaintiff's contention that the original States did not own lands within the three-mile belt at the time of the formation of the United States has been conclusively answered by the foregoing authorities. They also furnish a conclusive answer to plaintiff's argument "that ownership of the submerged lands . . . if an attribute of sovereignty, is an attribute of national rather than local sovereignty."[55] This argument, as we pointed out, was rejected by this Court in *United States v. Bevans, Manchester v. Massachusetts,* and other cases previously discussed.

66 F. Lands Beneath Navigable Waters Are Held by the States by Virtue of, and as an Incident to, State Sovereignty.

We pass now to the alternative argument of plaintiff (Br. p. 143, *et seq.*) that "ownership of the submerged lands is not an attribute of sovereignty at all within the meaning of the equal footing clause."

It is of course true that in the broadest sense every act of the sovereign is done by virtue of its sovereignty and all property which the sovereign possesses is held by it as sovereign, or, in other words, as the governing power. When it is said that a State holds some property in a proprietary capacity and other property as an attribute of sovereignty, it is a convenient way of saying that the legal results (*i.e.*, obligations and duties) which flow from the ownership of one type of property are different from the legal results which flow from ownership of the other type of property. The real question is whether such differences do exist and whether they are based on valid and substantial grounds. If so, it is immaterial whether we

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55 Plaintiff's Br. pp. 9-10; 72-73; 89.

describe one type of legal result by calling it an attribute of sovereignty and the other by calling it proprietary, although this has been the practice of the courts from time immemorial, as we shall show.

There are many instances in which the governmental ownership of dry land does not involve any treatment that is substantially different from that required for similar land held by private individuals, and hence it is said that the sovereign owns such land "as a proprietor." But the ownership of navigable waters, because of their nature as highways of commerce and as the source of the common right of fishery, calls for the exercise of governmental
67 powers and duties which are different both in kind and degree from those powers which need to be exercised in relation to dry land. It was this doctrine which gave rise to the terminology *jus privatum* and *jus publicum,* used by Lord Hale [Appendix C, pp. 45-46], which simply meant that although the King owned the land as a proprietor, he held it subject to the public trust and that the administration of this trust was a necessary governmental duty or function.

This principle that lands beneath navigable waters are subject to these common rights of fishery and navigation has been consistently applied by the English courts from the earliest times to the present, as we show in the outline of the English decisions [see App. C, pp. 39-65].

The same principle of course applied when the original States succeeded to the rights of the Crown. They succeeded to the Crown's proprietary right in the bed of the sea but they also assumed, as sovereigns, the governmental function of protecting and regulating the public trust, that is, of protecting and regulating the rights of

the public in the use of the navigable waters for fishery and commerce. That is the factual and historical basis of the rule that the ownership of navigable waters vests in the State by virtue of its sovereignty.

The cases already cited show that the States' ownership of lands beneath navigable waters is in the *capacity of sovereign* in a sense different from its ownership of dry land. This was stated in *Martin v. Waddell, Pollard v. Hagan,* and, indeed, in all the cases cited *supra,* pp. 51-65. No better statement of the principle can be found than that in the opinion of this Court by Mr. Justice Stone in
68 *Massachusetts v. New York,* 271 U.S. 65, 89 (1926):

> ". . . The dominion over *navigable waters,* and property in *the soil under them,* are so identified with the exercise of the sovereign powers of government that *a presumption against their separation from sovereignty must be indulged,* . . . "

The same statement appears in *United States v. Oregon,* 295 U.S. 1, 14 (1935).

It is important to note that in these decisions the Court held that the dominion over navigable waters was identified with the sovereign powers of *state* government, not of the Federal Government. Yet plaintiff cites these very cases as holding that:

> "The presumption would be against any intention *of Congress* to sever the title from the sovereignty of *the United States* to which it was annexed. Cf. *Massachusetts v. New York,* 271 U.S. 65, 89; *United States v. Oregon,* 295 U.S. 1, 14." (Br. p. 73.)

What this Court holds to be a presumption against the separation of dominion over lands under navigable waters

from *state sovereignty*, plaintiff advances as an argument against the separation of such lands from the *sovereignty of the United States.*

The *Massachusetts* case is also of importance because it deals with the bed of Lake Ontario, the center of which constitutes the international boundary between the United States and Canada. The State is held to be the owner of the bed of that lake to the international boundary. If
69 there was any national interest which called for Federal ownership of lands beneath the three-mile belt of the ocean, it would seem such interest would apply even more strongly to the bed of a lake in which the boundary between this country and a foreign nation is located. Yet, as above stated, the Court held that the ownership of the bed of this lake was so closely identified with sovereignty *of the State* that a presumption against their separation must be indulged.

In the case of *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892), involving the title to the soil beneath Lake Michigan within the boundaries of the State, this Court described fully the different legal results which flow from ownership of lands beneath navigable waters as compared with dry land. On this point the Court said (p. 452):

> "That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, * * * But it is a *title different in character* from that which the State holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. It is a *title held in trust for the people* of

the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the *State may grant parcels of the submerged lands;* and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. *General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases.* A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. *The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them,* so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, *than it can abdicate its police powers in the administration of government and the preservation of the peace."*[56]

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[56] Plaintiff cites this case (Br. p. 151) in support of its argument that the State may convey title to lands beneath navigable

(Continued)

An example of the application of this rule is found in *United States v. Chandler-Dunbar W.P. Co.*, 209 U.S. 447 (1908). The case involved the character of the State of Michigan's ownership of land beneath navigable waters in
71 the bed of the St. Mary's River. Incidentally, the center of this river was the boundary between the United States and Canada. If the Federal Government could acquire a proprietary right in the bed of navigable waters by reason of the national interest, it would seem that the Court would have so declared in this case, in view of the existence of the international boundary line in the bed of the river. Nevertheless, the Court, through Mr. Justice Holmes not only upheld the State's title, but said (pp. 451-452):

> ". . . The right of the State to grant lands covered by tide waters or navigable lakes and the qualifications, as stated in Shively v. Bowlby, 152 U.S. 1, 47, are that the State may use or dispose of any portion of the same *'when that can be done without substantial impairment of the interest of the public in such waters, . . .'* "

The principle as expressed by Mr. Justice Holmes is invariably applied in the development of a harbor. Ships cannot land on a beach between high and low tide. Land must be filled and often leased or disposed of into private ownership for purposes of docks, wharves, warehouses

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56 (Continued) waters "free of any public trust." Obviously the case does not support plaintiff's statement. Plaintiff ignores the fact that this case holds that grants by the State of submerged lands are valid only when they can be made without impairing the public trust. This was the holding in *Weber v. Board of Harbor Commissioners*, 18 Wall. 57, 66 (1873); *Boone v. Kingsbury*, 206 Cal. 148 (1928) and *City of Long Beach v. Marshall*, 11 Cal. (2d) 609, 614-615 (1938), also cited by plaintiff at this point.

and other uses incidental to navigation and fisheries. (See map of Los Angeles and Long Beach Harbors, p. 5.)

It would take too long to list all the cases of this Court which announce and rely upon this principle but we respectfully submit that the statements of Mr. Chief Justice Taney in *Martin v. Waddell*, and of Mr. Justice Field in *Illinois Central v. Illinois*, and of Mr. Justice Holmes in *United States v. Chandler-Dunbar W.P. Co.*, and of Mr. Chief Justice Stone in *Massachusetts v. New York*, and of
72 many other of the justices of this Court, are not "patently unsound."[57]

This public trust doctrine is embedded in the constitutional and statutory law of the various States as well as in the common law. Congress has followed a consistent course ever since the enactment of the Ordinance of 1787 for the government of The Northwest Territory. This Ordinance required that:

> "all navigable waters within the said State shall forever remain public highways, free to the citizens of said State and of the United States, without any tax, duty, impost, or toll, therefor, imposed by the said State."

This language in the Ordinance of 1787 governed the States formed out of The Northwest Territory, namely, Illinois, Indiana, Ohio, etc. This language was then embodied in the Acts of Admission of other newly admitted States such as Alabama, Mississippi, Louisiana, Oregon, Florida, California, etc. Likewise, Congress required the Southern States, when they were readmitted into the

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[57] This Court unanimously applied the public trust doctrine to navigable waters in California in *United States v. Mission Rock Co.*, 189 U.S. 391, 407 (1903), citing many cases.

Union after the Civil War, to embody this same phrase in their State Constitutions or statutes.

* * *

101 H. Decisions and Authorities Upholding State Ownership of Bed of Sea Out to the Three-Mile Limit.

Plaintiff relies heavily upon the assumption (Br. p. 154) that there are no decisions in which this Court has definitely determined the question of the ownership of the bed of the sea within a State's territorial limits.

We have already discussed this question under subdivision E (*supra*, pp. 47-65), where we showed that the courts have definitely held that ownership by the original States of the beds of their navigable waters is co-extensive with their respective jurisdictions. We showed that the Court applied this principle as well to the open sea (*Dunham v. Lamphere*, approved in *Manchester v. Massachusetts*) as to bays and harbors. It is by no means correct to say that the Court has not definitely dealt with the subject of the State's ownership of the bed of the sea. A few other decisions dealing with the "open sea" are:

UNITED STATES SUPREME COURT.

(a) THE ABBY DODGE V. UNITED STATES, 223 U.S. 166 (1912).

The principle that the ownership by the State of the lands beneath navigable waters is co-extensive with its jurisdiction over such lands is graphically shown in *The Abby Dodge.*

The case is also important because the United States was a party to and, in fact, instituted the action.[78]

102 The main issue was the constitutionality of an Act of Congress adopted June 20, 1906, prohibiting the landing or sale of sponges taken by means of diving apparatus

> "from the waters of the Gulf of Mexico or Straits of Florida."

The Act did not specify whether its operation was limited to the territorial waters of the State or extended to the bed of the ocean outside the jurisdiction of the State. Appellant urged that the Act was unconstitutional, whichever way construed; *i.e.*, that Congress had no authority to legislate on this subject either within or without the territorial limits of the State.

The Court considered the Act from both aspects. Taking up first the claim that the Act applied *within the State*, the Court said (p. 173) that if this construction were to be accepted

> "the repugnancy of the act to the Constitution would plainly be established by the decisions of this court."

Here we have an unequivocal holding that an Act of Congress regulating the taking of sponges from the bed of the sea within the territorial waters of a State would be unconstitutional. And the reason for such unconstitutionality is given in the following passage, which the Court quoted from *McCready v. Virginia:*

> " 'The principle has long been settled in this court, that each State owns the beds of all tide-waters *within its jurisdiction*, unless they have been granted away.

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78 The docket title of the case is "The vessel 'Abby Dodge', A. Kalimeris, Claimant, Appellant, v. The United States."

Pollard's Lessee v. Hagan, 3 How. 212; *Smith v. Maryland*, 18 How. 74; *Mumford v. Wardwell*, 6 Wall. 486; *Weber v. Harbor Commissioners*, 18 *id.* 66. In like manner, the States own the tidewaters themselves, and the fish in them, so far as they are capable of
103 ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. *Martin v. Waddell*, 16 Pet. 410. . . .

"'The right which the people of the State thus acquire comes not from their citizenship alone, but *from their citizenship and property combined.* It is, in fact, *a property right*, and not a mere privilege or immunity of citizenship.'" (p. 177.)

This holding cannot be considered as dictum because it was one of the questions involved and necessary to be decided in that case. This appears from the following (p. 175):

"The obvious correctness of the deduction which the proposition embodies that the statute is repugnant to the Constitution when applied to sponges taken or gathered within state territorial limits, however, establishes the want of merit in the contention as a whole. In other words, the premise that the statute is to be construed as applying to sponges taken within the territorial jurisdiction of a State is demonstrated to be unfounded by the *deduction of unconstitutionality to which such premise inevitably and plainly leads.* This follows because of the elementary rule of construction that where two interpretations of a statute are in reason admissible, one of which creates a repugnancy to the Constitution and the other avoids such repugnancy, the one which

> makes the statute harmonize with the Constitution must be adopted."

The Court then held the statute valid as an exertion of congressional power to regulate foreign commerce if the
104 Abby Dodge was gathering sponges *outside of State boundaries* and *only* in

> "waters which by the law of nations would be regarded as the common property of all and was transporting the sponges so gathered to the United States, the vessel was engaged in foreign commerce, and was therefore amenable to the regulating power of Congress over that subject."

The court held that although the statute *so construed* was valid, the "averments of the libel" were indefinite and failed to *"negative the fact that the sponges may have been taken from waters within the territorial limits of a State."* Therefore, the court said that

> "the libel failed to charge an element essential to be alleged and proved, in order to establish a violation of the statute."

This holding is squarely in accord with the rulings of *United States v. Bevans, Manchester v. Massachusetts, Pollard v. Hagan,* and other cases previously discussed. The Federal Government was held *not* to have jurisdiction to regulate the taking of sponges from the bed of the sea within the territorial limits of Florida *because* the bed of the sea *belongs* to Florida. Conversely, if the United States had owned the soil within three miles of the coast it could have prevented the taking of sponges from its own property.[79]

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[79] *Camfield v. United States,* 167 U.S. 518 (1897); *United States v. Beebe,* 127 U.S. 338 (1888).

It is also significant that the Court cited *Pollard v. Hagan, McCready v. Virginia* and *Martin v. Waddell.* These cases, plaintiff asserts, involved only "inland waters." But
105 here they are cited as furnishing the basis of the ruling that the State owns the beds of *all* waters within its territorial jurisdiction. This demonstrates that the governing principle does not rest on any supposed distinction between "inland waters" and the three-mile belt, but rather on the question whether the area in dispute is beneath navigable waters within the legally established boundaries of the State.

Finally, and perhaps the most significant thing about the *Abby Dodge* case is that Congress in 1914 recognized and gave effect to the Court's decision by amending the statute so as to make it effective only in waters

"outside of State territorial limits."

We have, therefore, a statutory recognition *by the United States itself,* acting in its sovereign capacity through Congress, that the Federal Government cannot exercise the proprietary right of an owner of the soil in the territorial waters of a State.

(b) NEW JERSEY v. DELAWARE, 291 U.S. 361 (1934). DECREE 295 U.S. 694 (1935).

This case involved the settlement of the boundary line between Delaware and New Jersey. The opinion by Mr. Justice Cardozo contains important statements concerning the ownership by the Crown of England of the beds of navigable waters and the like ownership of our States, and also concerning the sovereign capacity in which such ownership is held. On these points Justice Cardozo said:

". . . There is high authority for the view that power was in the Crown by virtue of the *jus privatum* to convey the soil beneath the waters for uses merely private, but subject always to the *jus publicum*, the right to navigate and fish. *Commonwealth v. Alger*, 7 Cush. 53; *People v. N.Y. & S.I. Ferry Co.*, 68 N.Y. 71, 76; *People v. Steeplechase Park Co.*, 218 N.Y. 459, 473; 113 N.E. 521; *Shively v. Bowlby*, 152 U.S. 1, 13; Hale De Jure Maris, p. 22. Never has it been doubted that the grant will be upheld where the soil has been conveyed as an incident to the grant or delegation of powers strictly governmental. *Martin v. Waddell's Lessee*, 16 Pet. 367, 410, 413; *Massachusetts v. New York*, 271 U.S. 65, 89, 90. In such circumstances, 'the land under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; and were to be held by him in the same manner, and for the same purposes that the navigable waters of England, and the soils under them, are held by the Crown.' *Martin v. Waddell's Lessee, supra*, p. 413." (291 U.S. 373-374.)

It is important to note that here Justice Cardozo does not talk about "inland waters" but about "navigable waters" and the soils under them.

The above holding must be considered in relation to the final decree of the Court.

The decree in this case (295 U.S. 694) contains a description of the boundary lines as fixed by this Court between the two States. A map is attached to and made part of the decree and is contained in 295 U.S. opposite page 701. The boundary line, as described in the decree and shown on the map, *extends three miles into the*

Atlantic Ocean. The description in the decree of that portion of the line which extends into the Atlantic is as follows (p. 698):

> "Thence (13) in a straight line S 24° 06′ E True, be the distance more or less, *through Delaware Bay and seaward to the limits of the respective States of*
107 *New Jersey and Delaware in the Atlantic Ocean,* said course passing through a point located S 65° 54′ W True, 1303 yards from Brandywine Shoal Light."

It is clear from the above, together with the map, that the limits of the respective States are three miles oceanward of a line drawn between the headlands of Delaware Bay, namely Cape Henlopen to Cape May. It is also important to note that this Court adjudicated *ownership* by each State over the territory thus declared to be within its jurisdiction. On this point the Court decreed (pp. 698-699):

> "The State of Delaware, its officers, agents and representatives, its citizens and all other persons, are perpetually enjoined from disputing the *sovereignty, jurisdiction and dominion of the State of New Jersey over the territory adjudged to the State of New Jersey by this decree;* and the State of New Jersey, its officers, agents and representatives, its citizens and all other persons are perpetually enjoined from disputing the *sovereignty, jurisdiction and dominion of the State of Delaware over the territory adjudged to the State of Delaware by this decree.*"

The word "dominion,"[80] especially when used together with the words "sovereignty" and "jurisdiction," necessarily implies ownership.

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80 " 'Dominion' is a word of definite legal meaning and means ownership or right to property or perfect or complete property or
(Continued)

08 (c) LOUISIANA V. MISSISSIPPI, 202 U.S. 1 (1906).

This case involved the boundary between Louisiana and Mississippi. However, the dispute arose over the validity of an Act of the Legislature of Louisiana prohibiting non-residents from "fishing oysters in Louisiana waters."

The Court determined that the boundary extends from the Pearl River

> ". . . thence south along the channel of that river to Lake Borgne. Pearl river flows into Lake Borgne, Lake Borgne into Mississippi Sound and Mississippi Sound *into the open Gulf of Mexico*, . . . " (p. 48.)

The problem was thus presented of locating the boundary through Lake Borgne and Mississippi Sound. Here the Court applied the doctrine of the Thalweg or "deep water channel." Mississippi contended that the rule of Thalweg

> "expires by its own limitation when such midchannel reaches Lake Borgne, which in contemplation of the rule is the open sea, and part of the waters of the Gulf of Mexico." (pp. 51-52.)

The Court rejected this argument on the ground that Lake Borgne and Mississippi Sound is not open sea, but an arm of the sea having a deep water channel. The rule of Thalweg was, therefore, applied until the deep water channel line reached the open sea, but obviously it could

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80 (Continued) ownership in a thing. *Whelan v. Henderson*, Tex. Civ. App. 137 S.W.2d 150, 153." (13 Words and Phrases, Cum. An. Pock. Part, 51.)

Gruber v. Pac. States Sav. & Loan Co., 13 Cal. (2d) 144, 148; *Fisher v. Pickwick*, 42 Cal. App. (2d) Supp. 823, 825-826; *Kee v. Becker*, 54 Cal. App. (2d) 466, 470.

have no application *in* the open sea. To negative the inference that ownership stopped where the rule of Thalweg ceased to be applicable the Court held (p. 52):

> "The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea. See *Manchester v. Massachusetts,* 139 U.S. 240; *McCready v. Virginia,* 94 U.S. 391."

109

It is important to note that the Court cited the *Manchester* and *McCready* cases. Plaintiff has insisted that the *McCready* case applies only to "inland waters." If so, it is pertinent to ask why this Court cited it in support of the statement above quoted. The answer is plain. The Court was referring to the basic principle set forth in the *McCready* case, namely, that

> "each State owns the beds of all tide waters within its jurisdiction, . . . " (94 U.S. 391, 394.)

thus demonstrating that the Court was of the view that this principle applies as well to the maritime belt as to "inland waters."

That the Court intended to hold that the State owned this maritime belt is further evidenced by the following excerpt (pp. 52-53):

> "Islands formed by alluvion were held by Lord Stowell, in respect of certain mud islands at the mouth of the Mississippi, to be 'natural appendages of the coast on which they border, and from which indeed they are formed.' *The Anna* (1805), 5 C. Rob. 373."

The Court did say in this case that it was unnecessary to determine "the breadth of the maritime belt," but it did not say that it was unnecessary to determine that the States owned such a belt, and the case does determine that precise question. This is further borne out by the decree, which reads, in part (pp. 58-59):

> "It is further ordered, adjudged and decreed that the State of Mississippi, its officers, agents and citizens, be and they are hereby enjoined and restrained from *disputing the sovereignty and ownership of the State* of Louisiana in *the land and water territory* south and west of said boundary line as laid down on the foregoing map."

The effect of the decision was to uphold the statute of Louisiana which applied to "Louisiana waters." If Louisiana had not owned the soil beneath the waters along her coasts, this statute excluding non-residents from taking oysters would not have been valid. This Court has held that the right of a State to exclude non-residents from taking fish from its waters is predicated on ownership of the soil.[81] In other words, if the soil under the marginal sea had been owned by the United States, the privileges and immunities clause in the Constitution would have prevented Louisiana from reserving the oyster beds and other products of the soil for her own citizens. The same principles must apply to minerals.

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81 *Smith v. Maryland*, 18 How. 71 (1855); *McCready v. Virginia*, 94 U.S. 391 (1876); *Manchester v. Massachusetts*, 139 U.S. 240 (1891).

(d) ILLINOIS CENTRAL R. R. CO. v. ILLINOIS, 146 U.S. 387 (1892).

This case involved the waters of Lake Michigan within the boundaries of that State. The Court held that the States have title to the bed of the sea, and that the Great Lakes are "open seas." On this ground it was held that Illinois owned the bed of Lake Michigan. The case is, therefore, in effect, a decision on the ownership of the beds of the open sea within the boundaries of a State.

111 The Court held (pp. 435-437):

> "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by *tide waters, within the limits of the several States,* belong to the respective States within which they are found, . . . *Pollard's Lessee v. Hagan,* 3 How. 212; *Weber v. Harbor Commissioners,* 18 Wall. 57.
>
> "The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different States and foreign nations. *These lakes possess all the general characteristics of open seas,* except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands *covered by tide waters* that is not equally applicable to its ownership *of and dominion and sovereignty over lands covered by the fresh waters of these lakes."*

(e) MASSACHUSETTS v. NEW YORK, 271 U.S. 65 (1926).

This case, from which we have already quoted (*supra*, pp. 32, 68), holds that the State of New York is the owner of the land in the bed of Lake Ontario within its boundaries. This ownership is equivalent in every respect to the ownership of lands in the open sea out to the State's boundary. If, as plainfiff asserts, it is necessary to the exercise of the Federal Government's powers of external sovereignty that it own the three-mile belt of the open sea, on the same reasoning it would be necessary for the Federal Government to own the bed of the Great Lakes to the international boundary line. The direct holding of this Court in the *Illinois* and *New York* cases completely destroy plaintiff's theory that ownership of the waters along the coasts of this nation has anything to do with the exercise by the Federal Government of its constitutional duties, either of national defense or otherwise. To the same effect see *United States v. Chandler-Dunbar Water Co.*, 209 U.S. 447 (1908), regarding the ownership by the State of waters in a river which forms the international boundary. (*Supra*, pp. 70-71.)

112

CALIFORNIA AND OTHER STATE COURT DECISIONS.

The California Supreme Court in *Boone v. Kingsbury*, 206 Cal. 148 (1929)[82] decided that the State of California was the owner of the submerged lands in the Pacific Ocean along the entire coast of California within the State's boundaries. In reliance upon the decisions of this Court in *Hardin v. Jordan*, 140 U.S. 371; *Shively v. Bowlby*, 152 U.S. 1 and *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, the California court held (p. 190):

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82 Certiorari denied, 280 U.S. 517.

"Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State – a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery – cannot be retained or granted out to individuals by the United States. Such title being in the State, the lands are subject to State regulation and control, . . . "

113 A number of other California decisions have followed and applied the rule of *Boone v. Kingsbury* under the 1921 offshore leasing statutes.[83]

The Florida Supreme Court said in *Freed v. Miami Beach Pier Corporation,* 112 So. 841; 844 (1927), that:

"Upon the admission of the state of Florida . . . the lands within the territorial limits of the state below ordinary high-water marks of the ocean and gulf and other navigable waters became the property of the state by virtue of its sovereignty. See the Abby Dodge, 223 U.S. 166, 32 S. Ct. 310, 56 L. Ed. 390."

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[83] *Kelley v. Kingsbury* (1930), 210 Cal. 37; *Joyner v. Kingsbury* (1929), 97 Cal. App. 17; *Carr v. Kingsbury* (1931), 111 Cal. App. 165; *Feisthamel v. Kingsbury* (1931), 111 Cal. App. 762; *Cummings v. Kingsbury* (1931), 111 Cal. App. 763; *Joyner v. Kingsbury* (1931), 111 Cal. App. 764; *Maggart v. Kingsbury* (1931), 111 Cal. App. 765; *Stone v. City of Los Angeles* (1931), 114 Cal. App. 192; *Farry v. King* (1932), 120 Cal. App. 118; *Hollister v. Kingsbury* (1933), 129 Cal. App. 420; *General Pet. Corp. v. Hobson* (D.C. Cal. 1927), 23 F. (2d) 349; *Bankline Oil Co. v. Comm.* (C.C.A. 9, 1937), 90 F. (2d) 899; *Helvering v. Bankline Oil Co.* (1938), 303 U.S. 362; *Spalding v. United States* (D.C. Cal. 1937), 17 Fed. Supp. 957; *Spalding v. U.S.* (C.C.A. 9, 1938), 97 F. (2d) 697; *Stockburger v. Jordan* (1938), 10 Cal. (2d) 636; *Miller v. Stockburger* (1938), 12 Cal. (2d) 440.

In 1931 the Florida Supreme Court said in *Lipscomb v. Gialourakis*, 133 So. 104, 106, that:

> "All the bottoms of the gulfs and natural bays within the limits of the state of Florida passed to the State of Florida in its sovereign capacity when Florida was admitted into the Union."[84]

114 The New York Appellate Division in 1927 in *People ex rel. Mexican Telegraph Company v. State Tax Commission*, 220 N.Y.S. 8, 17, Note 10, said that:

> "State owns land under water within three-mile limit."

In *People v. Reilly*, 14 N.Y.S. (2d) 589, 592 (Magistrates' Court 1939), the court said that:

> "The State owns and has jurisdiction over all land under water within the three-mile limit. People *ex rel.* Mexican Tel. Co. v. State Tax Commissioner, 219 App. Div. 401, 220 N.Y.S. 8."

State v. Pollock, 239 Pac. 8, 10 (Wash. 1925), states that:

> ". . . the jurisdiction and dominion of the state extends to the three-mile limit offshore."[85]

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84 See also *Deering v. Martin* (Florida 1928), 116 So. 54, 61; *Perky Properties v. Felton* (Florida 1934), 151 So. 892, 895.

85 To the same effect: *Suttori v. Peckham* (1920), 48 Cal. App. 88; *Dunham v. Lamphere* (1855), 69 Mass. (3 Gray) 268. See *Commonwealth v. Boston Terminal Company* (Mass. 1904), 70 N.E. 125; *Pope v. Blanton* (1935, D.C. Fla.), 10 Fed. Supp. 18, dismissed for lack of jurisdiction 299 U.S. 521; *Bosarge v. State* (Alabama 1929), 120 So. 427, cert. den. 280 U.S. 568.

TREATISES.

2 *Lindley on Mines* (3d ed. 1914), Section 429, page 1016, states that:

"When a state bordering upon these waters is admitted into the Union it becomes, by virtue of its sovereignty, the owner of all lands extending seaward so far as its municipal dominion extends, — . . . from
115 the line of ordinary high tide on the shore of the open ocean seaward to the distance of three miles, or a marine league."

2 Thornton, *Oil and Gas* (Willis, 5th ed. 1932), Section 476, page 979, states that:

"Mineral beneath . . . the sea belongs to the State."

45 C.J., page 540, Note 78(b), states that:

"Within the three-mile limit, a state owns land submerged by the sea."

27 *Ruling Case Law*, page 1358, states that:

Under the common law of England the title to the bed of the sea below high water mark . . . was in the Crown. . . . In the United States the several states have succeeded to all the right of the Crown and Parliament in the soil under navigable tide waters, and each, subject to limitations to be found in the federal constitution, has the ownership and control of all the navigable waters and the bed thereof within its limits."

Tiffany, *Real Property* (3d Ed., 1939), Vol. 3, p. 638:

"The land under navigable waters within the limits of the territory ceded to the United States, either by one of the states or by a foreign country, passed to

the United States for the benefit of the whole people, and in trust for the several states to be ultimately created out of such territory, and, upon
116 the admission of any part of such territory as a state, such lands pass *ipso facto* to the state government, . . ."

Gould, *Waters* (2nd Ed., 1891), p. 75:

"At the time of the Revolution, when the people became sovereign, the respective States succeeded to the title of the Crown in the tide waters within their territorial limits, . . ."

Angell, *Tide Waters* (2nd Ed., 1847), pp. 55, 53, 57:

"The original states, in virtue of their royal charters, are entitled to the navigable waters within their territory, . . ."

"The next question is, whether the *new* states of the Union, or those which have been admitted since the revolution, stand upon the same footing as the *original* states; or whether the sovereign right of property in the tide waters within the jurisdictional limits of a new state, is transferred to the state government, or remains in the general government."

". . . the shores of navigable waters, and the soil under them, were not granted by the constitution to the United States, but were reserved to the states respectively; and . . . the *new* states have the same rights, sovereignty and jurisdiction over the subject as the *original* states."[86]

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[86] Italics in Angell.

I. RULE OF PROPERTY.

1. Rationale of the Rule of State Ownership.

117 It must be strikingly apparent from the numerous cases already cited that the courts have never predicated property rights or governmental powers upon any distinction as between "inland waters" (including bays, harbors and waters between high and low tide) on the one hand and the marginal sea on the other.

The reason no such distinction was ever made is that the rationale of the principle of State ownership is the same as to all navigable waters within the State's boundary. Navigability is the sole criterion. Navigability is not dependent on whether the waters are salt or fresh, or whether they are land-locked or in the open sea below low-water mark.

This principle is graphically illustrated in the case of *Barney v. Keokuk*, 94 U.S. 324 (1876), a case involving the bed of the Mississippi River. Regarding the title to the bed of that river, and particularly to accretions which attached to land on a navigable river, this Court said (pp. 337-8):

> ". . . By the common law, as before remarked, such additions to the land on navigable waters belong to the crown; but as the only waters recognized in England as navigable were tide-waters, the rule was often expressed as applicable to tide-waters only, although *the reason of the rule* would equally apply to navigable waters above the flow of the tide; that reason being, that the public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience.

. . . In our view of the subject the correct principles were laid down in *Martin v. Waddell*, 16 Pet. 118 367; *Pollard's Lessee v. Hagan*, 3 How. 212, and *Goodtitle v. Kibbe*, 9 *id.* 471. These cases related to *tide-waters*, it is true; but they enunciate principles which are equally applicable to *all navigable waters.*"

It will be seen that the rule of State ownership is based *solely* on the ground that the waters are navigable, not on the character of the waters as "inland waters" or waters of the sea.

This rationale is further elaborated by this Court in the case of *Illinois Central R.R. Co. v. Illinois*, previously discussed. The Court held (146 U.S. 387, 435-437):

> "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by *tide waters, within the limits of the several States*, belong to the respective States within which they are found, . . . *Pollard's Lessee v. Hagan*, 3 How. 212; *Weber v. Harbor Commissioners*, 18 Wall. 57.
>
> "*The same doctrine* is in this country held to be applicable to lands covered by fresh water in the Great Lakes . . . and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands *covered by tide waters* that is not equally applicable to its *ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes.* . . .
>
> ". . . by the common law, the doctrine of the dominion over and ownership by the crown of lands *within the realm under tide waters* is not founded

upon the existence of the tide over the lands, but upon the fact that the waters *are navigable*, . . ."

119 Plaintiff concedes that the language employed by this Court in its decisions, is

"susceptible of an interpretation that would include lands under the marginal sea." (Br. p. 155.)

However, plaintiff attempts to explain away this language on the ground that it was "probably merely fortuitous," by which we assume plaintiff means it was a mere accident that the Court repeatedly said that the States were the owners of the lands beneath all navigable waters within their boundaries.

Even if it could be assumed that an accident such as this could happen consistently in dozens of decisions over a period of one hundred years, still that argument ignores the fact that the court was in each instance stating *the rationale of the rule of State ownership of lands beneath navigable waters*– and the rationale is the same for both "inland waters" and marginal sea. The court was therefore setting forth in each case a general principle which required only specific application to the particular facts before the Court. This being so, it is entirely erroneous to say that this language was careless or fortuitous *obiter dictum*. The truth is that it was the basic principle upon which State ownership in each case had to be predicated.

It is a well settled rule of law in this Court that the considered enunciation of a principle of law upon which a decision is based does not constitute *obiter dictum*. (See cases cited *infra*, p. 128 *et seq.*)

It is also well settled that the repeated expression of a general principle upon which titles to property have become predicated constitutes a rule of property of the kind

which this Court has consistently, throughout its history, declined to overrule. (See cases *infra*, pp. 130-137.)

120 We desire at this point to set forth in skeleton form a series of pronouncements on this subject by this Court which demonstrate that the rule of State ownership has been adopted by this Court as a fundamental principle of public law which has become a rule of property.

It is important to notice that in each of the quotations two elements are expressly or impliedly present. One, the factor of navigability, and the other that State ownership is co-extensive with the jurisdiction (boundaries) of the State.

2. Supreme Court Cases.

Chief Justice Taney, in 1842 in the first case establishing the rule, said:

> "For when the Revolution took place the people of each State became themselves sovereign, and in that character hold the abolute right to all their navigable waters and the soils under them. . ."[87]

Mr. Justice McKinley in 1845 said:

> "First, the shores of navigable waters, and the soils under them, were not granted by the constitution to the United States, but were reserved to the states respectively. Secondly, the new states have the same rights, sovereignty, and jurisdiction over the subject as the original states."[88]

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87 *Martin v. Waddell* (1842), 16 Peters 367, 410.

88 *Pollard v. Hagan* (1845), 3 How. 212, 229.

Mr. Justice Clifford in 1867 said:

> "Settled rule of law in this court is, that the shores of navigable waters and the soils under the same in the original states were not granted by the Constitution to the United States, but were reserved to the several states, and that the new
121 states since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original states possess within their respective borders. When the Revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them. . . ."[89]

Mr. Justice Field in 1873, for a unanimous court that included Chief Justice Chase, said

> "all soils under the tide waters within her limits passed to the State";[90]

Mr. Justice Bradley in 1876 said:

> "In our view of the subject the correct principles were laid down in Martin v. Waddell, 16 Pet. 367, Pollard's Lessee v. Hagan, 3 How. 312, and Goodtitle v. Kibbe, 9 How. 471. These cases related to tidewaters, it is true; that they enunciated principles which are equally applicable to all navigable waters . . . it [the bed and shore of such waters] properly belongs to the State by their inherent sovereignty. . ."[91]

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89 *Mumford v. Wardwell* (1867), 6 Wall. 423, 436.

90 *Weber v. Harbor Commissioners* (1873), 18 Wall. 57, 66.

91 *Barney v. Keokuk* (1876), 94 U.S. 324, 336.

Chief Justice Waite in 1876 said:

> ". . . each State owns the beds of all tide-waters within its jurisdiction . . .";[92]

Mr. Justice Field in 1891 said:

> ". . . the titles acquired by the United States to lands in California under tide-waters, from Mexico, were held in trust for the future State, so that their ownership and right of disposition passed to it upon its admission into the Union, . . ."[93]

Mr. Justice Lamar in 1891 said:

> "It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders."[94]

Mr. Justice Gray in 1894 said:

> "The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions."[95]

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92 *McCready v. Virginia* (1876), 94 U.S. 391, 394.

93 *San Francisco v. Leroy* (1891), 138 U.S. 656, 670-671.

94 *Knight v. United States Land Association* (1891), 142 U.S. 161, 183.

95 *Shively v. Bowlby* (1894), 152 U.S. 1, 57.

Mr. Justice Holmes in 1903 said:

> ". . . the grounds for the decision must be quite different from the considerations affecting the conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the State by its admission to the Union."[96]

Chief Justice Fuller in 1906 said:

> "the maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls,
123 or amber, or other products of the sea";[97]

Mr. Justice Holmes in 1908 said:

> "The right of the State to grant lands covered by tide waters or navigable lakes and the qualifications, as stated in Shively v. Bowlby, 152 U.S. 1, 47, are that the State may use or dispose of any portion of the same 'when that can be done without substantial impairment of the interest of the public in such waters, . . .,"[98]

Chief Justice White said in 1912:

> "each State owns the beds of all tide-waters within its jurisdiction";[99]

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[96] *Hardin v. Shedd* (1903), 190 U.S. 508, 519.

[97] *Louisiana v. Mississippi* (1906), 202 U.S. 1, 52.

[98] *United States v. Chandler-Dunbar Water Power Co.* (1908), 209 U.S. 447, 451.

[99] *Abby Dodge* (1912), 223 U.S. 166, 174.

Mr. Justice Brandeis in 1921 said:

> ". . . Washington became . . . the owner of the navigable waters within its boundaries and of the land under the same."[100]

Chief Justice Taft in 1926 said:

> "all the proprietary rights of the Crown and Parliament in, and all their dominion over, lands under tidewater vested in the several states;"[101]

Chief Justice (then Mr. Justice) Stone in 1935 said that:

> "lands underlying navigable waters within the States passes to [the States];"[102]

Chief Justice Hughes said in 1935:

> "The soils under tidewaters within the original states were reserved to them respectively, and the states since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original states possessed;".[103]

Chief Justice Hughes in 1935 said:

> "Pollard v. Hagan, 3 How. 212, Shively v. Bowlby, 152 U.S. 1, and Port of Seattle v. Oregon-Washington R. Co., 255 U.S. 56, dealt with the title of the

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100 *Port of Seattle v. Oregon & W.R.R. Co.* (1921), 255 U.S. 56, 63.

101 *Appleby v. New York* (1926), 271 U.S. 364, 381.

102 *United States v. Oregon* (1935), 295 U.S. 1, 14.

103 *Borax Consolidated v. Los Angeles* (1935), 296 U.S. 10, 15.

States to tidelands *and the soil under navigable waters within their borders.* See Borax Consolidated v. Los Angeles, 296 U.S. 10, 15."[104]

The rule has been stated in substantially the same words by more than 25 other justices of this Court over a period of the last 100 years,[105] as well as by numerous judges of

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104 *Ashwander v. Tennessee Valley Authority* (1936), 297 U.S. 288, 337.

105 *Goodtitle v. Kibbe* (1850, Taney, C.J.), 9 How. 470, 477;
Den v. Jersey Company (1853, Taney, C.J.), 15 How. 426, 432-433;
Smith v. Maryland (1855, Curtis, J.), 18 How. 71, 74;
County of St. Clair v. Lovingston (1874, Swayne, J.), 90 U.S. 46, 68;
City of Hoboken v. Penn. R. Co. (1888, Mathews, J.), 124 U.S. 656, 688;
Manchester v. Massachusetts (1890, Blatchford, J.), 139 U.S. 240, 256;
Hardin v. Jordan (1891, Bradley, J.), 140 U.S. 371, 381;
Illinois Central Railroad v. Illinois (1896, Field, J.), 146 U.S. 387, 485;
St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners (1897, Peckham, J.), 168 U.S. 349, 365;
Mobile Transportation Co. v. Mobile (1903, Brown, J.), 187 U.S. 479, 482;
United States v. Mission Rock Co. (1903, McKenna, J.), 189 U.S. 391, 392;
Scott v. Lattig (1913, Van Devanter, J.), 227 U.S. 229, 243;
Donnelly v. United States (1913, Pitney, J.), 228 U.S. 243, 261;
Greenleaf Lumber Co. v. Garrison (1915, McKenna, J.), 237 U.S. 251, 259;
United States v. Coronado Beach Co. (1921, Holmes, J.), 255 U.S. 472, 487;
Brewer-Elliott Oil Co. v. United States (1922, Taft, C.J.), 260 U.S. 77, 85; (continued)

the lower Federal Courts.[106]

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105 (continued)

Oklahoma v. Texas (1922, Van Devanter, J.), 258 U.S. 574, 583;

United States v. Holt Bank (1926, Van Devanter, J.), 270 U.S. 49, 54;

Massachusetts v. New York (1926, Stone, J.), 271 U.S. 65, 89);

Fox River Company v. Railroad Commission (1927, Stone, J.), 274 U.S. 651, 655;

United States v. O'Donnell (1938, Stone, J.), 303 U.S. 501, 519.

106 *Spalding v. United States* (D.C. Cal., 1937), 17 Fed. Supp. 966, affirmed (C.C.A. 9) 97 F. (2d) 701, involving California submerged land lease No. 92, held by Pacific Western Oil Corporation; *Spalding v. United States* (D.C. Cal., 1937), 17 Fed. Supp. 957, involved California submerged land lease No. 93, in which Pacific Western Oil Corporation held an interest. These areas are described in the Complaint of the United States in the instant proceeding and extend 3/4 of a mile into the Pacific Ocean and Santa Barbara Channel. In referring to these submerged land areas located in the Pacific Ocean and Santa Barbara Channel, the District Court there said:

> "The tidelands of California are held by the State in trust for the people for the purpose of navigation, commerce and fishery. The Constitution of California, art. 15, sec. 2; Borax Consolidated v. Los Angeles (1935), 296 U.S. 10. . .; Illinois Central Railroad Company v. Illinois (1892), 146 U.S. 387, 452, . . . Boone v. Kingsbury (1928), 206 Cal. 148.
>
> "While the State is prohibited from alienating the tidelands . . . , general leasing statutes allowing their leasing exist. . . ."

Affirmed (C.C.A. 9), 97 F. (2d) 697, cert. den. 305 U.S. 644.

Bankline Oil Company v. Commissioner, 90 F. (2d) 899 (C.C.A. 9, 1937), affirmed in part 303 U.S. 362, involved California submerged land lease No. 89 in the Elwood Oil Field, being a lease extending 3/4 of a mile into the Pacific Ocean and Santa Barbara Channel. The Circuit Court of Appeals there said (90 F. (2d) 900):

(continued)

126 Thus, for a period of more than 100 years this Court, in determining questions of the ownership of submerged lands, has consistently used language expressly including all lands under navigable waters within the respective boundaries of the States. And during this entire period of time, *no Justice of this Court has dissented from any of the decisions on the ground that the language used was too broad a statement of the governing principle.* Furthermore, many of the decisions in which this principle has been enunciated are among the most carefully considered cases in the history of the Supreme Court.

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106 (continued)

"The State of California holds the tidelands within its boundaries in its sovereign capacity in trust 'for the people of the State . . .' *Boone v. Kingsbury*, 206 Cal. 148, 183. . . . The petitioner's lease was granted pursuant to the Statutes of California, 1921, C. 303, P. 404, entitled, 'An Act to reserve all minerals in State lands,' etc. By this Act, the State has reserved the mineral deposits in all lands belonging to the State. . . . One of the purposes of the aforesaid Act . . . is to . . . '. . . reduce to useful purposes oil, gas and mineral deposits *reposing beneath the Ocean's bed.*' Boone v. Kingsbury, 206 Cal. 148, 181."

McCloskey v. Pacific Coast Co. (C.C.A. 9, 1908), 160 Fed. 794, 796:

"The common law has, by act of Congress, been declared to be in force in the territory of Alaska. By the common law of England, the King was the owner of the bed of the ocean and of everything below the line of ordinary high tide. . ."

Dean v. City of San Diego (D.C. Cal., 1925), 275 Fed. 228, 231.

Pope v. Blanton (D.C. Fla., 1935), 10 F. Supp. 18, reversed on another point, 299 U.S. 521.

U.S. Ex. No. 9

Appendices A to I to Brief for the State of California in Opposition to Motion for Judgment

* * *

50 2. The English Common Law Authorities After 1776 Confirm the Crown's Title to the Bed of the Marginal Sea.

After 1776 neither the English courts nor the English text writers departed from the basic principles laid down by Callis and Hale as to the Crown's ownership, subject always to the public rights of navigation and fishing, of the bed of the sea, of arms of the sea and navigable rivers so far as the tide flows and reflows, and of the foreshore bordering on such waters. With the development of the cannon-shot rule in international law, which began to be
51 recognized by the English Admiralty Courts by 1760,[30] the common law cases began to place the outer limit of the Crown's ownership of the sea bed at the distance of a cannon-shot or three miles from low-water mark. But that international law doctrine had no effect whatever upon the internal common law of England as to the ownership of the submerged lands within that limit.

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[30] In 1760, the High Court of Admiralty in England decided that a captured French vessel was not good prize because taken within a port of the King of Spain "within reach of his cannon." *The De Fortuyn* (1760), *Marsden's Admiralty Cases*, p. 175. And see *The Twee Gebroeders*, 3 C. Rob. 162, 165 Eng. Rep. 422 (1800), where it was held that the capture of Dutch ships by an English ship effected within three miles of the Prussian coast, Prussia being neutral, was made within the limits to which neutral immunity was conceded, *The Anna*, 5 C. Rob. 373, 165 Eng. Rep. 809 (1805), where it was held that a capture made by a British ship

(Continued)

(a) THE CASES.

The continuity in the common law from the Sixteenth Century to the Twentieth is perfectly demonstrated by the application, in 1916, of the principles announced by Hale and Callis to the question of the ownership of the bed of the open sea near the coast of India. In the case of *Secretary of State for India v. Chelikani Rama Rao*, 43 L.R. Ind. App. 192 (1916), (a case which is given only the most cursory mention by counsel for the plaintiff),[31] the Judicial Committee of the Privy Council, the highest court in the British Empire for the determination of questions arising in the dominions and colonies, held squarely that islands formed on the bed of the sea within three miles of the coast of India belonged in property to the British Crown. In delivering the unanimous judg-
52 ment of the court, Lord Shaw of Dunfermline said (pp. 189-199):

> "Upon the undisputed facts as to the formation of these islands in the sea and in the situation described, the case would appear to be the ordinary one described by Hale, 'De Jure Maris.' He describes how 'the king hath a title to *maritima incrementa* or increase of land by the sea; and this is of three kinds, viz.:—
>
> '1. Increase *per projectionen vel alluvionem.*
> '2. Increase *per relictionem vel desertionem.*
> '3. *Per insulae productionem.*'

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30 (Continued) within three miles of certain mud islands off the mouth of the Mississippi River was made within the boundaries of the United States, a neutral nation. (It is to be noted that the coast at that point was then a part of the Louisiana Territory, the State of Louisiana not yet having been admitted into the Union.)

31 Plaintiff's Br. pp. 45, 50, 115.

"The lands in dispute fall under the third catetory, which is thus dealt with by Hale:–

" '3. The third sort of maritime increase are islands arising *de novo* in the king's seas, or the king's arms thereof. These upon the same account and reason *prima facie* and of common right belong to the king; for they are part of that soil of the sea, that belonged before in point of propriety to the king; for when islands *de novo* arise, it is either by the recess or sinking of the water, or else by the exaggeration of sand and slubb, which in process of time grow firm land environed with water'."

It is plain that the court did not consider that it was applying any new doctrine based upon any recently developed rules of international law, for not only did the court rely upon Lord Hale but it also stated (p. 199):

"The date of formation of these islands is not certain. Plans have been produced showing that from the forties to the sixties of last century they or the larger part of them appeared above the surface of the water.
53 *At what date soever they appeared*, they were in the high seas at a point thereof not far from the shore of the mainland, and in these circumstances, in the opinion of the Board, they were Crown property.

"The case is not complicated by any point as to geographical situation, or by the question whether a limit from the shore seawards should be beyond three miles, should be the extreme range of cannon fire, or should be even more if the *locus* be claimed to be *intra fauces terrae* – no such questions arise here. The point is geographically within even three miles of British territory; at that point islands have arisen from the sea. Are those islands no man's land?

> The answer is, they are not; they belong in property to the British Crown."

No clearer answer to the contentions of the plaintiff in this case could be formulated.

The common law principles relied on by Lord Shaw in the *Secretary of State for India* case were repeatedly applied and confirmed by the English courts between 1776 and 1916.

The first case dealing with the subject that arose after 1776 was *Blundell v. Catterall*, 5 B. & Ald. 268, 106 Eng. Rep. 1190 (1821). All four of the judges who wrote opinions relied upon the authority of Lord Hale, with respect not only to the ownership of submerged lands by the Crown but also to the public trusts to which that ownership is subject. Holroyd, J., said in his opinion:

> ". . . as he [Hale] also there lays it down, in the main sea itself, adjacent to his dominions, the
54 King only hath the propriety, but a subject hath not . . .
>
> * * * * * * *
>
> "By the common law, though the shore, that is to say the soil betwixt the ordinary flux and reflux of the tide, *as well as the sea itself, belongs to the King;* yet it is true that the same are also *prima facie publici juris,* or clothed with a public interest. But this *jus publicum* appears from Lord Hale to be the public right in all the King's subjects, of navigation for the purposes of commerce, trade, and intercourse; and also the liberty of fishing in the sea or the creeks or arms thereof . . . " (106 Eng. Rep. at 1199.)

Here it will be seen that the English court was not announcing any new doctrine but was simply applying the settled common law on the authority of Lord Hale. The fact that there were no court decisions between 1768 (*Carter v. Murcot, supra*) and this case did not mean that there was a hiatus in the law during that period.

In *Rex v. Lord Yarborough*, 3 B. & C. 91, 5 Bing 163, 1 Eng. Rul. Cas. 458 (1828), the old principles of Callis and Hale were reaffirmed by Best, C.J., speaking the unanimous opinion of the eleven judges who heard the case in the House of Lords, as follows:

> "All the writers on the law of England agree in this: that as the King is lord of the sea that flows around our coasts, and also owner of all the land to which no individual has acquired a right by occupation and improvement, the soil that was once covered by the sea belongs to him." (1 Eng. Rul. Cas. at 471.)

55 In 1829 in the case of *Benest v. Pipon*, 1 Knapp 60, 12 Eng. Rep. 243, the Privy Council considered the property right to cut sea-weed (vraic) growing on the rocks called "L'Isle Percee" which were located in a bay on the Isle of Jersey. Lord Wynford, speaking for the court, said (12 Eng. Rep. at 246-247):

> *"The sea is the property of the King, and so is the land beneath it,* except such part of that land as is capable of being usefully occupied without prejudice to navigation, and of which a subject has either had a grant from the King, or has exclusivity used for so long a time as to confer on him a title by prescription: . . . This is the law of England and the cases referred to prove that it is the law of Jersey . . .

This rule of law is derived from a universal principle of convenience and justice. *What never has had an individual owner belongs to the Sovereign within whose territory it is situated.* . . .

"The Islands of Jersey and Guernsey were parts of the duchy of Normandy. The laws of Normandy were introduced into this kingdom by William the First, and superseded the Saxon laws, which before that period were the laws of England. This circumstance accounts for the laws of England and Jersey being precisely the same with regard to *land that is below the ordinary tides, dealing with such land as a part of the bottom of the sea, and vesting the original right to it in the King.*"

This decision conclusively negatives plaintiff's theory that property rights in the marginal sea "emerged" under international law after 1776. Such rights have existed in the sovereign continuously since 1066.

56 In *Attorney-General v. Chambers*, 4 De G. M. & G. 206, 43 Eng. Rep. 486 (1854), the Attorney General filed an information against the owners and lessees of a certain district abutting on the seashore in the County of Carmathen, alleging that by royal prerogative, all mines and minerals lying under the sea, seashore and arms of the sea, belonged and had at all times belonged to the Kings and Queens of England. The Court's decision was premised upon the following statement of Mr. Baron Alderson (43 Eng. Rep. at 489):

"The Crown is clearly in such a case, according to all the authorities, entitled to the 'littus maris' *as well as to the soil of the sea itself adjoining the coasts of England.*"

In *Attorney-General v. Hanmer*, 4 Jur. N.S. 751 (1858), a case in Vice-Chancellor Stuart's Court involving the construction of a royal grant of coal mines, Mr. Baron Watson, speaking for the court, relied on Lord Hale as follows (p. 753): 8

> "Lord Hale says that the main sea is the waste and demesne of the kings of England, and the king is the owner of that great waste the sea."

In 1858 an arbitration proceeding was conducted to determine the respective property rights of the Queen of England and the Prince of Wales, who was also Duke of Cornwall, in minerals lying under the seashore of the Duchy of Cornwall both above and below low water-mark.[32] The arbitrator, Sir John Patteson, decided that the right to all mines and minerals lying below low water-mark under the open sea adjacent to the County of Cornwall was vested 57 in the Queen, although the Duke was in fact the first occupier of those mines and it was contended for the Duke that he owned them as first occupier. The argument for the Queen, however, was founded on the proposition that the bed of the sea below low water-mark belonged in property to the Crown,[33] and such was the decision of the arbitrator. The arbitrator's decision was confirmed

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[32] See Plaintiff's Br. pp. 45-47.

[33] See opinion of Lord Coleridge, C.J. in *The Queen v. Keyn*, L.R. 2 Exch. Div. 63 at 155-158 (1876). Lord Chancellor Cranworth was counsel for the Crown in this arbitration, having then recently participated in the decision in *Attorney-General v. Chambers, supra*. Callis, Selden, Hale and other common law authorities reviewed above were presented to the arbitrator, Sir John Patteson, and in his award he stated that he had reviewed them carefully in

(Continued)

and ratified by Parliament in the Cornwall Submarine Mines Act, 1858, 21-22 Vict., Ch. 109, which declared that the mines and minerals lying below-water mark under the open sea were vested in the Queen in right of her Crown *"as part of the soil and territorial possessions of the Crown."* In the words of Lord Chief Justice Coleridge, "Parliament did but apply . . . that which is and always has been the law of this country."[34]

In *Gammell v. Her Majesty's Commissioners of Woods and Forests,* 3 Macqueen's Appeals 419 (1859), the House
58 of Lords held that the salmon fisheries in the open sea around the coast of Scotland, unless parted with by grant, belong exclusively to the Crown and formed part of its hereditary revenue. In speaking of the limits of the fisheries in question, Lord Wensleydale said (pp. 465-466):

> " * * * it would be hardly possible to extend it seaward beyond the distance of three miles, which by the acknowledged law of nations, belongs to the coast of the country, that which is under the dominion of the country by being within cannon range, and so capable of being kept in perpetual possession."

In *The Free Fishers and Dredgers of Whitstable v. Gann,* 20 C.B. (N.S.) 1, 144 Eng. Rep. 1003 (1865), Lord Chelmsford in the House of Lords quoted with approval the following statement of Lord Chief Justice Erle of the Common Pleas in his opinion on the case in the lower court (144 Eng. Rep. at 1011-1012):

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33 (Continued) formulating his conclusions. Copies of the submission, briefs and award in the Cornwall Mines Arbitration are lodged, concurrently herewith, with the Clerk for the convenience of the Court.

34 In *The Queen v. Keyn,* L.R. 2 Exch. Div. 63, at 158 (1876).

"The soil of the sea-shore to the extent of three miles from the beach is vested in the Crown * * * ."

In *Ipswich Dock Commissioners v. Overseers of the Parish of St. Peter, Ipswich*, 7 B. & S. 310 (1866), the Exchequer Chamber through Blackburn, J., said (p. 344):

> "In *Reg. v. Musson* it was rightly decided that what Lord Hale calls the main sea is *prima facie* extra-parochial, and in the absence of evidence that it forms part of a parish it must be taken that it does not; and the same reason, that it is part of the waste and demesnes and dominions of the Crown, would apply to an estuary or arm of the sea; it is a part of the great waste, both land and water, of which the king is lord."

In *Murphy v. Ryan*, Jr. R. 2 C.L. 143 (1868), the court said through O'Hagan, J. (p. 149):

> "But whilst the right of fishing in fresh water rivers, in which the soil belongs to the riparian owners, is thus exclusive, the right of fishing in the sea, and in its arms and estuaries, and in its tidal waters, wherever it ebbs and flows, is held by the common law to be *publici juris*, and to belong to all the subjects of the Crown—*the soil of the sea, and its arms and estuaries, and tidal waters being vested in the Sovereign as a trustee for the public.*"

In *Lord Advocate v. Trustees of the Clyde Navigation*, 19 Rettie 174 (1891), the Court of Session of Scotland held through Lord Kyllachy (p. 177);

> " * * * there is <u>*no distinction*</u> in legal character between the Crown's right in the foreshore, in tidal and navigable rivers, *and in the bed of the sea within three miles of the shore.* In each case it is of course a right largely qualified by public use. * * *

but nonetheless is it, in my opinion, a proprietary right * * * *."

In the same case, Lord Young said (p. 183):

"* * * * I have no objection to indicate my own view * * * that the Crown has a right of property within the three mile limit."

60 Again the three mile doctrine shows its influence, but only as a seaward boundary for rights already well established and unaltered in quality.

In *Lord Advocate v. Weymss*, 1900 A.C. 48 (1899), the House of Lords, through Lord Watson, said (p. 66);

"I see no reason to doubt that, by the law of Scotland, the solum underlying the water of the ocean, whether within the narrow seas, or from the coast outward to the three mile limit, and also the minerals beneath it, are vested in the Crown * * *."[35]

In *Lord Fitzhardinge v. Purcell* (1908), 2 Ch. 139, the court treated tidal rivers and the bed of the sea alike. Parker, J. said (p. 166):

"*Clearly the bed of the sea, at any rate for some distance below low-water mark*, and the beds of tidal navigable rivers, are *prima facie* vested in the Crown, and there seems no good reason why the ownership thereof

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[35] Quoted with approval by Lord Shaw in *Secretary of State for India v. Chelikani Rama Rao*, 43 L.R. Ind. App. 192 (1916), discussed *supra*, pp. 51-53. Lord Shaw said of the *Wemyss* case (p. 201): "The action had reference to the ownership of minerals in the bed of the sea and below low-water mark. This, of course, was entirely a question, not as to rights upon or over that portion of the bed of the sea, but as to the actual ownership of the corpus or thing itself – of which corpus the minerals formed a part."

by the Crown should not also, subject to the rights of the public, be a beneficial ownership."[36]

61 During the period since 1776 the English cases have followed Digges' principle that the Crown *prima facie* owns the foreshore between the high-and low-water marks, subject to the public right of navigation and fishing.[37] It is clear that the development of the Crown's right to the foreshore, which plaintiff apparently concedes to have been established in 1776, did not precede the establishment of the Crown's right to the bed of the sea. On the contrary, the establishment of the Crown's *prima facie* right to the foreshore under Digges' doctrine was developed from the earlier doctrine of the Crown's ownership of the bed of the sea.

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[36] Quoted with approval by Lord Shaw in *Secretary of State for India v. Chelikani Rama Rao*, 43 L.R. Ind. App. 192 (1916), discussed *supra*, pp. 51-53. Lord Shaw said of this case (p. 200): "It is true that the case cited dealt merely with the right of fowling, but it was necessary in the determination of that right to settle the true nature of the right in the land itself."

[37] Cases dealing with the ownership of the foreshore are *Attorney-General v. Richards*, 2 Anst. 603, 145 Eng. Rep. 980 (1794); *Attorney-General v. Parmeter*, 10 Price 378, 147 Eng. Rep. 345 (1811); *Attorney-General v. Johnson*, 2 Wilson Ch. 87, 37 Eng. Rep. 240 (1819); *Blundell v. Catterall*, 5 B. & Ald. 268, 106 Eng. Rep. 1190 (1821); *Smith v. Earl of Stair*, 6 Bell App. Cas. 487 (House of Lords, 1849); *Attorney-General v. Chambers*, 4 De G. M. & G. 206, 43 Eng. Rep. 486 (1854); *The Queen v. Musson*, 8 El. & Bl. 899, 120 Eng. Rep. 336 (1858); and *Attorney-General v. Emerson*, L.R. [1891] A.C. 649.

(b) TREATISES.

The doctrine of the common law cases cited above is likewise reflected in treatises on the English common law written since 1776. Henry Schultes in his *Essay on Aquatic Rights* (London, 1811), stated the law to be substantially as laid down by Lord Hale more than a century before him. Schultes said (pp. 109-110):

> "By the common law, the king hath the sovereign dominion over the sea adjoining the coasts, and over the navigable rivers; and hath also the right of property in the soil thereof, and is consequently entitled
62 to all *maritima incrementa.* But the crown has not an exclusive right of fishery, nor can it grant an exclusive right to another . . . The sea and navigable streams are public for all the king's subjects to fish indiscriminately, without interruption of common right."

Chitty[38] in his *Prerogatives of the Crown* (London, 1820), stated (p. 173):

> "Under this head it may also be mentioned, that the King possesses the *sovereign dominion* in all the narrow seas, that is, the seas which adjoin the coasts of England, and other seas within his dominions. This prerogative power is vested in the King, as the protector of his people, and guardian of their rights. It is subservient, however, to those *jura communia,* which nature and the principles of the constitution reserve for his Majesty's subjects. It can neither prevent them from trading or fishing."

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38 Chitty was one of the most famous editors of *Blackstone's Commentaries.*

Joseph K. Angell, in his *The Right of Property in Tide Waters,* published in 1826 (an American work which is mentioned here because it deals largely with the common law of England), said (pp. 17-18):

> "In this respect, it will appear, that the Roman law has been very much surpassed, by the common law of England. For although, as will presently be shewn, the sea, &c. according to the provisions of the common law, are as public and common, as they were among the Romans; yet it is not only the policy of the common law to assign to every thing capable of occupancy and susceptible of ownership a legal and certain proprietor – but also to make those things which from their nature cannot
63 be *exclusively* occupied and enjoyed, the property of the *sovereign.*
>
> * * * * * * *
>
> "To the king, therefore, is not only assigned the sovereign dominion over the sea adjoining the coasts, and over the arms of the sea; but in him is also vested the *right of property* in the *soil thereof.*"[39]

In short, such ownership is an *"incident of sovereignty."*

Hall, in his essay on *The Rights of the Crown in the Sea-Shores of the Realm,*[40] first published in 1830, emphasized the idea that the Crown's ownership of the beds of inland navigable waters was derived from the Crown's ownership of the sea, saying:

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[39] Italics are those of the author.

[40] 3rd ed., reprinted in Moore, *supra,* pp. 667-892. See quotation from Hall. Brief, pp. 20-21.

> "This dominion not only extends over the open seas, but also over all *creeks, arms of the sea, havens, ports and tiderivers,* as far as the reach of the tide, around the coasts of the kingdom. All waters, in short, which communicate with the sea, and are within the *flux* and *reflux* of its tides, are part and parcel of the sea, itself, and subject, in all respects, to the like ownership."[41]

Woolrych in his *Treatise on the Law of Waters and Sewers,* first published in 1830, based the King's original title to the beds of the sea adjoining the coast and of navigable rivers upon the common law principle that all the soil of the realm was originally vested in the King as lord paramount and universal occupant, and he traced
64 the King's ownership of the foreshore and the beds of navigable rivers to their similarity to the sea within the tidal flow.[42]

Among the other writers who similarly stated the law of the ownership of the bed of the sea and of navigable rivers are Bainbridge in 1841,[43] Jerwood in 1850,[44] Rogers

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[41] *Id.* at p. 669. Italics are those of the author.

[42] Woolrych, Treatise on the Law of Waters and Sewers (1st Am. ed. from 2d London ed., 1853), pp. 47, 52, 394-399.

[43] *Bainbridge on Mines and Minerals* (1st ed. London, 1841), see 1st Am. ed., 1871, from 3d London ed., p. 13.

[44] Jerwood, James, *A Dissertation on the Rights to the Sea Shores* (London, 1850), pp. 13, 40-41, 43-45.

in 1864,[45] Macswinney in 1884,[46] and Moore in 1888.[47]

Sir Cecil J. B. Hurst, President of the Permanent Court of International Justice, writing in 1923, said:

> "So far as the law of this country is concerned, the rights of the Crown were fixed long before the doctrine of the three-mile limit was thought of, and yet it seems to be agreed that nowadays these property rights do not in general extend beyond the three-mile limit."[48]

The cases and treatises cited above covering the period from 1776 to the present day all proceed on the basis of the same common law rules as those announced by Callis

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[45] *Rogers on Mines* (1st ed. London, 1864), see 2d ed., 1876, pp. 178 *et seq.*

[46] *Macswinney on Mines* (1st ed. London, 1884), see 5th ed., 1922, p. 33.

[47] Moore, Stuart A., *History and Law of the Foreshore and Sea Shore* (1888), p. 653.

[48] Hurst, Sir Cecil J. B., "Whose Is the Bed of the Sea?," 4 *British Year Book of International Law*, 1923, p. 34.

65 and Hale in the Seventeenth Century. They indicate no change whatsoever, in the common law after 1776 by which the Crown acquired any rights in the bed of the sea *which it did not have prior to 1776.*

(c) THE DICTA IN THE QUEEN V. KEYN.

Statements of some of the judges in the case of *The Queen v. Keyn*, L.R. 2 Exch. Div. 63 (1876), are relied upon by the Attorney General as the primary support for his contention that the English Crown in 1776 had no title to the bed of the marginal sea which could be transmitted to the original thirteen States. The statements relied upon not only constituted pure *obiter dictum*, but they are entirely out of line with the earlier and later English authorities cited above. They have, therefore, been reserved for special treatment.

The issue before the court in the *Keyn* case did not require a decision on the territorial limits of England, as plaintiff's counsel admit (Br. p. 47). The sole question there presented was whether the Central Criminal Court of England had jurisdiction to try a *foreigner* for a crime, as defined by English law, which was committed on board a *foreign ship* sailing within three miles of the English coast. The decision was that prior to the statute of 28 Hen. VIII, c. 15, the jurisdiction of the Lord High Admiral did not extend to a crime committed by a foreigner on board a foreign ship, either within or without the limit of three miles from the English coast; that by virtue of that and subsequent statutes, the Central Criminal Court had merely succeeded to the jurisdiction of the Admiral; and hence, *in the absence of a statute* extending its jurisdiction, the Central Criminal Court had no jurisdiction in the case at

66 bar. It is clear that no question of title to submerged lands was involved.[49]

The case was heard before thirteen judges, seven of whom held that there was no jurisdiction and six of whom were of the opinion that jurisdiction existed. Of the seven judges comprising the majority of the court, only five (Cockburn, C.J., Kelly, C.B., Field, J., Pollock, B., and Sir Robert Phillimore) expressed any doubt that the marginal sea, at least to the extent of three miles from the coast, constituted English territorial waters in the sense necessary to give the court jurisdiction without an Act of Parliament.

This doubt was based upon the fact that in England the "body of the counties," to which the jurisdiction of the common law courts was limited, did not extend below low-water mark, and upon the dual meaning of the word "realm" in English law. In this connection Chief Justice Cockburn and (L.R. 2 Exch. Div. at 197-198):

> "To come back to the subject of the realm, I cannot help thinking that some confusion arises from the term 'realm' being used in more than one sense.

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[49] The statement in plaintiff's brief (p. 113) that the opinion of Cockburn, C.J. in the *Keyn* case "is perhaps the most exhaustive English judicial opinion *on the question*" is incorrect. The opinion is not "on the question" of ownership of the bed of the sea but of criminal jurisdiction in admiralty over a foreigner. Perhaps the most exhaustive English judicial opinion of the question of the Crown's ownership is that in the case of *Secretary of State for India v. Chelikani Rama Rao, supra.* The most exhaustive judicial opinion on the same question in America is this Court's opinion in *Shively v. Bowlby*, 152 U.S. 1. Yet plaintiff would have this Court disregard these decisions (Br. p. 113); both of which deal with the subject here under consideration, in favor of the overruled *dictum* of the *Keyn* case.

Sometimes it is used, as in the statute of Richard II, to mean *the land of England,* and the internal sea within it, sometimes as meaning whatever the sover-
67 eignty of the Crown of England extended, or was supposed to extend, over.

"When it is used as synonymous with territory, I take the true meaning of the term 'realm of England' to be *the territory to and over which the common law of England extends* – in other words, all that is within the body of any county – to the exclusion of the high seas, which come under a different jurisdiction only because they are not within any of those territorial divisions, into which, among other things for the administration of the law, the kingdom is parcelled out."[50]

And Chief Justice Cockburn, on whose opinion in the *Keyn* case the Attorney General relies so heavily,[51] readily admitted that Parliamentary legislation extending the criminal jurisdiction to foreigners on foreign ships within the three-mile belt would be binding on the English courts, and succinctly stated the issue before the court as follows (L.R. 2 Exch. Div. at 208):

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50 The same dual meaning of the word "realm" in England was recognized by a former Justice of this Court in *De Lovio v. Boit,* 7 Fed. Cas. 418, Case No. 3776 (Circuit Court, Mass., 1815) where Mr. Justice Story said (p. 427):

"As to the dictum in 30 Hen. VI. p. 6, respecting the admiralty judges, that 'the place and things of which they hold plea, are *out of the realm,' if it means to speak of the realm in its largest sense, it will include the British seas* (Co. Litt. 259b; 1 Rolle, Abr. 528 l. 13), and is not law; if in a more narrow sense, as including only the bodies of the counties, it will be fully considered hereafter."

51 Plaintiff's Br. pp. 47, 75, 114, 115, 118, 136, 138.

"The question is whether, acting judicially, we can treat the power of Parliament to legislate as making up for the absence of actual legislation. I am clearly of opinion that we cannot, and that it is only in the instances in which foreigners on the seas have been
68 made specifically liable to our law by statutory enactment that that law can be applied to them."

The majority judges in the *Keyn* case were thus chiefly concerned with the absence of statutory jurisdiction to try a foreigner – a problem obviously unrelated to any question of rights of ownership below low-water mark as between the sovereign and his subjects or as between different political sovereigns within the same territory.

The claim that the *Keyn* case constitutes any authority in support of the plaintiff's theories in the present case, is, it is submitted, predicated on a failure to distinguish between the meaning of the word "jurisdiction" as applied to the *power of a court to enforce existing laws,* and "jurisdiction" as applied to the *power of the sovereign to enact laws* within a certain territory. Jurisdiction in the latter sense is *political jurisdiction* which is synonymous with sovereignty. The majority judges in the *Keyn* case held only that the power of the court to try a foreigner for a crime committed in the three-mile belt outside the body of the English counties could not be conferred by implication, – in other words, that jurisdiction of the court could not exist without legislation. But the power, *i.e.,* political jurisdiction, of Parliament to enact such laws was expressly conceded.

Thus even the majority decision in the *Keyn* case is not inconsistent with the Crown's ownership of the bed of the sea. And none of the factors which troubled the majority in that case exists in the case at bar. In California

the entire three-mile belt is not only within the State's boundaries as defined in the California Constitution but is within the body of the California coastal counties, all of which are described by statute as extending three miles from shore. [Appendix to Answer, pp. 83-86.] Furthermore this Court in *Manchester v. Massachusetts*, 139 U.S. 240, at 263-264 (1891), held that the body of the counties in the States of this Union need not be bounded by low-water mark by reason of the rule of the English common law, but extends to the States' boundaries, which may be lawfully fixed at three miles from shore.[52] Likewise there is definite legislation by which California has conferred upon its judicial and executive officers complete jurisdiction and power over the three-mile belt.

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[52] In *Manchester v. Massachusetts*, Mr. Justice Blatchford said (139 U.S. at 263-264):

> "It is also contended that the jurisdiction of a State as between it and the United States must be confined to the body of counties; that counties must be defined according to the customary English usage at the time of the adoption of the Constitution of the United States; that by this usage counties were bounded by the margin of the open sea; and that, as to bays and arms of the sea extending into the land, only such or such parts were included in counties as were so narrow that objects could be distinctly seen from one shore to the other by the naked eye. But there is no indication that the customary law of England in regard to the boundaries of counties was adopted by the Constitution of the United States as a measure to determine the territorial jurisdiction of the States. The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and, except so far as any right of control over this territory has been granted to the United States, this control remains with the State."

The lack of criminal jurisdiction over foreigners within the three-mile limit, which was held to exist in *The Queen v. Keyn,* was quickly supplied by Parliament through the passage of the Territorial Waters Jurisdiction Act, 1878,
70 41 and 42 Vict. c. 73.[53] That Act stated in its preamble:

> "Whereas the rightful jurisdiction of Her Majesty, her heirs and successors, extends *and has always extended* over the open seas adjacent to the coasts of the United Kingdom and of all parts of Her Majesty's dominions to such a distance as is necessary for the defense and security of such dominions * * *"

and it was thereby enacted that an offense, committed by any person, whether or not a British subject, on the open sea within British territorial waters was an offense within the jurisdiction of the Admiral, although committed on board or by means of a foreign ship. The act defined

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53 As a result of the decision in *The Queen v. Keyn,* the Lord Chancellor (Lord Cairns) in February 1878 presented a bill in the House of Lords which was passed as the Territorial Waters Jurisdiction Act, 1878, 41 and 42 Vict. c. 73, stating that he understood the common ground on which the majority of the judges acted in quashing the conviction in the *Keyn* case to be that the jurisdiction of the Lord High Admiral extended to the high seas, but that the persons over whom it was exercised must be British subjects and not foreigners, and that the Central Criminal Court had merely succeeded to the jurisdiction of the Admiral. Lord Cairns also pointed out that the Dover Port Authorities had, pursuant to Parliamentary authority, defined the port as extending three miles from shore and including the place of the offense in the *Keyn* case *prior to its commission,* but that through some unbelievable piece of inadvertence this fact had not been called to the attention of the judges. If it had been brought to their knowledge, he said, the decision would have been the other way. See Halleck, *International Law,* 4th ed., London, 1908 (as reprinted in Crocker, *The Extent of the Marginal Sea* (1919), p. 98).

territorial waters in reference to the sea as meaning such part of the sea adjacent to the coast as is deemed by international law to be within the territorial sovereignty of the Crown, and provided that for purposes of the Act it included "any part of the open sea within one marine
71 league of the coast measured from low-water mark."[54]

John Bassett Moore said of this Parliamentary action:

> " * * * the government and Parliament of Great Britain, after the decision in *Queen v. Keyn*, considered it imperative to adopt legislation nullifying its effect for the future, besides declaring it wrong as to the past."[55]

The gratuitous statements of Chief Justice Cockburn and some of his colleagues in *The Queen v. Keyn* were placed in their proper perspective, as respects the question of ownership of submerged lands, in the decision of

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54 Despite this legislation, the dicta contained in the majority opinions in *The Queen v. Keyn* continued to have some influence, at least in the decision of the Privy Council in *Attorney-General for British Columbia v. Attorney-General for Canada*, [1914] A.C. 153 (see Plaintiff's Br., pp. 48-50). The Privy Council stated in that case that no decision was required on the question of whether the Crown had a right of property in the bed of the sea below low-water mark, and the statements in the opinion upon which plaintiff relies were therefore pure dicta. It is of interest, however, that the Privy Council did say in that case, in answer to one of the questions certified to it from the Supreme Court of Canada, that there was no difference between the open sea within a marine league of the coast on the one hand, and arms of the sea and estuaries on the other, so far as concerned the public right of fishing, thus reaffirming and applying the common law doctrine under which the sea and arms of the sea were and are treated alike.

55 *The Collected Papers of John Bassett Moore*, vol. VII, p. 294.

the Privy Council in *Secretary of State for India v. Chelikani Rama Rao*, 43 L.R. Ind. App. 192 (1916). That case has heretofore been referred to (pp. 51-53) as holding squarely that islands formed on the bed of the sea within three miles of the coast of India belonged in property to the British Crown, a decision which was grounded squarely upon the authority of Lord Hale and of common law
72 cases dealing with ownership of submerged lands. Speaking for the Privy Council, Lord Shaw of Dunfermline said of *The Queen v. Keyn* (pp. 199-200):

> "The doubt raised upon this proposition has been substantially rested on certain dicta pronounced in the case of *Reg. v. Keyn*. (2 Ex. D., 63). The Crown, admitted to be owner of the foreshore, is, so it was there suggested, bounded in its dominion of the bed of the sea by the range of the rise or fall of the tide. Crown property does not, it was said, extend further seaward. *It should not be forgotten that that case had reference on its merits solely to the point as to the limits of Admiralty jurisdiction; nothing else fell to be there decided.* It was marked by an extreme conflict of judicial opinion, and the judgment of the majority of the Court was rested on the ground of there having been no jurisdiction in former times in the Admiral to try offences by foreigners on board foreign ships whether within or without the limit of three miles from the shore.
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> *"When, however, the actual question as to the dominion of the bed of the sea within a limited distance from our shores has been actually in issue, the doubt just mentioned has not been supported nor has the suggestion appeared to be helpful or sound.* Their Lordships do not refer to the settlement of the rights of the Crown as against the Duchy of

Cornwall in the Cornwall case – but to much more recent examples of contested rights in or over land *ex adverso* of the foreshore."

After referring to and quoting from *Lord Fitzhardinge v. Purcell, supra,* and *Lord Advocate v. Clyde Navigation Trustees, supra,* Lord Shaw quoted as follows from the
73 opinion of Lord Watson in *Lord Advocate v. Weymss* (p. 201):

"I see no reason to doubt that by the law of Scotland the solum underneath the waters of the ocean, whether within the narrow seas, or from the coast outward to the three mile limit, and also the minerals beneath it are vested in the Crown."

And Lord Shaw continued (p. 201-202):

"In the opinion of the Board, this is also the law of India. The Crown is the owner and the owner in property, of islands arising in the sea within the territorial limits of the Indian Empire."

Some years before the Privy Council's decision in the *Secretary of State for India* case, this Court expressed a similar view as to the weight to be given the decision in *The Queen v. Keyn.* In *Manchester v. Massachusetts,* 139 U.S. 240 (1891), Mr. Justice Blatchford said of that case (p. 257):

" * * * there [in *The Queen v. Keyn*] the question was not as to the extent of the dominion of Great Britain over the open sea adjacent to the coast, but only as to the extent of the existing jurisdiction of the Court of Admiralty in England over offenses committed on the open sea; and the decision had nothing to do with the right of control over fisheries in the open sea or in bays or arms of the sea. In all the

cases cited in the opinions delivered in *Reg. v. Keyn*, wherever the question of the right of fishery is referred to, it is conceded that the control of fisheries, to the extent of at least a marine league from the shore, belongs to the nation on whose coast the fisheries are prosecuted."

(d) SUMMARY.

74 The foregoing review of English common law authorities from 1569 to the present time conclusively shows:

1. That whenever the question as to the dominion or ownership of the bed of the sea within a limited distance from the open coast of England and its colonies has been in issue, the answer given by the English common law courts has invariably been that the ownership of the sea bed is in the British Crown, subject only to the public rights of navigation and fishing.

2. That there has been no change in the English common law on this subject since 1776 or 1789, all the cases having relied upon the principles laid down by Lord Hale in the Seventeenth Century.

3. That no distinction whatever has been made between the Crown's ownership of the sea bed off the open coast on the one hand and the Crown's ownership of the foreshore and the beds of so-called inland navigable waters to the extent of the flow of the tide on the other, the Crown's title in each case being subject to the public rights of navigation and fishing.

4. That the development of the three mile limit in international law has in no sense served as a basis for the emergence of any new rights of the Crown in the sea

bed which it did not enjoy in and prior to 1776, and that the only and utmost effect of that doctrine has been to place a seaward boundary upon the extent of sea bed owned by the Crown.

5. That the plaintiff's contention that the English Crown in 1776 and 1789 had no title to the bed of the sea off the open coast, which could be transferred to the original thirteen States, is based solely upon doubts expressed a century later by a few English judges in *obiter dicta* which have subsequently been unequivocally overruled and repudiated both by Parliament and by the Courts.

* * *

II.

Original States Both in Colonial Times and Since Statehood Have Always Maintained Their Ownership of the Marginal Seas.

86

(a) Massachusetts

* * *

(ii) *Colonial Legislation.*

By early legislation the Plymouth and Massachusetts Bay Colonies exercised rights of ownership, control and government in portions of the adjoining sea. For example, as early as 1652 the Plymouth General Court enacted a statute providing that:

> " . . . if any man take a drift whale of att the sea and bring or tow it to the shore, it [shall] be accounted his owne goods; but *if within a harbour or mile of the shore* they be taken they be reputed the townships where they are brought on shore."[17]

17 *Plymouth Colony Laws*, Part I, 96-97.

Again, in 1671, it was enacted by the same body that:

> ". . . all such Whales as are cast up within the Bounds of any particular Township, or floating upon the stream, *within a Mile of the Shoar*, against the said Bounds of any Township, shall be accounted the respective Towns falling within their Bounds as aforesaid . . . "[18]

87 In 1684 an act was passed by the Plymouth General Court relating to the catching of mackerel with seines

> "att Cape Codd or else where near any shore in this Colonie, . . . "[19]

Other statutes were enacted by the colonial legislatures of Plymouth and Massachusetts Bay Colonies affecting the territorial waters of these colonies.[20]

(iii) *County and Town Coastal Boundaries.*

In 1760 the Legislature of the Province of Massachusetts Bay fixed the coastal boundary of Cumberland County (now a part of the State of Maine) as limited

> "on the Southeast *by the Sea* or Western Ocean . . . *including all the Islands* on the Sea Coast of the said new County,"

and defined the coastal boundary of Lincoln County (now also a part of the State of Maine) as limited

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[18] Part III, *idem.*, 282 (*Revised Laws*, 1671, c. XI, §2).

[19] *Plymouth Colony Laws* (Brigham), Part II, p. 205.

[20] *Plymouth Colony Laws* (Brigham), Part II, pp. 282, 283-4 Rev. Laws 1671, c. X, Sections 3, 4.
Massachusetts Province Laws 1692-3, Chapter 32, Act of November 26, 1692, Sections 1, 2.
Massachusetts Province Laws 1702, Chapter 12, Act of November 21, 1702.

"on the South and Southeast *by the Sea* or Western Ocean; and on the North by the utmost Northern Limits of this Province; *including all the Islands* to the Eastward of the County of Cumberland aforesaid."[21]

88 In 1789 the General Court of the Commonwealth of Massachusetts fixed the boundary of Washington County (now a part of the State of Maine) as bounded

"on the south and southeast *by the sea* or western ocean, on the north by the utmost northern limits of this Commonwealth, . . . *including all the islands* on the seacoast . . ."[22]

Until 1820 the State of Maine was a District of Massachusetts. The coastal counties of the State of Maine established by the Massachusetts Legislature in 1760 and 1789, were redrafted by the Maine Legislature in 1916 to provide that:

". . . the lines of the several counties which terminate at or in tide waters shall . . . include . . . the several islands in said waters, and after so including such islands shall run in the shortest and most direct line *to the extreme limit of the waters under the jurisdiction of this State;* and all waters between such lines off the shores of the respective counties shall be a part of and held to be within such counties."[23]

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21 *1760 Acts and Laws of Massachusetts,* Chap. II, pp. 523-526. Plaintiff's Brief, p. 94.

22 *Massachusetts Laws* (1789), page 27. Plaintiff's Brief, page 94.

23 *Maine Rev. Stat. 1916,* Chapter 133, Section 3, page 1514. *Maine Rev. Stat. 1930,* Chapter 143, Section 3, page 1640.

92 (ii) *Colonial Statutes:*

In 1736 the [Rhode Island] Colonial Legislature passed an act prohibiting the use of seines in catching fish

> *"within the Extent of half a Mile distance from Point Judith Breach, in the sea, nor . . .* within the Extent of *half a Mile* of each side of the Entrance of said Petaquamscut River *in the sea. . . ."*[33]

This statute was reenacted in 1798 and is found in the 1938 General Laws of Rhode Island.[34]

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[33] Rhode Island Acts and Laws 1730-1736 (James Franklin's Edition), page 277, adopted June 2, 1736.

[34] The Public Laws of the State of Rhode Island and Providence Plantations, 1798 (Carter and Wilkinson, 1798 Ed.), page 496; General Laws of Rhode Island (1938), Title XXIV, page 242, Sec. 12.

* * *

98 (ii) *Colonial Legislation:*

In 1726 the [New York] Colonial Legislature passed an act granting one Lovis de Langloiserie exclusive fishery of porpoises for a term of ten years

> "in the *seas,* harbors, rivers and other waters *within this colony.*"[50]

Legislation governing the maritime territory of this colony was enacted as, for example, the Act of May 10, 1699, for

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[50] II Colonial Laws of New York, pages 311-312.

"securing his Majesty's and his Subjects' just Rights to all Drift-Whales, and other royal Fishes that shall be cast to the Shore *or found floating on the Coasts of this Province.*"[51]

and the "Act for Preserving Oysters" passed in May, 1715.[52]

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[51] I Colonial Laws of New York, page 409.

[52] I Colonial Laws of New York, page 845.
Other acts for preservation of oysters were passed in December, 1737 – II Colonial Laws of New York, page 1067; October 17, 1730 – II Colonial Laws of New York, page 655.

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U.S. Ex. No. 11

Brief of National Association of Attorneys General, Amicus Curiae

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49 A second category of State acts based on ownership of submerged lands under coastal waters is found in the statutes relating to the regulation or leasing of fisheries, oyster beds and other marine life or resources. Thus New Jersey early forbade non-residents to take clams or oysters in any of the rivers, bays or waters of the State (Act of December 10, 1825 – Comp. Laws (1833) 124), and Rhode Island had a similar regulation against taking shellfish within the waters or on the shores of this State (Dig. 1844, p. 533, §6; see *State v. Medbury*, 3 R.I. 138–1855).

It has been impossible to assemble all the fishing laws of the States, but it is clear that control of fisheries in

the open sea continued to be a matter of concern to the States. Mississippi granted to the upland owners the exclusive right to plant oysters in the waters of the Gulf of Mexico in front of their lands (1886 Miss. Laws, p. 180; Apdx. to Answ., p. 614); Louisiana by a series of acts beginning in 1886[54] declared its title to all oyster beds underlying the navigable waters of the Gulf of Mexico within its territorial limits, and provided for leases thereof to individuals upon the payment of specified rentals to the State; Virginia claimed ownership of oyster-beds "whether the said bed * * * shall ebb bare or not" (Va. Code 1887, §1338); Georgia gave to upland owners the exclusive rights to oysters and clams in the tide waters of the State, which were defined to include waters below low tide (1902 Ga. Laws, p. 108; Apdx. to Answ., pp. 648-49), but forbade the use of dredges within 1000 feet of ordinary mean tide (1905 Laws 73; Apdx. to Answ., p. 650); Rhode Island authorized State leases for oyster culture of land "covered by four feet of tidewater at mean low tide" (General Laws 1909, c. 203; Apdx. to Answ., p. 706); the New York Conservation Law fixed the marine district as including "all tidal waters within three nautical miles of the State coast" (L. 1912, c. 318); Oregon has authorized the State Land Board to lease land between low tide and three miles seaward therefrom for the harvesting of kelp and other seaweed (1917 Laws of Ore., c. 276, p. 516, Apdx. to Answ., p. 586); Texas has asserted its ownership of the bed of the Gulf of Mexico within its jurisdiction and vested the Game, Fish and Oyster Commission with control of fishing therein (Acts 1925, p. 438; Rev. Civ. Stat. [1936] Art. 4026); New Jersey has

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[54] Acts 106 of 1886, 121 of 1896 and 159 of 1900 (Apdx. to Answ., p. 604).

exercised jurisdiction over fishing in its Atlantic Waters (23 N.J.S.A. §§5-241, 5-24.2(e), 3-43); and Washington provided for leases of oyster beds lying below extreme low tide under navigable waters (Act 255 of 1927, Sec. 142, Apdx. to Answ., p. 557).

The long continuous nature of this jurisdiction is illustrated by New Jersey's current Shellfish Law, and especially Chapter 4, "Regulations applicable to Atlantic Coast." 51
The imposition of a seasonal restriction on oyster gathering (N.J.S.A. §50:4-1) and the exclusion of non-residents (§50:4-2 and §§50:2-1, 50:2-2) go back to the colonial regulations of 1718 (1 Nevill 86, *supra*, p. 18), while the restriction on the use of dredges, etc. (§50:4-2) goes back at least to the prohibition in the New Jersey Act of June 9, 1820, §II (1838 Digest N.J. Laws, p. 372).

In addition to the statutes cited above, there are numerous State decisions upholding State regulation of fisheries in the coastal waters. For instance, in *Bosarge v. State*, 23 Ala. App. 18, 121, So. 427 (1928), cert. den., 219 Ala. 154, 121 So. 428 (1929), cert. den., 280 U.S. 568, (1929), the Alabama Court, in reliance on this Court's holding in *Manchester v. Massachusetts*, 139 U.S. 240, previously referred to at pp. 18, 28-29, 45, *supra*), held that an Alabama statute regulating the trolling for shrimp could be applied at a point within the Gulf of Mexico three-fourths of a mile beyond the beach of one of the outermost islands and that such point was within the "territorial jurisdiction" of the State of Alabama.

In the early case of *Dunham v. Lamphere*, 3 Gray 268 (Mass. 1855), Chief Justice Shaw sustained a Massachusetts statute forbidding the use of seines within one mile of the shores of Nantucket Island and Gravel Island.

In *Lipscomb v. Gialourakis*, 101 Fla. 1130, 133 So. 104 (1931), the Florida Court upheld a conviction for using diving apparatus to take commercial sponges from the Gulf of Mexico within the territorial limits of Florida.

Other State cases dealing with fishing regulations and other questions of ownership of submerged coastal lands are listed in the footnote.[55]

52 A third category of State acts in the coastal sea relates to express grants of land under water or rights to extract products therefrom. An example of the exercise of such jurisdiction in coastal waters is a New Jersey statute entitled: "An act to authorize the owners of land upon tidewaters to build wharves in front of the same", which authorized "the owners of lands situated along and upon tidewaters to build docks or wharf on the shore in front

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[55] *Ocean Industries, Inc. v. Superior Court*, 200 Cal. 235, 252 Pac. 722 (1927) (enforcing regulation against sardine reduction plant on ship anchored off shore); *State v. Ruvido*, 137 Me. 102 (1940) (fishing regulation within three-mile limit); *Burnham v. Webster*, 5 Mass. 266 (1809) (penalty for taking bass in the sea near mouth of river); *Dill v. Inhabitants of Wareham*, 7 Mete. (48 Mass.) 438 (1844) (King's ownership of fisheries passed to colonies); *Commonwealth v. Boston Terminal Co.*, 185 Mass. 281, 282 (1904) (State has title to land within one league of shore); *State v. Stewart*, 184 Miss. 202, 184 So. 44 (1938) (removal of sand from bed of a tidal inlet); *Simpson v. Moorhead*, 65 N.J. Eq. 623 (1904) (holding that State owns tidal meadows below high water mark); *State v. Brown*, 3 Dutcher (27 N.J.L.) 13 (1858) (right to build wharf beyond low water mark); *State v. Kofines*, 33 R.I. 211 (1911) (license for lobster fishing); *Narragansett Real Estate Co. v. Mackenzie*, 34 R.I. 103 (1912) (holding that State has title to the bed of the Ocean); *State ex. rel. Luketa v. Pollock*, 136 Wash. 25, 239 Pac. 8 (1925) (permitting enforcement of State fishing regulations within three-mile limit).

of his lands beyond the limits of ordinary low water * * *" subject to license and to the preservation of public navigation (N.J. Laws 1851, p. 335).[56]

The right-of-way of the Florida East Coast Railway was largely on submerged lands granted by the State of Florida (Apdx. to Answ., pp. 641-45).

The New York Land Office, acting under long standing statutory authority, gave a grant of land under water in 1897 extending 1500 feet from mean high water line into the Atlantic Ocean (see *People v. Steeplechase Park Co.*, 218 N.Y. 459, 113 N.E. 521–1916). The right to make
53 similar grants is one of the basic assumptions in New York's recent anti-erosion statute, permitting grants to municipalities of State owned land under water along the Atlantic Ocean, for the construction of jetties and other works to arrest erosion (N.Y. Laws 1945, c. 535).

Among other examples, Pennsylvania has authorized the Water and Power Resources Board to permit the dredging of sand and gravel from the bed of Lake Erie (Act of June 25, 1913; Apdx. to Answ., p. 687), and Ohio has authorized municipalities to lease land under water in Lake Erie for docks and wharves (Apdx. to Answ., p. 725).

Texas, beginning as early as 1913, authorized the Commissioners of the General Land Office to lease that portion of the Gulf of Mexico within its jurisdiction, for the production of oil and gas (1913 Texas Laws, p. 409; Apdx. to Answ., pp. 595-96). Act 30, Extra Session of the Legislature of Louisiana of 1915, and subsequent acts, authorized

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56 *Cf. Freed v. Miami Beach Pier Corp.*, 93 Fla. 888, 112 So. 841 (1927) (right of littoral owner to build wharf on soil of marine belt, owned by State).

the execution of oil, gas and mineral leases covering State-owned lands, including submerged lands. (See also Apdx. to Answ., pp. 608-10.)

Grants of submerged lands in bays and harbors by the various States are too numerous to recite, but the States' ownership of such lands is based on the same principle as their ownership of lands under coastal waters. The Government recognizes the unity of the principle, and also that reliance on ownership of so-called inland waters has been of too great proportion to permit any suggestion of change (Br., p. 143).

Reference should also be made to the State cases dealing generally with the territorial limits of the States. A typical example is *Commonwealth v. Manchester*, 152 Mass. 230 (1890), wherein the Court upheld the statutory definition of the territorial limits of Massachusetts as extending "one marine league from its seashore at low-water mark." (Aff'd, 139 U.S. 240, *supra*, p. 28.)

54 In speaking for the Massachusetts Court, Field, *C.J.*, made the terse statement of the principle of law (p. 241):

> "There is no belt of land under the sea adjacent to the coast which is the property of the United States and not the property of the States."

In all of the above cases the Courts based the powers of the States to regulate on the *ownership* by the States of the soils beneath their territorial waters.

These many State acts and decisions recognizing State title to submerged lands furnish strong additional reason for adhering to the rule, even apart from the decisions of this Court mentioned in Point II. As this Court said in *Best v. Polk*, 18 Wall. 112, 117 (1873), with respect to claims of title based on United States treaty with Indians:

"* * * * These decisions, furnishing a rule of property on this subject in Mississippi, were not brought to this court for review, as they could have been, but have been acquiesced in for a quarter of a century. To disturb them now would unsettle titles *bona fide* acquired."

B. Federal acceptance of grants from the States.

The repeated rulings and declarations of this Court sustaining and emphasizing the States' ownership of all lands under tidal waters within their boundaries have always been accepted and acted upon by the other branches of the Federal Government. The rule has thus been treated as a settled one. Whenever the Federal Government has required sites under coastal waters for defense or navigation, it has obtained them from the States by cession, by purchase, or by condemnation proceedings.

For instance, when the Federal Government built jetties in the Ocean, it has frequently obtained grants from the
55 States covering the land on which the jetties were built. Such grants were obtained in 1899 from South Carolina, covering a jetty extending 500 feet into the Atlantic Ocean (Apdx. to Answ., p. 653); from Florida in 1938, for a jetty at the mouth of the St. Johns River extending 2 miles into the Atlantic Ocean (Apdx. to Answ., p. 1931); and from Texas in 1912, for a strip extending 2 miles into the Gulf of Mexico from the City of Galveston (Apdx. to Answ., p. 592).[57]

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[57] In the absence of such a grant, the jetty remains within State jurisdiction. *Winston Bros. Co. v. Galloway*, 168 Ore. 109, 121 P. (2d) 457 (1940) (sustaining State tax on profits from work done on jetty beyond low-water mark).

Other grants of land under water, below low-water mark, are set forth in the Appendix to California's Answer. See, for instance, the Acts of Mississippi in 1858 (Apdx. to Answ., p. 612); Delaware in 1871, 1873 and 1899 (Apdx. to Answ., pp. 681-84); South Carolina in 1896 and 1900 (pp. 654 to 656); Washington in 1909 (pp. 543-44); Virginia in 1922 (p. 667); and Florida in 1939 (Apdx. to Answ., p. 639). The foregoing list does not include the more numerous grants in bays and harbors, such as Alabama's 1919 grant of 12 acres of submerged land in Mobile Bay (Apdx. to Answ., pp. 618-19), although we have seen that the same rule sustains State title to submerged lands in bays as applies in coastal waters.

Special mention should be made of lighthouse sites, for the Federal Government has always recognized that these must be obtained from the States. The Federal statute provides (33 U.S.C.A., §727):

> "No lighthouse, beacon, public piers, or landmark, shall be built or erected on any site until cession of jurisdiction over the same has been made to the United States."

56 The States and the United States have acted on the principle set forth in this statute, that deeds from a State are necessary for lighthouse sites, whether they be above or below low-water mark. The Legislature of Maine in 1887 made a grant of lands under water in Quoddy Roads (Apdx. to Answ., p. 719); New York in 1874 ceded jurisdiction over a number of sites in New York Harbor and Long Island Sound (Apdx. to Answ., pp. 692-96); and general statutes have been enacted by Alabama in 1875 (Apdx. to Answ., pp. 617-18), Maryland in 1874 (Apdx. to Answ., pp. 671-72); Massachusetts in 1880 (Apdx. to

Answ., pp. 709-10), Michigan in 1874 (Apdx. to Answ., p. 734), Ohio in 1875 (Apdx. to Answ., p. 726), South Carolina in 1874 (Apdx. to Answ., p. 658), and Virginia in 1874 and later (Apdx. to Answ., pp. 664-65).

Similarly, grants have been obtained covering lands under water required by the Federal Government for forts.[58]

The Government attempts to belittle these grants by eliminating all those in harbors or bays, eliminating the Great Lakes as inland waters and then finding some excuse for each of those which it admits covered coastal waters. We have shown earlier in this brief (Point II C, *supra*) that bays and the Great Lakes are all subject to the same rules as coastal waters. Even apart from that, the fact remains that the United States has repeatedly accepted State deeds, made upon the assumption that the State held title to land under coastal waters, and that the Government has been unable to point to a single claim of Federal ownership prior to Mr. Ickes' reversal of his own earlier position in 1937.

The Federal Government, through its various agencies, has recognized the State ownership of these submerged
57 lands, not simply by requesting and accepting deeds from the States, but by other affirmative rulings.

The Attorney General has been required to pass on the validity of the title of the State in each instance where a deed was received (R.S. §355; 40 U.S.C.A. § 255). An illustration is the opinion of the Attorney General of the United States affirming Washington's title to tidelands and waters in the Pacific Ocean, surrounding the

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[58] South Carolina Act of 1896 (Apdx. to Answ., pp. 654-55); California statutes of 1897 and later (Apdx. to Answ., pp. 91 to 116).

Fort Canby Military Reservation, rendered March 20, 1925 (34 Op. A.G. 428; Apdx. to Answ., pp. 545-46).

The Commissioner of the United States General Land Office, in 1910, in rejecting an application for submerged lands east of Key West, Florida, ruled that title thereto belonged to the State by its right of sovereignty (Apdx. to Answ., p. 637). Other rulings relating to submerged lands in Washington (13 L.D. 299, Apdx. to Answ., p. 565) and Texas (Navy Dept. Report of 1917, Apdx. to Answ., pp. 596-602) and lands in Lake Ontario within the State of New York (7 Op. A.G. 314; Apdx. to Answ., p. 699) and in Lake Michigan within the State of Illinois (8 Op. A.G. 172; Apdx. to Answ., p. 728) and within the State of Wisconsin (House Doc. 804, 66th Cong., 2d Sess.; Apdx. to Answ., p. 737), likewise recognize State title thereto.[59]

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[59] A similar principle is applied in Alaska, where submerged lands in the Behring Sea were deemed reserved from grant to be left to the disposition of the new State when organized (29 L.D. 395, Apdx. to Answ., pp. 531, 534).

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U.S. Ex. No. 72

Order In Council Relative To Encroachments On The Grant To The New England Company, September 28, 1621, E.B. O'Callaghan, ed., III *Documents Relative To The Colonial History Of The State of New York* (Albany, 1853)

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Order in Council relative to encroachments on the grant to the New England Company.

[Council Register, Jac. L, R. V. 143]

At Hampton Court the 28th September 1621.

PRESENT.— Lo. Archbishop of Canterburie,

Lo. Keeper	Lo. Brooke
Lo. Treasurer	Lo. Cranfield
Lo. Stewarde	Mr. Secy Calvert
E. Marshall	Mr. of the Roles
Lo. Vic. Falkland	Sir Rich. Weston.
Lo. Bp. Winton	

A Letter to the Mayors of Bristoll Exon. Plymouth, Dartmouth, Barnstable, and Waymouth, and to each of them, and to all Merchants, owners of Shipps and other His Majesties subjects to whom it shall or may appertaine.

WHEREAS wee have been informed on the behalfe of the President and Councill of New England, that although they by their ordinances established by the authoritie of his Majesties letters patents have freely given way to divers Marchants or others to become Adventurers with them in their trade and Plantation in those parts, soe as they submitt themselves to such convenient orders as shall be sett downe for the advancement of that plantation, and more

regular and free increase of Publick Trade, notwithstanding there are some what have alreadie attempted, and are in further preparation to assume a libertie to themselves to trade to the prejudice of the said Plantation, without resort to the said Government or orders established for the publick good, Which, if it should bee tollerated in them, would not only bee a prejudice to the Plantation adventurers, who by their industrie have discovered those remoate places, and with the hazard of the lives of their people and expense of their Estates have layd the first foundation of soe honorable an enterprise, but would alsoe bringe a confusion to the said Plantation and an overthrowe untoe that Trade, and bee likewise an utter discouragement to all future endeavours of the like kinds. Wee have therefore thought fitt hereby to lett you knowe and doe require you to signifie as much unto such of his Majesties subjects inhabitinge neere unto that Coast whom the same may concerne, That if anie person shall presume to attempt, or doe anie thing in that behalfe contrary to his Majesties said Graunt, hee is to expect noe less than the due execution thereof, and such further punishment as is fitt to be inflicted upon those that shall contemne his Majesties Royall authoritie. Neverthelesse it is hereby intended and soe ordered, that the agreement made by order of this Board betweene them of New England and Virginia shall in all respects be duly observed by either partie. And soe &c. &c.

U.S. Ex. No. 73

"Minutes of the First Division of the Great Patent of New England by the Great Council for New England, June 24, 1622," M.F. Farnham, ed., VII *Documentary History of the State of Maine* (Maine Historical Society, *Collections*, 2d series I-XXIV [Portland, 1869-1916])

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X.

MINUTES OF THE FIRST DIVISION OF THE GREAT PATENT FOR NEW ENGLAND BY THE GREAT COUNCIL FOR NEW ENGLAND.

JUNE 24,
JULY 4, 1622.

* * *

Minutes of the Council of New England Wednesday ye 24th of July 1622. The Earle of Arundell. Sr. Ferd: Gorges. Mr. Secretary Calvert. Sr. Sam Argall.

It is ordered and agreed that the Lord Duke of Lenox have for his devident and part of the Mayne Land of New
62 England in America, from ye middle of Sawahquatock towards Sagadahoc, and his bounds that way to reach mid way betweene Sawahquatock and Sagadahoc upon ye Coast. And to reach 30 miles backward into ye Mayne. And 3 Leagues into ye sea.

Mr. Secretary Calvert to begin his devident ye middle of Sagadahoc and to goe close to ye Lord Duke his bounds. And to have further into his devident the Island called by ye name of Setquin.

The Earle of Arundele to have for his devident from ye middle of Sagadahoc, and to goe northeast soe much on his side, as Mr. Secretary goes on ye other side upon ye Coast. And to reach miles backward into ye Mayne, and 3 leagues into ye Sea. And to have furter into his Devident ye Iland called Menehigan.

It is propounded that ye Tenure in ye grand pattent is thought meet to bee held of ye Crowne of England by ye sword.

And that private Planters shall hold of the Chamber of State to bee established there, and shall have power to create their owner Tenures to such as shall hold under them.

The Country to be called Nova Albion. That there may bee power given in the grand pattent to create Titles of Honour and precedency soe as ye differ in nominacon from the titles used heere in England.

Mr. Rattcliffe is sent for by a Messinger of the Chamber to attend Earle of Arundell, tomorrow by two of ye
63 clock, touching Timber stayd by his appointment in ye woods at Whiteby.

It is thought meet that the two great Islands lying in ye river of Sagadahoc bee reserved for the publike plantacon.

Further that a place bee reserved betweene the branches of the two rivers for a publike Citty.

Mr. Thompson is appointed to attend the Lords for a Warrant to Mr. Attorney generall for drawing ye new Pattents, and Sr. Henry Spilman is desired to attend Mr. Attorney thereabouts.

The Lord Dukes and ye Earle of Arundells devidents, sett down by Sr. Ferd: Gorges upon view of ye mapps.

The Lord Duke of Lenox is to have for a part of his Devident of ye lands in New England, from the midst of the river called Sawahquatock 15 English Miles in a straight line upon the sea coast, to ye Eastward of ye River. And 30 English miles backward of all the breadth afore-sd upp into the Mayne Land, North or North and by west. as ye Coast and River of Sawahquatock lyeth. accounting 1760 yards to every mile, with all ye fishings. Bayes, Havens, Harbours and Islands lyeing or being within 9 miles directly into ye sea (Excepting such Island, as are allready granted etc. All lyeing betweene the degrees of 43 and 44 etc.)

The Earl of Arundell to have for a part of his devident from ye Southermost poynt of Pethippscott East 12 Miles
64 in a straight lyne as the coast lyeth on ye sea shoare. And 30 miles by all that breadth upp into the Mane Land due North, acounting 1760 yards to every mile, with all ye Fishings, Havens, Islands, etc. Lying and being within 9 miles directly into the sea, etc. Together with ye Islands of Menehiggan etc. All lyeing betweene the Degrees of 43 & 44.

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U.S. Ex. No. 334

Conference between Gerard de Rayneval, French Under Secretary of Foreign Affairs and the Earl of Shelburne, British Prime Minister, September 18, 1782; Correspondence Politique, Angleterre, lib. 358: 172-192 Ministere des Affaires Estrangeres, Paris.

* * *

Finally there came the turn of America, Mylord Shelburne foresaw that they would have many difficulties with the Americans, as much with regard to boundaries as to the Newfoundland fisheries, but he hopes the King will not support them in their demands. I replied that I did not doubt the King's eagerness to do what shall rest with him to keep the Americans within the bounds of justice and reason; and, mylord having desired to know what I thought of their claims, I answered that I did not know what they were with respect to the fisheries, but that whatever they might be it seemed to me that there was one safe principle to be followed in this matter, that is, that fishing on the high seas is *res nullius* whereas coastal fishing belongs by right to the proprietor of the coasts, in the absence of derogations based on conventions. As to the extent of the boundaries, I supposed that the Americans would draw it from their charters, that is to say, they will want to extend from the Ocean to the South Sea. . . .

* * *

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, Plaintiff,

v.

STATE OF MAINE, ET AL., Defendants.

APPENDIX TO EXCEPTIONS AND BRIEF OF THE COMMON COUNSEL STATES

VOLUME III - MAPS

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Syllabus

UNITED STATES v. MAINE ET AL.

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 35, Orig. Argued February 24–25, 1975—Decided March 17, 1975

The United States, to the exclusion of defendant Atlantic Coastal States, *held* to have sovereign rights over the seabed and subsoil underlying the Atlantic Ocean, lying more than three geographical miles seaward from the ordinary low watermark and from the outer limits of inland coastal waters, extending seaward to the outer edge of the continental shelf, that area, like the seabed adjacent to the coastline, being in the domain of the Nation rather than of the separate States. *United States* v. *California*, 332 U. S. 19; *United States* v. *Louisiana*, 339 U. S. 699; *United States* v. *Texas*, 339 U. S. 707. And this rule that the paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty is confirmed by both the Submerged Lands Act of 1953 and the Outer Continental Shelf Lands Act of 1953. Pp. 519–528.

WHITE, J., delivered the opinion of the Court, in which all other Members joined except DOUGLAS, J., who took no part in the consideration or decision of the case.

Solicitor General Bork argued the cause for the United States. With him on the brief were *Assistant Attorney General Johnson*, *Deputy Solicitor General Wallace*, *Keith A. Jones*, and *Bruce C. Rashkow*.

Brice M. Clagett argued the cause for defendants. With him on the briefs for the Common Counsel States were *Michael Boudin*, *W. Laird Stabler, Jr.*, Attorney General, and *Charles Brandt*, Assistant Attorney General of Delaware, *Jon A. Lund*, Attorney General, and *Lee M. Schepps*, Assistant Attorney General of Maine, *Francis B. Burch*, Attorney General, and *Henry R. Lord*, Deputy Attorney General of Maryland, *Robert H. Quinn*, former Attorney General, *Francis X. Bellotti*, Attorney General,

and *Henry Herrmann*, Special Assistant Attorney General of Massachusetts, *Warren B. Rudman*, Attorney General, and *David H. Souter*, Deputy Attorney General of New Hampshire, *William F. Hyland*, Attorney General, and *Elias Abelson*, Assistant Attorney General of New Jersey, *Louis J. Lefkowitz*, Attorney General, and *Joseph T. Hopkins*, Assistant Attorney General of New York, *Richard J. Israel*, Attorney General, and *W. Slater Allen, Jr.*, Assistant Attorney General of Rhode Island, *Andrew P. Miller*, Attorney General, and *Gerald L. Baliles*, Deputy Attorney General of Virginia. On the brief for defendants the States of North Carolina et al. were *Rufus Edmisten*, Attorney General, and *Jean A. Benoy*, Deputy Attorney General of North Carolina, *Daniel R. McLeod*, Attorney General, and *Edward B. Latimer*, Assistant Attorney General of South Carolina, and *Arthur K. Bolton*, Attorney General, and *Alfred L. Evans, Jr.*, Assistant Attorney General of Georgia.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Seeking to invoke the jurisdiction of this Court under Art. III, § 2, and 28 U. S. C. § 1251 (b), the United States in April 1969 asked leave to file a complaint against the 13 States bordering on the Atlantic Ocean—Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Caro-

*Briefs of *amici curiae* were filed by *William J. Guste, Jr.*, Attorney General of Louisiana, *Norman C. Gorsuch*, Attorney General of Alaska, *Slade Gorton*, Attorney General of Washington, *John L. Hill*, Attorney General of Texas, *Daniel R. McLeod*, Attorney General of South Carolina, *Andrew P. Miller*, Attorney General of Virginia, *Robert H. Quinn*, former Attorney General of Massachusetts, and *Evelle J. Younger*, Attorney General of California; and by *Frederick Moring* for the Associated Gas Distributors.

lina, South Carolina, Georgia, and Florida.[1] We granted leave to file, 395 U. S. 955, on June 16, 1969. The complaint asserted a separate cause of action against each of the States which alleged that:

> "[T]he United States is now entitled to the exclusion of the defendant State, to exercise sovereign rights over the seabed and subsoil underlying the Atlantic Ocean, lying more than three geographical miles seaward from the ordinary low-watermark and from the outer limit of inland waters on the coast, extending seaward to the outer edge of the continental shelf, for the purpose of exploring the area and exploiting its natural resources."

It was further alleged that each of the States claimed some right or title to the relevant area and was interfering with the rights of the United States. It was therefore prayed that a decree be entered declaring the rights of the United States and that such further relief be awarded as might prove proper.[2]

The defendants answered, each generally denying proprietary rights of the United States in the seabed in the area beyond the three-mile marginal sea. Each of them, except Florida,[3] claimed for itself, as successor in title

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[1] The State of Connecticut was not made a defendant, apparently because that State borders on Long Island Sound, which is considered inland water rather than open sea.

[2] The United States also demanded an accounting for all sums that the States may have derived from the area in question. This claim the Special Master recommends be denied for failure of proof. The United States does not except to this recommendation, and we approve it.

[3] The State of Florida claimed that by virtue of the Act of June 25, 1868, 15 Stat. 73, Congress had approved the maritime boundaries for that State which at certain places included more than three miles of the Atlantic Ocean and had thereby granted to the State all of the seabed within those boundaries. Florida also claimed in its answer

to certain grantees of the Crown of England (and in the case of New York, to the Crown of Holland), the exclusive right of dominion and control over the seabed underlying the Atlantic Ocean seaward from its coastline to the limits of the jurisdiction of the United States, asserting as well that any attempt by the United States to interfere with these rights would in itself violate the Constitution of the United States.[4]

Without acting on the motion for judgment filed by the United States that asserted that there was no material issue of fact to be resolved, we entered an order appointing the Honorable Albert B. Maris as Special Master and referred the case to him with authority to request further pleadings, to summon witnesses, and to take such evidence and submit such reports as he might deem appropriate. 398 U. S. 947 (1970). Before the Special Master, the United States contended that based on *United States* v. *California*, 332 U. S. 19 (1947), *United States* v. *Louisiana*, 339 U. S. 699 (1950), and *United States* v. *Texas*, 339 U. S. 707 (1950), it was entitled to judgment in accordance with its motion. The defendant States asserted that their cases were distinguishable from the prior cases and that in any event, *California*, *Louisiana*, and *Texas* were erroneously decided and should be

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that the Florida Straits were not in the Atlantic Ocean as claimed by the United States but in the Gulf of Mexico. Subsequently, the controversy between the United States and Florida was severed and consolidated with the proceeding in No. 9, Original, which was then concerned with the seabed rights of the State of Florida in the Gulf of Mexico, 403 U. S. 949, 950 (1971). The consolidated proceedings were given a new number—No. 52, Original. We have acted on the Special Master's Report in that case. See *post*, p. 531.

[4] The States of Rhode Island, North Carolina, and Georgia each submitted an additional special defense applicable only to itself. We agree with the Special Master's rejection of these special defenses, and they will not be mentioned further.

overruled. They offered, and the Special Master received, voluminous documentary evidence to support their claims that, contrary to the Court's prior decisions, they acquired dominion over the offshore seabed prior to the adoption of the Constitution and at no time relinquished it to the United States. At the conclusion of the proceeding before him, the Special Master submitted a Report (hereinafter Report) which the United States supports in all respects but to which the States have submitted extensive and detailed exceptions. The controversy is now before us on the Report, the exceptions to it, and the briefs and oral arguments of the parties.

In his Report, the Special Master concluded that the *California*, *Louisiana*, and *Texas* cases, which he deemed binding on him, governed this case and required that judgment be entered for the United States. Assuming, however, that those cases were open to re-examination, the Special Master went on independently to examine the legal and factual contentions of the States and concluded that they were without merit and that the Court's prior cases should be reaffirmed.

We fully agree with the Special Master that *California*, *Louisiana*, and *Texas* rule the issues before us. We also decline to overrule those cases as the defendant States request us to do.

United States v. *California*, *supra*, involved an original action brought in this Court by the United States seeking a decree declaring its paramount rights, to the exclusion of California, to the seabed underlying the Pacific Ocean and extending three miles from the coastline and from the seaward limits of the State's inland waters. California answered, claiming ownership of the disputed seabed. The basis of its claim, as the Court described it, was that the three-mile belt lay within the historic boundaries of the State; "that the original thirteen states acquired from

EXHIBITS ARE TOO LARGE TO BE FILMED

the Crown of England title to all lands within their boundaries under navigable waters, including a three-mile belt in adjacent seas; and that since California was admitted as a state on an 'equal footing' with the original states, California at that time became vested with title to all such lands." 332 U. S., at 23. The Court rejected California's claim. The original Colonies had not "separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it." *Id.*, at 31. As the Court viewed our history, dominion over the marginal sea was first accomplished by the National Government rather than by the Colonies or by the States. Moreover, the Court went on to hold that the "protection and control of [the marginal sea] has been and is a function of national external sovereignty," *id.*, at 34, and that in our constitutional system paramount rights over the ocean waters and their seabed were vested in the Federal Government.

The United States later brought actions to confirm its title to the seabed adjacent to the coastline of other States. *United States* v. *Louisiana, supra,* was one of them. There Louisiana claimed title to the seabed under waters extending 27 miles into the Gulf of Mexico, the basis of the claim being that before and since the time of its admission to the Union, Louisiana had exercised dominion over the ocean area in question and that its legislature had formally included the 27-mile belt within the boundaries of the State. The Court gave judgment for the United States, holding that *United States* v. *California* was controlling and emphasizing that paramount rights in the marginal sea and seabed were incidents of national sovereignty:

> "As we pointed out in *United States* v. *California,* the issue in this class of litigation does not turn on

> title or ownership in the conventional sense. California, like the thirteen original colonies, never acquired ownership in the marginal sea. The claim to our three-mile belt was first asserted by the national government. Protection and control of the area are indeed functions of national external sovereignty. 332 U. S. pp. 31–34. The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area." 339 U. S., at 704.

Louisiana had "no stronger claim to ownership of the marginal sea than the original thirteen colonies or California had," *id.*, at 705; and its claim, like theirs, gave way to the overriding rule that "the three-mile belt is in the domain of the Nation rather than that of the separate States," *ibid.* *A fortiori*, the waters and seabed beyond that limit were governed by the same rule.

In a companion case, *United States* v. *Texas*, *supra*, the Court again reaffirmed the holding and rationale of *United States* v. *California* and again rejected the claims of the State based on its historic boundaries at the time of the State's admission to the Union:

> "If the property, whatever it may be, lies seaward of low-water mark, its use, disposition, management, and control involve national interests and national responsibilities. That is the source of national rights in it. Such is the rationale of the *California* decision which we have applied to Louisiana's case. The same result must be reached here if 'equal footing' with the various States is to be achieved. Unless any claim or title which the Republic of Texas had

to the marginal sea is subordinated to this full paramount power of the United States on admission, there is or may be in practical effect a subtraction in favor of Texas from the national sovereignty of the United States. Yet neither the original thirteen States (*United States* v. *California, supra,* pp. 31–32) nor California nor Louisiana enjoys such an advantage." 339 U. S., at 719.

The Special Master was correct in concluding that these cases, unless they are to be overruled, completely dispose of the States' claims of ownership here. These decisions considered and expressly rejected the assertion that the original States were entitled to the seabed under the three-mile marginal sea. They also held that under our constitutional arrangement paramount rights to the lands underlying the marginal sea are an incident to national sovereignty and that their control and disposition in the first instance are the business of the Federal Government rather than the States.

The States seriously contend that the prior cases, as well as the Special Master, were in error in denying that the original Colonies had substantial rights in the seabed prior to independence, and afterwards, by grant from or succession to the sovereignty of the Crown. Given the dual basis of the *California* decision, however, and of those that followed it, the States' claims of ownership prior to the adoption of the Constitution are not dispositive. Whatever interest the States might have had immediately prior to statehood, the Special Master was correct in reading the Court's cases to hold that as a matter of "purely legal principle . . . the Constitution . . . allotted to the federal government jurisdiction over foreign commerce, foreign affairs and national defense" and that "it necessarily follows, as a matter of constitutional law, that as attributes of these external sovereign powers

the federal government has paramount rights in the marginal sea." Report 23.

United States v. *Texas* unmistakably declares this constitutional proposition. There, Texas claimed that prior to joining the Union, it was an independent sovereign with boundaries extending a substantial distance in the Gulf of Mexico—boundaries which Congress had allegedly recognized when Texas was admitted to the Union. In deciding against the State, the Court did not reject the prestatehood rights of Texas as it had the rights of the 13 original States in the *California* case. On the contrary, the Court was quite willing to "assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held. In other words, we assume that it then had *dominium* and *imperium* in and over this belt which the United States now claims." 339 U. S., at 717. Such prior ownership nevertheless did not survive becoming a member of the Union:

> "When Texas came into the Union, she ceased to be an independent nation. She then became a sister State on an 'equal footing' with all the other States. That act concededly entailed a relinquishment of some of her sovereignty. The United States then took her place as respects foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like. In external affairs the United States became the sole and exclusive spokesman for the Nation. We hold that as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States." *Id.*, at 717–718.

The Court stood squarely on the *California* and *Louisiana* cases for this conclusion; and in our view, the Special Master correctly read these authorities, unless they were

to be overruled in all respects, as foreclosing the present efforts of the States to demonstrate error in the Court's understanding of history in the *California* case.

Assuming the possibility, however, that the Court might re-examine the constitutional premise of *California* and similar cases, the Special Master proceeded, with admirable diligence and lucidity, to address the historical evidence presented by the States aimed primarily at establishing that the Colonies had legitimate claims to the marginal sea prior to independence and statehood and that the new States never surrendered these rights to the Federal Government. The Special Master's ultimate conclusion was that the Court's view of our history expressed in the *California* case was essentially correct and that if prior cases were open to re-examination, they should be reaffirmed in all respects.

We need not retrace the Special Master's analysis of historical evidence, for we are firmly convinced that we should not undertake to re-examine the constitutional underpinnings of the *California* case and of those cases which followed and explicated the rule that paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty. That premise, as we have indicated, has been repeated time and again in the cases. It is also our view, contrary to the contentions of the States, that the premise was embraced rather than repudiated by Congress in the Submerged Lands Act of 1953, 67 Stat. 29, 43 U. S. C. § 1301. In that legislation, it is true, Congress transferred to the States the rights to the seabed underlying the marginal sea; however, this transfer was in no wise inconsistent with paramount national power but was merely an exercise of that authority. As the Special Master said, the Court in its prior cases "did not indicate that the federal government by Act of Congress

might not, as it did by the subsequently enacted Submerged Lands Act, grant to the riparian states rights to the resources of the federal area, subject to the reservation by the federal government of its rights and powers of regulation and control for purposes of commerce, navigation, national defense, and international affairs." Report 16. The question before the Court in the *California* case was "whether the state or the Federal Government has the paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited." 332 U. S., at 29. The decision there was that the National Government had the power at issue, the Court declining to speculate that "Congress, which has constitutional control over Government property, will execute its powers in such a way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission." *Id.*, at 40.

The Submerged Lands Act did indeed grant to the States dominion over the offshore seabed within the limits defined in the Act and released the States from any liability to account for any prior income received from state leases that had been granted with respect to the marginal sea.[5] But in further exercise of paramount national authority, the Act expressly declared that nothing in the Act

> "shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of [the marginal sea], all of which natural resources appertain to the

[5] The Submerged Lands Act was held constitutional in *Alabama* v. *Texas*, 347 U. S. 272 (1954).

> United States, and the jurisdiction and control of which by the United States is confirmed." 43 U. S. C. § 1302.

This declaration by Congress is squarely at odds with the assertions of the States in the present case. So, too, is the provision of the Act by which the grant to the States is expressly limited to the seabed within three miles (or three marine leagues in some cases) of the coastline, whether or not the States' historic boundaries might extend farther into the ocean. § 1301 (b). Moreover, in the course of litigation dealing with the reach and impact of the Act, the Court has said as plainly as may be that "the Act concededly did not impair the validity of the *California, Louisiana,* and *Texas* cases, which are admittedly applicable to all coastal States . . . ." *United States* v. *Louisiana,* 363 U. S. 1, 7 (1960); see also *id.,* at 83 n. 140. We agree with the Special Master when he said: "It is quite obvious that Congress could reserve to the federal government all the rights to the seabed of the continental shelf beyond the three-mile territorial belt of sea (or three leagues in the case of certain Gulf states) only upon the basis that it already had the paramount right to that seabed under the rule laid down in the *California* case." Report 19.

Congress emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit when a few months later it enacted the Outer Continental Shelf Lands Act of 1953, 67 Stat. 462, 43 U. S. C. § 1331 *et seq.* Section 3 of the Act

> "declared [it] to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition

as provided in this subchapter." 43 U. S. C. § 1332 (a).

The Act then proceeds to set out detailed provisions for the exercise of exclusive jurisdiction in the area and for the leasing and development of the resources of the seabed.

Of course, the defendant States were not parties to *United States* v. *California* or to the relevant decisions, and they are not precluded by res judicata from litigating the issues decided by those cases. But the doctrine of *stare decisis* is still a powerful force in our jurisprudence; and although on occasion the Court has declared—and acted accordingly—that constitutional decisions are open to re-examination, we are convinced that the doctrine has peculiar force and relevance in the present context. It is apparent that in the almost 30 years since *California*, a great deal of public and private business has been transacted in accordance with those decisions and in accordance with major legislation enacted by Congress, a principal purpose of which was to resolve the "interminable litigation" arising over the controversy of the ownership of the lands underlying the marginal sea. See H. R. Rep. No. 215, 83d Cong., 1st Sess., 2 (1953). Both the Submerged Lands Act and the Outer Continental Shelf Lands Act which soon followed proceeded from the premises established by prior Court decisions and provided for the orderly development of offshore resources. Since 1953, when this legislation was enacted, 33 lease sales have been held, in which 1,940 leases, embracing over eight million acres, have been issued. The Outer Continental Shelf, since 1953, has yielded over three billion barrels of oil, 19 trillion m.c.f. of natural gas, 13 million long tons of sulfur, and over four million long tons of salt.[6] In 1973 alone, 1,081,000 barrels of oil

[6] S. Rep. No. 93-1140, p. 4 (1974).

and 8.9 billion cubic feet of natural gas were extracted daily from the Outer Continental Shelf.[7] Exploitation of our resources offshore implicates a broad range of federal legislation, ranging from the Longshoremen's and Harbor Workers' Compensation Act, incorporated into the Outer Continental Shelf Lands Act, to the more recent Coastal Zone Management Act.[8] We are quite sure that it would be inappropriate to disturb our prior cases, major legislation, and many years of commercial activity[9] by calling into question, at this date, the constitutional premise of prior decisions. We add only that the Atlantic States, by virtue of the *California, Louisiana,* and *Texas* cases, as well as by reason of the Submerged Lands Act, have been on notice of the substantial body of authoritative law, both constitutional and statutory, which is squarely at odds with their claims to the seabed beyond the three-mile marginal sea. Neither the States nor their putative lessees have been in the slightest misled. Judgment shall be entered for the United States.

So ordered.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

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[7] *Id.*, at 5.

[8] 86 Stat. 1280, 16 U. S. C. § 1451 *et seq.* (1970 ed., Supp. II). For a summary of legislation affecting the Outer Continental Shelf, see Outer Continental Shelf Oil and Gas Development and the Coastal Zone, Senate Committee on Commerce, 93d Cong., 2d Sess., 55–58 (Comm. Print 1974).

[9] We have long held that the doctrine of *stare decisis* carries particular force where the effect of re-examination of a prior rule would be to overturn long-accepted commercial practice. See, *e. g.*, *M'Gruder* v. *Bank of Washington*, 9 Wheat. 598, 602 (1824); *Rock Spring Distilling Co.* v. *W. A. Gaines & Co.*, 246 U. S. 312, 320 (1918).